The London School of Economics and Political Science

Human Rights as Sources of Penality

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A thesis submitted to the LSE Law School for the degree of Doctor of Philosophy

London, August 2022

Declaration

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

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Abstract

This thesis examines the role that human rights play in fostering and justifying penality. The more human rights have become the global language of justice, the more they have lent themselves to, and 'accelerated', the use of penal solutions around the world. This phenomenon has entailed the creation of international criminal tribunals, the institution of criminal proceedings against human rights violators and the introduction of new human rights-based offences. The embrace of penality by human rights has also occurred at the level of discourse. In particular, the twin assumptions that effective human rights protection requires criminal accountability and that impunity causes further human rights violations have become essential parts of the ways we generally think and speak about human rights.

The thesis investigates whether, how and why human rights have become triggers of expanded penality. It not only considers changes in legislation and judgments but focuses especially on its legal and political discursive formations. To this end, it adopts a socio-legal perspective that gives priority to discourse analysis, a method inspired by the work of Michel Foucault. The research draws upon a transnational approach to legal problems and takes human trafficking and torture as its case studies. In this context, it recovers the contemporary and historical assumptions that sustain, and lie behind, the deployment of penal means to protect and promote human rights.

The central argument is that, within dominant human rights discourses, penality assumes a necessary function in preserving the moral authority of human rights. However, in recruiting penality in their moral crusade against abuses, dominant human rights discourses make the confirmation and reinforcement of human rights norms dependent on penality—and, I would argue, also on the inequality, prejudice and violence that penality inevitably produces. Dominant human rights discourses may try to humanise the state's penal powers, but the practice of penality, made a moral obligation, ultimately represents impulses and drives that outrun their humanisation.

Acknowledgements

This thesis is the culmination of four years of conversations and engagements with a number of people. Without their insights and encouragement this thesis would not have been possible.

First, I would like to thank my supervisors Peter Ramsay and Conor Gearty for their consistent support and guidance. Peter and Conor provided me with the confidence to pursue the arguments developed in this thesis, as well as the encouragement to experiment with discourse analysis and take risks. They read and discussed with me countless drafts, pushing me to develop my ideas into clear arguments. Their example will be an inexhaustible source of inspiration throughout my future career.

I am grateful to the academic and administrative staff in the LSE Law School. Sincere thanks go to Nicola Lacey and Gerry Simpson, whose extensive comments on my upgrade material were crucial to the shaping of the rest of the thesis. Nicola, in particular, was almost a third supervisor to me: she read nearly all my chapters and relentlessly supported all my job applications and my development as a researcher. I am also grateful to Susan Marks, Gerry Simpson (again), Rachel Yarham and Rebecca Newman for running the LSE Law PhD programme.

I owe a great intellectual debt to Audrey Alejandro, who served as my discourse analysis mentor. During my first year, I attended her course on Qualitative Text Analysis, which deeply influenced my methodology. Audrey's critical engagement with an early draft of chapter 4 also helped me adjust some methodological inaccuracies and continue my research in the right direction.

Numerous other people at the LSE assisted me at various stages of this project. Through the Criminal Law and Criminal Justice Theory Forum, I had the privilege to interact with, and learn from, great scholars, but also to present my work and receive valuable feedback. Thanks especially to Federico Picinali, Jeremy Horder, Richard Martin and Insa Koch. The LSE Mannheim Doctoral Working Group was also a supportive forum where I could share my research and receive terrific feedback. I am indebted to Johann Koehler for organising it as well as for his incisive comments and overall support.

Furthermore, I would like to extend my gratitude to my fellow PhD students. Particular mention must go to Stephanie Classmann for our passionate and enlightening discussions. Her critique of moralism in criminal law theory and her uncompromised commitment to political realism had a huge influence on my intellectual development. I also wish to thank Olivia Nantermoz for her contributions at multiple levels, including reading and commenting

on every single chapter of my thesis. Other PhD friends who helped me in different ways include: Alexandra Sinclair, Ben Goh, Bob Roth, Carly Krakow, David Eichert, Evgenia Ralli, Fatima Ahdash, Francesca Uberti, Jacob Van De Beeten, John Taggart, Katie Nolan, Lauren Bursey, Mikołaj Szafrański, Mireia Garcés de Marcilla Musté, Parashar Das, Raphaël Girard, Sina Akbari, Tanmay Misra, Valeria Ruiz Perez and Viknes Muthiah. Thank you all!

I owe a huge debt of gratitude to my LLM supervisor at King's College London, Nicola Palmer. She was the first who took interest in my research. She also helped me secure a place in a PhD programme and provided appreciated feedback at different moments of my journey. Natasa Mavronicola and Silvana Tapia Tapia were vital co-conspirators against human rights-driven penality. Natasa was an exceptional mentor from the very beginning of my research; she involved me in many projects and generously supported my job applications. I am extremely grateful for her invaluable advice on an academic, professional and personal level. My regular conversations with Silvana have been a source of new ideas and pushed my critique of penality to higher levels. My heartfelt gratitude goes also to my old friends from the University of Bologna who took their time to comment on my research on several occasions: Diletta Marchesi, Giulia Bosi, Rebecca Nocella and Salvatore Sapienza.

My research benefited from a variety of presentations, workshops and conferences. I am grateful to Audrey Alejandro (again), Hannah Owens, Jef Huysmans, Josh Walmsley, Mirko Palestrino and Shruti Belaji for organising with me the 2021/22 PhD Seminar Series in International Political Sociology. The seminar series offered me the opportunity to make my research truly interdisciplinary. I would similarly like to thank Maayan Niezna and Pankhuri Agarwal for organising the Critical Modern Slavery Study Group, which provided a close-knit forum where I could discuss and learn about human trafficking from a critical perspective. I am also thankful to Antony Duff, Christoph Burchard, Javier Alberto Wilenmann, Linday Farmer and Rocío Lorca for running the Virtual Workshop on the Political Turn(s) in Criminal Law Theory and inviting me to present an early draft of chapter 5.

I was fortunate to receive feedback and criticism from a number of other scholars in the fields of law, criminology, political science and sociology. Aside from those named above, thanks must go to: Alberto Di Martino, Alejandro Chehtman, Alice Engelhard, Alvina Hoffmann, Anuscheh Farahat, Avi Boukli, Ayushman Bhagat, Barrie Sander, Borislav Gerasimov, Callum Musto, Christiane Wilke, Corina Heri, Dhruv Aggarwal, Elena Baylis, Felipe Figueroa Zimmermann, Francisco-José Quintana, Gaurav Mukherjee, Guha Krishnamurthi, Heinz Klug, Ian Patel, Immi Tallgren, Jan Kleinheisterkamp, Jens Theielen, Joel Quirk, Jonathan Simon, José Manuel Fernandez Ruiz, Kai Müller, Kate Grady, Kjersti Lohne, Laurens Lavrysen, Leonidas Cheliotis, Lutz Oette, Margaret deGuzman, Meredith Rossner, Merris Amos, Michael Wilkinson, Micheál Ó Floinn, Michelle Farrell, Monika Krause, Nicola Recchia, Pablo Ibáñez Colomo, Paul Rock, Pier-Luc Dupont, Rachel Lopez,

Rafi Reznik, Roger Graef, Ryan Liss, Sanja Milivojevic, Sara van Der Hoeven, Simanti Dasgupta, Stergios Aidinlis, Steven Malby, Tasniem Anwar, Thiago Oliveira, Tim Newburn, Veerle Heyvaert and Virginia Mantouvalou.

This research was made possible through generous financial support provided by the LSE and the *Modern Law Review*. Early drafts of chapters 2 and 3 were published in the journals *Human Rights Quarterly* and *International Journal of Law in Context*, respectively. Thanks to the editors and the anonymous reviewers for their feedback.

On a personal note, I wish to thank my family and my friends, in London as well as in Italy, for always being there throughout this journey. Last but not least, I need to thank Isabella Mancini, my companion of life, for being my first guide and sounding board. The pages that follow owe a great deal to her patience, suggestions and unwavering support.

Contents

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List of abbreviations

CATW	Coalition Against Trafficking in Women
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CIA	Central Intelligence Agency
CICC	Coalition for an International Criminal Court
CoE	Council of Europe
CoE Anti-Trafficking Convention	Council of Europe Convention on Action against Trafficking in Human Beings
CPT	European Committee for the Prevention of Torture
CSJ	Centre for Social Justice
CTI	Convention Against Torture Initiative
CTJM	Chicago Torture Justice Memorials
CTW	Advisory Committee on the Traffic in Women and Children
ECHR	European Convention on Human Rights
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GAATW	Global Alliance Against Traffic in Women
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
GJC	Global Justice Center
GRETA	Group of Experts on Action against Trafficking in Human Beings
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IRCT	International Rehabilitation Council for Torture Victims

JCHR	Joint Committee on Human Rights
Joinet's Principles	*Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*
LoN	League of Nations
MP	Member of Parliament
NGO	Nongovernmental organisation
NPCC	National Police Chiefs' Council
NPM	National Preventive Mechanism
NVA	National Vigilance Association
OAS	Organisation of American States
OHCHR	United Nations Office of the High Commissioner for Human Rights
OMCT	World Organisation Against Torture
OPT	Office of the Prosecutor
OSCE	Organization for Security and Co-operation in Europe
SPT	Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
Torture Convention	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Torture Declaration	Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UN Principles to Combat Impunity	*Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*
UN Trafficking Protocol	United Nation Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children
UN Victims' Declaration	United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
UN.GIFT	United Nations Global Initiative to Fight Human Trafficking

UNCAT	United Nations Committee Against Torture
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
US	United States of America
Van Boven/Bassiouni Principles	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
WLW	Women's Link Worldwide

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Introduction

In 2016, Amnesty International launched a powerful campaign titled 'Handcuff tyranny' (Kolm 2016). It took black-and-white photos of three world leaders accused of serious human rights violations—Russia's Vladimir Putin, North Korea's Kim Jong-un and Syria's Bashar al-Assad—and used yellow zip ties to fasten them to fences, including one outside the Russian consulate in Montreal. By placing the ties around the leaders' hands, it appeared as if they were being handcuffed. In a corner of each poster Amnesty's logo was clearly visible: yellow, like the zip ties. It portrays a candle surrounded by barbed wire. The candle represents hope; the barbed wire represents prison—a symbol of human rights violations.[1]

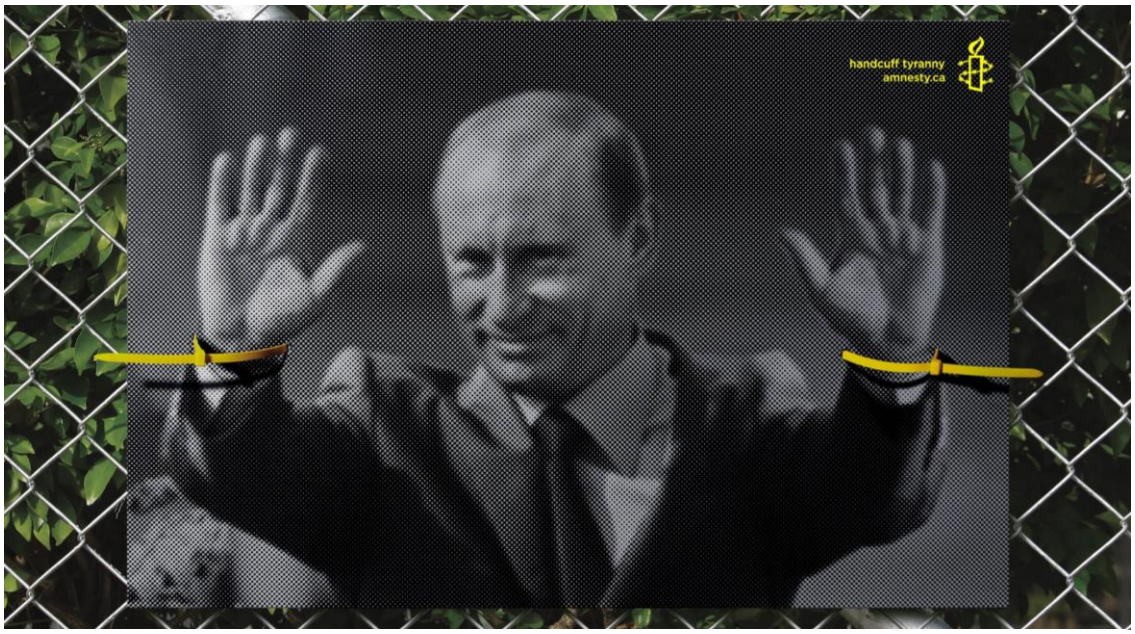

Figure 1: Amnesty campaign 'Handcuff tyranny', published in Canada in March 2016 (ad agency: Cossette).

These photos provide a vivid illustration of the relationship between human rights and penality. Human rights are traditionally considered as promises of freedom from state interference (Fredman 2008, 9). They are often presented as delimiting state powers and preventing state oppression against its citizenry (e.g., OHCHR 2016).[2] At first glance, penality

1 On the origin of Amnesty's logo, see Power (2001, 122).

2 Over time, human rights have expanded their scope to include abuses by non-state actors (e.g., corporations, armed groups, intergovernmental organisations, individuals, etc.) (Clapham 2006).

is the opposite. The penal system encompasses the most coercive powers the state can exert over the individual in peacetime (Van Kempen 2014, xi; Dubber 2004, 546). Criminal law expresses the highest legal censure of acts within society and provides for the harshest sanctions, including incarceration and possibly loss of life (Horder 2016, 75–76). It is self-evident that penality, as Amnesty's logo implies, can become a source of abuse—through incarceration, for example. Hence, since its inception, international human rights law has provided procedural and substantive principles for protecting the individual from the state's arbitrary use of penal mechanisms.[3] However, Amnesty's campaign tells us something different. The underlying assumption is that penal action, including arresting human rights violators, is necessary to protect human rights. In a way that is very different from using the language of human rights to liberate certain individuals from the clutches of penality, a prominent nongovernmental organisation (NGO) invokes penality to respond to abuses committed by other individuals. Amnesty is not alone. Over time, human rights have increasingly been used as a driver and justificatory language for the deployment of penal means. This phenomenon is mostly visible in contexts involving large-scale human rights abuses and regime change, with the so-called 'fight against impunity' in international criminal law and transitional justice (Engle, Miller, and Davis 2016a); but it has also permeated the 'everyday' penality of politically stable countries (Mavronicola and Lavrysen 2020, 23; Sattar 2019; Pinto 2020).

Christine van den Wyngaert (2006), former judge of the International Criminal Court (ICC), has referred to this double role that human rights are made to play in relation to penality—a role of both limiting and triggering the application of criminal law—as the 'shield' and the 'sword' functions. These two functions illustrate the complexity, and for some the paradox (Delmas-Marty 1996; Tulkens 2011), affecting the relationship between human rights and penality. However, in legal practice, advocacy and scholarship, there is remarkably little analysis of what makes possible and sustains the role of human rights as both 'shield' and 'sword' regarding public penal powers. Aiming to fill this research gap, this thesis is about the role that human rights play in fostering and justifying penality. In this respect, I primarily look at the 'sword' function, albeit without neglecting the 'shield' function, since—as we shall see—the two are deeply interconnected.

The thesis demonstrates that the more human rights have become the global language of justice,[4] the more they have lent themselves to, and 'accelerated', the use of penal solutions,

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3 Substantive rights include, for instance, the provisions that crimes and punishment must be established by law, the prohibition of torture, inhuman and degrading treatment or punishment, and the prohibition against unlawful or arbitrary detention. Procedural rights include the right to fair trial, the presumption of innocence and the need to prove the guilt of the accused beyond reasonable doubt.

4 Throughout the thesis, I follow Samuel Moyn's (2010) genealogy of the contemporary human rights movement. Human rights became the global language of justice only in the 1970s, not without antecedents and precursors, but as a novel vocabulary that has a certain discontinuity with older conceptions of rights and justice (see also Eckel and Moyn 2014).

including the introduction of new criminal offences, more police control, the institution of criminal proceedings and the infliction of punishment. To examine this development, I not only consider changes in legislation and judgments but focus especially on its legal and political discursive formations. To this end, chapters 3–6 employ discourse analysis, a method inspired by the work of Michel Foucault (1972a). The analysis draws upon a transnational approach to legal problems and takes human trafficking (chapters 3–4) and torture (chapters 5–6) as the case studies that most clearly illustrate the phenomenon of human rights-driven penality.

Through the analysis of 480 texts across different sources, I advance a new and comprehensive understanding of how rights language is used to promote penal expansion. First, I show that human rights-driven penality is sustained by the competition between dominant sets of contemporary discourses, some of which tend to be more victim-centred while others are more state-oriented. Victim-centred discourses' endorsement of penality is based on the assumption that penality can become benevolent when used for the right purpose, including signalling the exceptional wrongfulness of certain rights abuses. Within state-oriented discourses, on the other hand, the language of human rights is mobilised strategically to support the state's crime-control objectives and protect its social-moral order. Second, I illustrate that this is not just a contemporary phenomenon, but also one that can be traced back to nascent areas of advocacy—against people trafficking since the late nineteenth century and the use of torture since the eighteenth century—that eventually came to form part of the core corpus of human rights as we now know them. In this regard, I refine Karen Engle's (2015) characterisation of a 'turn to criminal law in human rights' in terms of an 'acceleration' of human rights towards penality. My analysis shows that penality has been present in discourses about human rights[5] since their emergence in the 1970s but has become distinctly evident only in the 1990s. Third, I demonstrate how the development of human rights-driven penality is correlated, both historically and in the present, to a moralisation of discourses and the related reliance on the state's penal powers to convey moral condemnation of rights abuses.

With a view to explaining the reasons of human rights' dependence on penality, the last part of the thesis (chapter 7) moves beyond discourse analysis and engages with theoretical accounts of moralism and/or punishment offered in the work of Wendy Brown (1995), Friedrich Nietzsche (2006) and Émile Durkheim (1933), among others. I argue that dominant human rights discourses express their sense of moral outrage at serious abuses in the form of a Nietzschean *ressentiment*. This *ressentiment*, in turn, relies on punishment because it has the power to release the accumulated emotional tension and produce a feeling of justice achieved. In this way, human rights discourses make the confirmation of human rights

5 The choice of plural is deliberate since there is no single 'human rights discourse' but a variety of 'human rights discourses' which share some elements but differ for others.

norms dependent on penality—but also, I would argue, on the inequality, prejudice and violence that penality inevitably entails. Human rights discourses do try to minimise penal excesses, but the practice of penality, made a moral obligation, ultimately represents forces that outrun their moderation.

Before discussing these issues in detail, a clarification of terminology is necessary. The term 'human rights' refers to fundamental moral precepts, political ideas and legal norms. Enshrined in legal texts adopted after the Second World War, they are secured and enforced by domestic, regional and international institutions. In this institutionalised promotion and protection of rights, international human rights *law* has a central role. Human rights are also less-formalised demands and aspirations for protection and access to entitlements grounded on the dignity of every human being (Moyn 2010, 1). They form a *language* and a *practice* that fosters a 'human rights approach' to global policymaking (Marks 2012, 313). Human rights law, language and practice have given rise to a movement and a set of discourses that flourished in the 1970s and have penetrated everywhere in international, regional and national politics (Kennedy 2012, 20; Moyn 2010).[6] In today's polarised societies, the continuing influence of human rights is challenged by nationalistic and populist leaders (Alston 2017),[7] lamented in demise by a few scholars (Hopgood 2013; Mutua 2016), but also reaffirmed by several movements around the world engaged in struggles for social change (O'Connell 2018b). 'Penality' is the standard term used in the sociology of punishment to designate the entire penal complex, including its laws, sanctions, institutions, practices, discourses and representations (Garland 1985, x; 2013, 476; Foucault 1991a). As a generic term, it avoids the specific connotations of words such as 'criminal law', 'criminal justice', 'criminalisation', 'prosecution' or 'punishment'. A focus on penality enables me to historicise penal questions and to situate them in terms of their sociological connections and surrounding conditions (Sparks 2001, 205). It also allows me to include in my analysis, on the one hand, all the phases of the penal process (from policing to trial to punishment)[8] and, on the other, those modes and techniques that are not formally 'criminal', but arguably form

6 'Language' can be regarded as a system of signs through which things are represented. For example, a police officer beating a protester can be labelled as 'inhuman treatment' (contrary to article 5 of the Universal Declaration of Human Rights), if read through the *language* of human rights. The language of human rights can be used with a certain degree of regularity to make sense of the world and to act within it, thereby forming a human rights *discourse* (cf. Dunn and Neumann 2016, 2; Foucault 1972a, 49, 85). For a full elaboration on the concept of 'discourse', see section 3.

7 See, e.g., the British government's plans to overhaul the Human Rights Act (1998) by replacing it with a Bill of Rights to 'restore common sense to the application of human rights in the UK' (Raab 2021, 5).

8 It is true that each penal phase can be separated from the others and their interconnection is not necessary but historically contingent (e.g., it is possible to have or conceive policing without criminalisation, criminalisation without punishment and punishment without imprisonment). However, since my inquiry focuses on things as they generally are rather than as they could or should be, the term 'penality' enables me to analyse together all the moments where the state in practice uses its penal powers. On (international) criminal justice without imprisonment, see Cochrane (2017); Sander (2019a, 233–37); Drumbl (2020). On criminalisation without punishment, see J. Edwards (2017).

part of the broader penal apparatus of the state (e.g., border policing and control) (Stambøl 2021, 538–39; Barker 2017).

1. The debate surrounding human rights-driven penality

The embrace of penality by human rights—what Engle (2015) calls the 'turn to criminal law in human rights'—has been subject to growing academic attention in recent years from different theoretical and disciplinary perspectives. This section sets out the major contributions of the research already conducted on human rights-driven penality and how it informs my approach and research questions. Notwithstanding the important insights offered by these works, my inquiry seeks to address matters that the literature has omitted to date.

As I illustrate in chapter 2, in the last three decades there has been an increased emphasis on ending impunity for serious violations of international law (Engle, Miller, and Davis 2016a; Sayed 2019; Sander 2020; Drumbl 2020). Commenting on this trend, international law and relations scholars have examined the role, benefits and political costs of prosecution and punishment in the aftermath of large-scale human rights abuses (e.g., enforced disappearance, torture, systematic killing) (e.g., Roht-Arriaza 1990; Orentlicher 1991; 1994; Nino 1991; 1996; Minow 1998). They have, in particular, commented on the complexities of transitions to democracy and on what criminal trials can or cannot do to ensure justice and bring about peace (Aukerman 2002; Lessa and Payne 2012a; Teitel 2015; Sedacca 2019). Additionally, with the establishment of the international criminal tribunals for the former Yugoslavia (ICTY) (1993) and Rwanda (1994), as well as the ICC (1998), there has been an abundance of scholarship on international criminal law, which has connected the pursuit of prosecution at the international level to the protection of human rights worldwide (Safferling 2004; Drumbl 2007; Cassese 2011; Schabas 2011; Kendall 2015; Clapham 2016; B. U. Khan and Bhuiyan 2022). According to Kathryn Sikkink (2011, 13), this 'new' trend of holding perpetrators of serious human rights violations criminally accountable has recently 'gained new strength and legitimacy', fostering a 'justice cascade'. While indebted to the insights offered by these works, my focus goes beyond the contexts of conflict, transition and mass atrocity and also includes the domestic system of a politically stable country like the United Kingdom (UK).

Relatedly, extensive research has been conducted on human rights bodies' case law regarding state obligations to criminalise, prosecute and punish human rights breaches.[9] Human rights scholars have shown how these institutions have developed a practice of 'quasi-criminal review' (Huneeus 2013, 2) and a 'coercive human rights' jurisprudence (Lavrysen and

9 Throughout the thesis, the term 'human rights bodies' encompasses both regional human rights courts and international human rights monitoring bodies.

Mavronicola 2020), by ordering states to mobilise criminal law towards protection and redress for certain rights violations (e.g., serious ill-treatment, arbitrary killing, sexual violence and human trafficking) (Bengoetxea and Jung 1991; Tittemore 2005; Seibert-Fohr 2009; Tulkens 2011). For Frédéric Mégret and Jean-Paul Calderón (2015, 420), this practice is exemplary of a 'pro-repression turn in international human rights law'. Scholarship in this area ranges from doctrinal studies that either have a general scope or focus on specific bodies or provisions (Ashworth 2013, chap. 8; Stoyanova 2014; Kamber 2017; Mantouvalou 2020) to a proliferation of critical commentaries in recent years (Basch 2007; Sorochinsky 2009; Lazarus 2012; Malarino 2012; Van Kempen 2013; Mavronicola 2017; M. Jackson 2018; Pinto 2018). Some authors have also analysed the jurisprudence of human rights bodies from a criminal-theory perspective, highlighting either its risks (Pastor 2006; Cartuyvels et al. 2007; Manacorda 2014; Burchard 2021b) or its opportunities (Malby 2019; cf. Hörnle 2014). Although I draw on these contributions, including doctrinal and critical reasoning, my framework of analysis remains wider in scope and more sociological.

To this end, my research is also informed by studies in sociology and criminology that have correlated the embrace of penality by human rights with the rise of punitiveness in contemporary society (Lohne 2019; Sattar 2019; Dumortier et al. 2012). Critical works in criminology have made a substantial contribution to understanding human rights not only as sources of resistance but also as means of penal governance (Lippert 2017; Armstrong 2018; Lippert and Hamilton 2020). Increasingly concerned with 'citizen insecurity' and 'vulnerability', human rights may in fact legitimise retributive policies and an expanded penal system (Ávila Santamaría 2015; Ramsay 2012, 131). Finally, there are some insightful studies that, by drawing on feminist and critical legal studies, have questioned the entanglement of women's human rights with the state's penal powers—an entanglement that has been described as 'carceral feminism' (Bernstein 2018) or 'governance feminism' (Halley et al. 2006; 2018; 2019). Despite their many virtues, these works generally deal with specific case studies, such as sexual violence in conflict (Engle 2020), sexuality, gender and reproduction (A. M. Miller and Roseman 2019) or violence against women at the national (Tapia Tapia 2022b (Ecuador); Polavarapu 2019 (Uganda)) and international levels (Kapur 2018, chap. 3).

Although critical accounts of human rights-driven penality have recently gained more space, the use of penality to ensure respect for human rights has been welcomed as a logical, indeed largely uncontroversial development among legal practitioners, human rights advocates and many scholars. In some circumstances, for instance when gross abuses are committed, the assumption that human rights require criminalisation and punishment has been internalised to the point that it is deemed self-evident. Individual criminal accountability is viewed as an essential element of human rights protection: it would provide redress for victims of abuses (Neier 2012, 259), prevent future violations through deterrence (Kim and Sikkink 2010) and affirm respect for human rights law and values (Safferling 2004, 1482). For Sikkink (2011, chap. 6), for example, the 'justice cascade' has not just changed world's politics but also led

to an improvement in human rights and democracy, because the occurrence of prosecutions has reduced the general level of repression.

On the other hand, a growing body of critical scholarship has questioned the pursuit of human rights protection through criminalisation and punishment (Tulkens 2011; Lazarus 2012; Engle, Miller, and Davis 2016a; Pinto 2018). Engle (2015), in particular, has identified four main concerns regarding the correspondence between anti-impunity, criminal law and human rights. First, the penal lens individualises and decontextualises abuses, as it focuses on individual perpetrators and thus obscures the structural dynamics that (re)produce injustice (1120–1122). Second, the anti-impunity agenda displaces conceptions of economic harms and related remedies, since its goal is to prevent excesses rather than to restructure the economic system (1122–1124). Third, by promoting prosecutions, human rights advocates align with the state and its often biased and violent penal apparatus (1124–1126). Fourth, insofar as the collection of historical materials is mostly guided by its admissibility or relevance for criminal trials, much of the story risks being lost (1126–1127). In general, for most critics, true human rights protection cannot be achieved by widening penality (Lazarus 2012; Corrêa and Karam 2019). Human rights, it is argued, should rather be reoriented towards their 'shield' function, including the protection of the defendant's rights (Basch 2007; Sorochinsky 2009; Malarino 2012), or be rescued from the language of criminal accountability that has co-opted them (Hannum 2019, 11–25). For others, however, human rights are not co-opted but already a tool and a language that is prone to be 'governed through' (Sokhi-Bulley 2016) and to act as a vehicle for extended securitisation and penalisation (Lippert and Hamilton 2020; Kapur 2018).

These debates form an essential backdrop to the analysis in this thesis, which adds to them, by offering an original and thorough examination of the extent of, the assumptions behind and the reasons for penal expansion by reference to human rights. Indeed, there is still a lack of comprehensive engagement with the questions of *whether*, *how* and *why* human rights have become triggers not just of penality but of its expanded application. Even critical studies often leave behind these questions as they appear more interested in demonstrating that penality is incapable of effectively protecting rights. Yet I believe that these questions are essential to fully grasp what is involved in the relationship between human rights and penality. These are primarily diagnostic questions, taking the phenomenon of human rights-driven penality as an object of investigation in itself, but they also involve a critical dimension that ought to be made explicit. My inquiry first engages with things as they are. Yet it also supplements the critique of human rights-driven penality with new arguments. By illuminating the conditions of possibility for dominant practices and identifying counter-discourses that challenge these practices, it brings new light to the dangers and risks implicit

in contemporary arrangements.[10] What this thesis does not do is to develop alternative models for protecting human rights without reliance on penality. However, since I do indicate that current arrangements might have been—and might still be—differently arranged, the thesis ultimately lays the groundwork for new projects in this direction.

2. Research questions

The central aim of this thesis is, then, to explore the role that human rights play in fostering and justifying penality. This overarching objective is guided by three separate yet interconnected analytic questions:

i. (To what extent) have human rights become triggers of expanded penality?

ii. How is it possible that human rights have become intricately intertwined with penality?

iii. Why are human rights made dependent on penality for their protection and promotion?

As already noted, these three questions are both diagnostic and critical. They go to the roots of human rights-driven penality and problematise it. To be clear, by raising questions about the entanglement between human rights and penality, I do not mean that gross violations of human rights do not require due attention or that they are somehow not serious (cf. Chamberlen and Carvalho 2022, 95). Rather, I critically investigate the assumption that their protection by penal means is the result of inevitable historical logic and a necessary avenue to justice. This is particularly important if we consider that a penal approach to complex social problems has not only repeatedly failed to promote comprehensive justice (Aviram 2020), if justice at all, but in many cases has also actively contributed to further violence and domination (Fassin 2018).

The '*whether*' question

Much has been written about the use of human rights to demand criminal accountability, particularly in the case of crimes against humanity, genocide, war crimes and serious human rights violations. However, much less has been said about whether human rights have actually tangibly contributed to strengthening and expanding penality. Have new criminal offences been introduced by reference to human rights? Have new prosecutions been launched? Has stronger punishment been inflicted? And if human rights have been a major source of penality at national and international levels, which countries, institutions and actors have been involved? Most literature focuses on transitional justice and international criminal law—and related institutions and advocates. Yet it appears that the development has been many-sided,

10 I am inspired here by Foucault (1984b, 343): 'My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So my position leads not to apathy but to a hyper- and pessimistic activism.'

with diverse trends, including the growing importance of victims' rights in criminal proceedings, the introduction of penal obligations in human rights instruments and the recognition of these rights and obligations by human rights bodies through judicial interpretation. It is also important to situate these trends historically. Criminal accountability for human rights violations is generally presented as a relatively recent phenomenon. The story goes that human rights abuses were left unaddressed for centuries (Cassese 2011, 272). Only in recent years has criminal law become a tool to 'give teeth' to, and 'help improve compliance' with, international human rights standards (Sikkink 2011, 15). However, the literature does not agree on the starting point of this development. For some authors the origin of criminal accountability for human rights abuses is located at the end of the Second World War, with the Nuremberg trials of Nazi leaders (Teitel 2003). In Sikkink's (2011) influential account, the starting point is placed in the mid-1970s, with the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Declaration) (1975). Engle (2015), on the other hand, situates 'the turn to criminal law' in the early 1990s. This thesis—and, in particular, part 1 (chapter 2)—explores the extent to which human rights have contributed to the dissemination and legitimisation of penal responses around the globe and the distinctive ways in which this has occurred. It demonstrates that human rights have had a central role in the justification and expansion of penality in a variety of geographical and institutional contexts. Part 1 also situates the entanglement between human rights and penality historically. It contributes to the literature on the origins of human rights-driven penality, by showing that this phenomenon emerged in the 1970s, with the rise of victims' rights at the national level and the first penal measures in international human rights instruments. Yet it is only since the 1990s that the entanglement between human rights and penality has increasingly been normalised.

The '*how*' question

The relationship between human rights and penality has been described as 'paradoxical' (Tulkens 2011). While human rights advocates generally condemn over-reliance on the penal system led by populist, 'law and order' rhetoric, the 'toughening up' of penality is instead demanded when criminal law is used to protect and promote human rights. For some authors, today's reliance on penality is an important shift from where human rights advocacy started: 'originally distrustful of penal power, [it] came to be its greatest champion' (A. M. Miller and Zivkovic 2019, 41; see also Engle 2015). In this context, rather than trying to resolve this assumed paradox, an attempt must be made to understand the assumptions that sustain and lie behind it. How is the relationship between human rights and penality made sense of by the actors involved, framed by their discourses and reproduced in their practices? What are the historical assumptions upon which our present ways of protecting human rights through criminalisation and punishment depend? These questions cannot be addressed (only) through doctrinal, comparative or philosophical modes of inquiry. Rather, they require a

socio-legal method that is suitable for interrogating how knowledge about human rights and penality is socially constructed, resulting in the production of certain assumptions that create certain possibilities of action while precluding others. To this end, part 2 of this thesis (chapters 3–6) is based on discourse analysis and focuses on human trafficking and torture as two of the most illustrative cases of human rights-driven penality. My inquiry is thus less about the nature of human rights-driven penality than it is about the discourses underlying it (cf. Engle 2020, 17). These discourses—and the practices that accompany them—are investigated both in the present and throughout their historical emergence. The aim is to unearth and problematise how human rights-driven penality is discussed (or questioned) and put into practice as well as to understand the conditions of possibility of what is currently said about it. As my analysis shows, within dominant human rights discourses, the resort to penality has been promoted without any sense of contradiction or even paradox. In this way, I depart from the critical literature that argues that the 'shield' and the 'sword' functions of human rights in the application of penality are in paradoxical opposition (Delmas-Marty 1996; Tulkens 2011). I illustrate that these two functions are in fact mobilised towards the common goal of reorienting the state's penal powers away from marginalised members of society and towards powerful individuals. The embrace of penality by human rights also appears more as an 'acceleration' than a 'turn' (Engle 2015) or 'shift' (A. M. Miller and Zivkovic 2019)—as presented in some critical human rights literature. My analysis shows that it is a dimension that has been present in human rights discourses from their emergence but that has become distinctly evident only in recent years. My research finally provides an original finding on how the increased invocation of, and resort to, penality has been connected, both historically and today, to a tendency towards moralism in the discourses about and the practice against abuses.

The '*why*' question

In the past few decades and until today, human rights have 'accelerated' the reinforcement of penal solutions. However, a corresponding decline in human rights breaches does not seem to have followed suit. Most individuals involved in serious human rights violations have not been tried and punished, and probably never will be. Human rights activists are also aware that penal power, unless constrained by rigid moral and legal standards, is prone to abuse and that, in many countries, its arbitrary use is frequent and pervasive rather than exceptional or unusual. They also know that penality is not a tool in their hands or in the hands of individual victims, but that it requires institutionalised authorities to enforce the law and punish perpetrators (cf. Graf 2021). These points give relevance to the question of why the fight for human rights is waged through penality. Why, among all the possible legal and non-legal tools, have human rights activists embraced penality as the proper—if not preferred—method to protect and promote human rights? Why has the use of penality become an outright moral and legal obligation rather than simply an option for addressing serious human rights violations? This thesis—and, in particular, part 3 (chapter 7)—explains

why human rights are sources of penality. Here, I am not primarily interested in theoretical justifications of human rights-driven penality that can be offered a priori, generally by relying on moral and legal philosophy, such as retribution and deterrence (cf. Drumbl 2007). Rather, my aim is to offer a diagnostic, a posteriori, perspective (Fassin 2018, 64–65) that is informed both by the empirical discourse analysis findings of part 2 (chapters 3–6) and by critical works in sociological and political theory. While discourse analysis alone cannot answer 'why questions', it does provide an important base upon which to build theoretical explanations and draw causal or quasi-causal inferences.[11] As already mentioned, part 2 demonstrates that human rights-driven penality is correlated to a moralisation of discourses. Building upon this finding, in part 3 I engage with the work of Nietzsche, Durkheim and Wendy Brown to contend that human rights discourses rely on penality because of the anger at the breach of universal values and the desire to restore their moral authority. Emotions and desire for punishment, driven by the attempt to blame the 'mighty' and react against violated moral sentiments, are thus key to explaining human rights' dependence on penality. In this way, part 3 offers an innovative perspective about why human rights discourses resort to penality.

3. Methodology

Like all bodies of law, we can think of human rights law and criminal law as formal instruments of regulation, bodies of rules and decisions, academic subjects, and forms of teaching and training, as well as sources of justice and, in the case of criminal law, also of oppression (cf. Banakar and Travers 2005b). They can be many things at the same time. It is thus important to make explicit what aspects I am discussing and from which perspective I am exploring them. Based on my research questions, I explore the relationship between human rights and penality through a socio-legal perspective. I view law as a social phenomenon embedded in historical and socio-political contexts, but also as a framework and an expression of understandings that enable society to exist (Cotterrell 1998). Such a perspective helps me understand and integrate extra-legal considerations that contribute to the formation and transformation of law, and of human rights-driven penality more specifically. As Judith Shklar (1964, 3) reminds us, 'one ought not to think of law as a discrete entity that is "there", but rather to regard it as part of a social continuum'. A socio-legal perspective also allows me to combine knowledge, skills, theories and methods of research from different disciplines such as law, sociology and political science (Banakar and Travers 2005a).

11 Following Srdjan Vucetic (2011, 1308), I do not consider causal factors as variables in the sense of necessary-and-sufficient conditions, but 'reasons' in the sense of historically situated 'configurations' which 'simultaneously give rise to both actions and the actors that carry them out' (quoting P. T. Jackson 2006, 41). I also agree with Vucetic that a 'post-positivist' method, like discourse analysis, is not, in principle, incompatible with a broad idea of causation or quasi-causation.

To pursue these ambitions, I developed a socio-legal methodology based on the concept of *discourse*. In broad terms, to study discourse is 'to study language in action, looking at texts in relation to the social contexts in which they are used' (Hyland and Paltridge 2011, 1). Law's dependence on language and texts makes discourse a useful tool to explore law from a sociological perspective. Law, its processes and institutions are (re)produced through written and spoken words, which are often recorded in texts. These texts, in turn, reflect law as a social practice and reveal how law is socially organised (Banakar and Travers 2005c). In other words, by scrutinising texts about human rights and penality, their social contexts and the ways they enshrine discourses, we can gain insights into the social conditions and processes underlying human rights-driven penality. In this thesis, I treat discourses about human rights and penality as a form of 'data' to be analysed. This is not to say that everything related to law is discourse.[12] Rather, looking at discourses is a methodological strategy, one among the many available to study law as a social phenomenon. Following Kevin Dunn and Iver Neumann (2016, 2), I understand discourses as 'systems of meaning-production that fix meaning, however temporarily, and enable us to make sense of the world and to act within it'. This understanding of discourse builds upon the work of Foucault (1988; 1970; 1972a; 1972b; 1973; 1991b)[13] and other post-structuralist theorists who have followed him. The basic idea is that knowledge (including about law) is constitutive of reality: people construct and attach meanings (including legal meanings) to the material world and they do so through the construction of discourses (Dunn and Neumann 2016, 2).

The aforementioned definition is based on the idea that discourses are productive of the reality they name, in the sense of what can be known and acted upon by humans (Dunn and Neumann 2016, 47).[14] Discourses both produce and constrain knowledge: they order reality in particular ways, rendering it understandable, while also excluding alternative views of that same reality (Cheek 2008; see generally Foucault 1970). Certain objects are so produced, certain identities created, certain modes of thinking enabled and others constrained (see generally Foucault 1972a). Products of discourses are, for example, the notion of 'crime' or the designation of a person as 'criminal'. As Louk Hulsman (1986, 71) notes, the categories of crime and criminalisation have no 'ontological reality'—they do not exist independently of a discourse underlying the legal decision which constructs a behaviour as 'criminal' and attributes it to an individual. The view that discourses constitute reality underscores a

12 While law is often discursive and textual, it also manifests beyond textual and linguistic forms (e.g., architectural forms and institutional locations). See the work on legal materiality by Hyo Yoon Kang and Sara Kendall (2019).

13 Foucault (1972a, 49) considers discourses as 'practices that systematically form the objects of which they speak'.

14 While one cannot sensibly speak about discourses as 'causing' something to happen, we can nevertheless speak about their productive power. On discourses and causality, see Dunn and Neumann (2016, 51).

correlation between knowledge and power (Foucault 1991a, 27).[15] Discourses exert power by making certain understandings hegemonic and marginalising others. As Jennifer Milliken (1999, 229) observes:

> [D]iscourses are understood to work to define and to enable, and also to silence and to exclude, for example, by limiting and restricting authorities and experts to some groups, but not others, endorsing a certain common sense, but making other modes of categorizing and judging meaningless, impracticable, inadequate or otherwise disqualified.

Ultimately, discourses legitimise, normalise and naturalise meanings, by fixing particular worldviews and connected ways of action, giving the impression of 'truth' (Dunn and Neumann 2016, 3). The power of discourses is particularly visible in the legal realm, since legal discourses have their material base in legal institutions and practices, which are authorised to generate norms perceived as binding and, thus, to produce legal and juridical 'truth' (cf. Dent and Cook 2007).[16]

Discourses are also inextricably interwoven with practice. Because discourses maintain a degree of regularity in social relations, they establish preconditions and parameters for the possibility of action (Dunn and Neumann 2016, 61). In other words, what is said shapes what can and cannot be done and what is and is not done. This is not to say that discourses determine action completely: there will always be more than one possible outcome (Dunn and Neumann 2016, 4). In the legal context, through discourses about law, new legal institutions are created, legislations enacted and legal initiatives undertaken. For instance, a mode of speaking about and making sense of 'sexual violence' may enable certain ways of addressing it while precluding others: criminalisation and punishment, for example, instead of educational programmes or other non-penal measures (cf. Sattar 2019, 9). However, not all discourses are substantiated into action in the same way. There are, within discourses, those which become dominant due to their wider articulation or their material base in institutions with particular social authority (Foucault 1972a, 50–52) and, thus, exert a higher degree of power to shape practice.

Case studies

Investigating all discourses about human rights and penality would be impossible. It is important to narrow the focus to produce an achievable research task. Like a photographer,

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15 For Foucault (1991a, 27), 'power and knowledge directly imply one another; … there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations'. Foucault (1980, 93) also explains that relations of powers, which enable and constrain what can be known, cannot 'be established, consolidated or implemented without the production, accumulation, circulation and functioning of a discourse'.

16 See also Pierre Bourdieu (1987, 839): 'The law is the quintessential form of "active" discourse, able by its own operation to produce its effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law'.

I 'zoom in progressively closer and closer until [my] descriptive task is manageable, then zoom back out again to regain perspective' (Wolcott 1990, 69). After a chapter (2) that illustrates the general trends of using human rights as sources of penality, in the four chapters that follow (3–6) I use an empirical method (discourse analysis) and give attention to two areas of human rights practice and advocacy that offer clear insights into this phenomenon: human trafficking and torture. Then, the last chapter before the conclusion (7) goes back to the broader context, by generalising some of the findings of the case-study analysis. Using human trafficking and torture as case studies allows me to understand in depth the assumptions underlying human rights-driven penality (Gerring 2004), as well as to employ an empirical method like discourse analysis. Based on the literature (e.g., Bernstein 2012; Eriksson 2013; Sikkink 2011; Kelly 2013; Mavronicola 2021), I see human trafficking and torture as cases that best illustrate the various ways in which human rights have been used to achieve penal aims. The selection of these two cases is thus 'information-oriented', that is, human trafficking and torture 'are selected on the basis of expectations about their information content' and their capacity to reveal a great wealth of information about the analysed phenomenon (Flyvbjerg 2006, 230).

Human trafficking is a growing issue of both penal and human rights concern across the globe (A. Edwards 2007).[17] Over the last thirty years, there has been a marked rise in the number of laws against this phenomenon at the international, regional and national levels. Central to this increase was the United Nations' (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (UN Trafficking Protocol) (2000), supplementing the UN Convention against Transnational Organized Crime (2000), which has acted as a model for much domestic legislation. The upsurge of legislative activity has broadened the scope of trafficking as a crime (as it has been conceptualised for the past century) but also as a human rights violation. From an initial identification with prostitution and sex trafficking, it now includes other forms of people trafficking (e.g., child trafficking and forced labour) and is linked to the idea of 'modern slavery'. Human trafficking is an optimal case for my study because it is a cause around which progressive and conservative individuals, NGOs, states and international organisations mobilise. They all invoke the implementation and enforcement of criminal sanctions, along with human rights measures and victim protection. It is also an issue around which competing discourses have developed. While dominant discourses have promoted heightened penality to counter the phenomenon, alternative voices have criticised the centrality of crime control (Bernstein 2012; Halley et al. 2006). For all these reasons, the analysis of human trafficking offers a great amount of insight into the phenomenon of human rights-driven penality.

17 The analysis is limited to human trafficking, as defined by article 3 of the UN Trafficking Protocol (2000) and including forms of movement, transportation or harbouring. It does not focus on forced labour or (modern) slavery more generally, even though these concepts may be mentioned when connected to human trafficking.

While human trafficking is generally portrayed as perpetrated by private parties, torture is a more 'traditional' human rights violation that, at least in its dominant conceptualisation, originates from an act or omission by state authorities.[18] Torture also functions as the archetypal form of human rights violation (Kelly 2011, 327; Mavronicola 2021, 1). Since the early 1970s, it has been subject to extensive activism and advocacy in order to prevent its use, punish perpetrators and bring justice to victims. It is no coincidence that, as already noted, Sikkink (2011) considers the penal provisions in the Torture Declaration (1975) and in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) (1984) to be the starting points of human rights-driven penality. The fight to establish penal norms around the prohibition of torture appears as one of the success stories of the human rights movement (Kelly 2019, 235). Probably it has to do with the fact that torture seems ideally suited for human rights-driven penality. On the one hand, the gravity of torture appears to necessarily require penalisation. On the other hand, as Kenneth Roth (2004, 68), executive director of Human Rights Watch, has argued 'it is fairly easy to determine the violator (the torturer as well as the governments … that permit the torturer to operate with impunity) and the remedy (clear directions to stop torture, prosecutions to back these up …)' (see also Kelly 2013, 148). For these reasons, torture is another optimal case for my study and reveals important information about human rights-driven penality. It is possibly the 'original' case, but also the case where the entanglement between human rights and penality has probably been taken for granted the most.

Discourses around trafficking and torture are not necessarily interchangeable as they underlie and construct two different social phenomena. What figures in this thesis is a search for common traits across differences. With the help of the literature on rights-driven penality that I discussed in section 1, this search allows me to make some general points on how the relationship between human rights and penality tends to develop. I discuss these points in chapter 7, but it is worth highlighting here that my discussion neither suggests that human rights-driven penality is always based on the same assumptions nor aspires to be exhaustive. To this end, it can be useful to read my findings alongside studies on other cases and human rights violations. Engle (2020), for example, has discussed at length the deep entanglement between human rights and penality in the context of sexual violence in conflict. Her arguments on how penality has become the preferred method to end sexual violence and promote human rights both complement and confirm my findings.[19] Besides sexual violence

18 Rather than adopting a specific definition of torture, I am interested in how torture is discursively defined. A definitional benchmark on which all contemporary discourses around torture measure themselves is contained in article 1 of the Torture Convention (1984). Although I do not primarily focus on cruel, inhuman or degrading treatment or punishment, these other forms of ill-treatment become relevant insofar as the discourses under analysis consider them as part of the 'torture continuum' (Mavronicola 2021, 40).

19 According to Engle (2020), the 'common-sense' narrative about sexual violence in conflict consists of five prepositions: i) sexual violence is the worst war crime; ii) the harm of such crime mostly results from the shame it inflicts on individuals and community; iii) the perpetrators are individual male monsters; iv) the

(or, more broadly, violence against women) (see Houge and Lohne 2017; Tapia Tapia 2022b), scholarly research that can integrate my study has focused on slavery (Stoyanova 2017), arbitrary killing (Mavronicola 2017), and discrimination and hate speech (Stavros 2020; Thoreson 2022). It is important to note that not all human rights breaches today attract penal measures, but only a particular set of breaches that are deemed 'serious' or 'grave' enough.[20] Yet there is a tendency to extend criminal accountability to those phenomena, such as business corruption (Hess 2017) or environmental damage (Higgins, Short, and South 2013), that have increasingly been defined in terms of human rights issues.

In terms of space, I look at human trafficking and torture through a transnational approach to legal problems. I follow Terence Halliday and Gregory Shaffer's (2015, 3) suggestion that we should reframe 'the study of law and society' from 'a dualist orientation toward international law and national law' to 'a perspective that places processes of local, national, international, and transnational' lawmaking and practice 'in dynamic tension within a single analytic frame'. Both human rights and penality are neither purely national nor international, but 'transnational' in nature. On the one hand, human rights are omnipresent in the contemporary world (Sen 2012, 91), connecting global law levels with local ones (Merry 2006a). On the other hand, penal power is no longer confined within the nation state (Bosworth 2017; Lohne 2020). Penality today involves an intricate maze of international, regional and domestic norms and processes that constitute and influence each other (Kotiswaran and Palmer 2015). The relationship between human rights and penality is also transnational (Payne 2015). As presented in chapter 2, human rights have allowed penality to move and expand across horizontal and vertical law levels, taking various forms and meanings.

To narrow the focus, I give primary attention to discourses connected to Europe and the UK (and, in relation to criminal law, England and Wales).[21] Europe is selected for its advanced laws and policies on both trafficking and torture, which, more than those in any other region in the world, combine human rights elements along with penal measures. This can be evidenced by the European Convention on Human Rights (1950) (ECHR) and the case law of the European Court of Human Rights (ECtHR); for trafficking, by the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings (2005), the work of its monitoring mechanism (GRETA) and the European Union (EU) Trafficking Directive (2011); and, for torture, by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) and its Committee for the

victims are primarily women and girls; v) criminal law is the ultimately meaningful method to end sexual violence and promote peace.

20 For the provocative argument that any kind of violation of human rights should be formally criminalised, see Blau and Moncada (2007). For a critique, see Hagan and Levi (2007).

21 The UK has three criminal justice systems: English and Welsh, Scots and Northern Ireland criminal laws.

Prevention of Torture. The UK is also an optimal case for my investigation.[22] This is due to its lively debate on how to address human trafficking and the recent enactment of the Modern Slavery Act (2015), a law enthusiastically supported by human rights actors. In recent decades, Britain has also offered a heated discussion around real or supposed instances of torture, because of its role as a junior partner in the 'war on terror' and the enduring effects of its military operations in Northern Ireland (Kelly 2013, 6; Gearty 2021).

Discourse analysis

As already mentioned, part 2 aims to understand how it is possible that human rights have become intricately intertwined with penality. To capture the ways in which these two bodies of law are entangled and the assumptions that underpin them, in chapters 3–6 I used discourse analysis on 480 texts about human trafficking and torture. Discourse analysis is a method for critically investigating how knowledge is discursively produced and attached to various social objects, subjects and techniques, enabling certain possibilities of action while precluding others (Dunn and Neumann 2016, 8–9; Foucault 1972a). There is no single method of discourse analysis.[23] The one I used is a method that I developed through a methodological reading of Foucault's work on discourse,[24] combined with other post-structuralist approaches to discourse analysis (see, e.g., Dunn and Neumann 2016) and adapted to the study of *legal* discourses.[25] The objective is to examine the ways in which human rights-driven penality has been discursively generated, circulated, internalised and resisted, both in contemporary society (chapters 3 and 5) and historically (chapters 4 and 6) (cf. Dunn and Neumann 2016, 4).

Discourses were first analysed in the present and subsequently throughout their historical emergence. The choice of starting from contemporary experience and then moving into the past was dictated by the objective of developing a 'history of the present' (Foucault 1991a, 31) of human rights-driven penality.[26] Historical material is analysed to critically engage with the present, that is, to better understand how our contemporary arrangements that appear obvious and commonsensical became 'logically possible' (Bartelson 1995, 8). To this end,

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22 A focus on the UK also enabled me to collect and analyse texts in English.

23 Discourse analysis 'is an umbrella term covering a range of analytical positions and theoretical perspectives, which although they may share in common a concern with language in-use can and do differ from each other in many ways, including perhaps most importantly how they go about analysing empirical data' (Chamberlain 2013, 137).

24 Foucault (1972a, 27) describes discourse analysis as 'the project of a *pure description of discursive events* as the horizon for the search for the unities that form within it'.

25 For examples of other discourse analysis in socio-legal studies see, e.g., Rajah (2015); Ervo (2016); Houge and Lohne (2017); Reilly (2018); Paige (2019); Davidson (2019).

26 In describing my historical investigation as a 'history of the present' I hope to distance myself from any expectation of a comprehensive history of human trafficking or torture (cf. Garland 2001, 2). Since my concern is analytical rather than archival, I primarily focus on specific moments in history where distinct turns were taken and certain understandings of human trafficking and torture became dominant over others (cf. Bueger and Gadinger 2018, 140).

after identifying present-day discourses around trafficking and torture in chapters 3 and 5, in chapters 4 and 6 I explore the roots and antecedents of today's dominant discourses.[27] I genealogically investigate the multiple and contingent pathways that produced our discursive present, exposing the historical emergence, propagation and transformation(s) of anti-trafficking and torture discourses (Foucault 1984a).[28] I am interested in the continuities that have characterised discourses around human trafficking and torture since they first emerged as specific 'problems' (Foucault 1978, 8) until today, as well as in the ruptures and breaks within them (Dunn and Neumann 2016, 105). In this way, I expose how the contemporary relationship between human rights and penality is not the unfolding of a linear and progressive evolution, but the product of specific political choices and exercises of power, many of which are nowadays largely overlooked (cf. Garland 2014, 372).

The corpus of 480 texts that I analysed was constructed based on the research question: *how is it possible that human rights have become intricately intertwined with penality?* This question was broken down into the following sub-questions: *how is/was knowledge discursively produced around the subject-matter of trafficking/torture, its subjects and the social techniques to respond to it?* To include the broad legal and political debate (cf. Hansen 2006, 84), I focused on four genres of texts.[29] The first group includes positive legal texts (both 'hard law' and 'soft law'), such as international treaties and declarations, domestic statutes, decisions of courts and quasi-judicial bodies. The second group consists of policymakers' documents, such as official reports, speeches, press-releases, articles, transcripts of parliamentary debates, *travaux préparatoires* and websites. The third group includes writings by NGOs and members of civil society,[30] such as reports, press-releases and online publications. The fourth group consists of academic articles and books (treated as primary sources for the purpose of the discourse analysis).[31] Attention was given only to texts discussing trafficking and torture, their penalisation and their ethical objections (both broadly conceived and, especially for

27 I did not look at the roots of counter-discourses for practical reasons of time and space, but especially because of my aim of developing a 'history of the present' of human rights-driven penality, which is sustained by dominant discourses.

28 Foucault (1980, 85) terms *archaeology* 'the appropriate methodology of … analysis of local discursivities' and *genealogy* 'the tactics whereby, on the basis of the descriptions of these local discursivities, the subjected knowledges which were thus released would be brought into play.'

29 Discourse analyses inspired by Foucault generally draw upon a wide range of texts from a diversity of sources and genres (Nicholls 2009, 37; Dunn and Neumann 2016, 100).

30 Members of civil society are members of political groups and associations that are not organised by the state (Calhoun 2002).

31 Different genres employ different modalities of authority (Hansen 2006, 59): the authority of an international treaty differs from that of a scholar writing for an academic audience, which differs from that of an NGO doing advocacy. Yet looking at different genres together is a methodological strategy for searching for regularities of meaning across diverse authorities and, thus, for discourses that transcend specific sources or authors.

contemporary texts, in human rights terms).[32] In accordance with my methodological orientation, texts were selected at three levels: the international level, the European level and the domestic level of the UK (or England and Wales).[33] The time span of the texts varies in each chapter. In chapter 3, texts go from 1991 to 2021. Although trafficking is not a new phenomenon, it has been in the last three decades that it has become the important matter of international and national debate that it is today (Gallagher 2010, 16). In chapter 4, texts go from the late nineteenth century, when people trafficking first emerged as a specific problem to be regulated (Limoncelli 2010), to the early 1990s. In chapter 5, texts span from 1998 to 2021. Based on the secondary literature (Roht-Arriaza 2005; Bianchi 1999; also cf. Osofsky 1997, 216), I took the period around the arrest of Augusto Pinochet in London on a Spanish extradition warrant for torture, in 1998, as the beginning of contemporary debates on torture, human rights and penality.[34] In chapter 6, the time span of the texts starts in the eighteenth century, when torture was formally prohibited throughout Europe (Peters 1985), and ends in the early 1990s.

Through an initial literature review (Dunn and Neumann 2016, 93), I first selected texts that have been identified by commentators as having wider reception and those that are authoritative in terms of source or for their binding nature (treaties, legislations, judicial decisions). Starting from these texts (Dunn and Neumann 2016, 93–94), I gathered other documents taking into account their intertextuality (explicit and implicit references to other texts) (Hansen 2006, 50–53). I also consulted several online databases,[35] the websites of various bodies or organisations[36] and NGOs,[37] as well as the archives and special collections of the LSE Library (for chapters 4 and 6).

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32 I did not distinguish between sincere and hypocritical invocations of human rights, given the open nature of human rights language, which can be deployed for both emancipatory and repressive purposes (Graf 2021, 9; Perugini and Gordon 2015; Çubukçu 2018).

33 I made some exceptions for some texts produced outside Europe or in countries other than the UK when, in a particular period of time, there was a scarcity of texts produced in those contexts or for texts that have widely circulated in those contexts despite being produced elsewhere.

34 Tobias Kelly (2011, 328) has also stressed the relatively recent history of contemporary discourses around torture: 'When we speak about torture in the early twenty-first century we speak about very different things than we would had we held the conversation even fifty years ago. … It was only by the late twentieth century … that torture became associated with a distinct form of cruelty and suffering and a matter of fine-grained debate about legal definitions'.

35 Google Scholar; Google Books; LexisNexis; Heinonline; Westlaw UK; ProQuest; Internet Archive; HathiTrust; Refworld; UN Digital Library; Hansard; digitalised section 'Women and Social Movements, International—1840 to Present' of Alexander Street Press (chapter 4); Times Digital Archive (chapter 5).

36 UN bodies and agencies; EU; CoE; ECtHR; ICTY; UK Government; International Organization for Migration (IOM); Organization for Security and Co-operation in Europe (OSCE).

37 I selected texts produced by large organisations, more likely to influence anti-trafficking or anti-torture policy. Key international human rights NGOs such as Amnesty International and Human Rights Watch have worked extensively on trafficking and torture. Additionally, with regards to *trafficking*, I focused on Anti-Slavery International, CATW, GAATW, La Strada International, ECPAT International, International Committee on the Rights of Sex Workers in Europe, Centre For Social Justice and Institute for Public Policy Research; with regards to *torture*, on APT, Convention against Torture Initiative, DIGNITY,

Regarding the analysis of *contemporary discourses* (chapters 3 and 5), I typed the following keywords to find relevant material in online databases and search engines: 'human rights', 'crim-' and 'trafficking'/'torture'. I used the software NVivo on the thousands of documents initially collected to conduct a preliminary content analysis and reduce the number of texts to be analysed in detail (cf. Salter and Mutlu 2013, 116).[38] The choice of sampling was influenced by various factors. First, using the query function of NVivo I selected only those texts where 'trafficking'/'torture', 'human rights' and various terms connected to 'criminal law'[39] were all mentioned. Second, I sought to identify those texts where the relationship between human rights and penality was discussed at length. To this end, I reduced the corpus by focusing on texts with at least ten references to 'human rights' and 'criminal law' (and connected terms), and with the highest coverage of these words throughout the text. Based on the literature and a first reading of the documents, exceptions were made for texts that were often cited.

For retracing *historical discourses* (chapters 4 and 6), I collected texts around 'a few historical significant points' (Foucault 1978, 8) which are crucial to the understandings of human trafficking and torture in the present. Given my focus on legal discourses, these significant points are generally legal events, such as the enactment of new laws or the adoption of treaties. Mapping debates around these events offers a methodological technique for tracing the stability or transformation of discourses (Hansen 2006, 28). I found texts about trafficking in online databases using the following keywords: 'white slave traffic', 'white slavery', 'sex trafficking', 'sexual slavery', 'traffic in women', 'trafficking in women' and 'human trafficking' (see figure below). With regards to historical texts about torture, in case of numerous documents from the same source and period, I used NVivo to conduct a preliminary content analysis and to select the texts to be analysed in detail.[40]

FIACAT, FIDH, IRCT, OMCT, Penal Reform International, Prison Insider, Redress, TRIAL International, International Commission of Jurists, Justice, Liberty and Policy Exchange.

38 At this point, my aim was no longer to select influential texts (already included through an initial literature review), but to include other texts that contained 'clear articulations' (Hansen 2006, 76) of the relationship between human rights and penality.

39 E.g., 'crime(s)', 'criminalisation', 'prosecution', 'criminal', 'criminalise', 'prosecute', 'punish', 'punishment', 'penal', 'impunity', 'offence', 'amnesties'.

40 I selected the texts where 'torture', various terms connected to criminal law (see note 39) and morality ('human rights', 'dignity', 'barbarous', '(un)civilised', '(im)moral', 'morality', 'wrong', 'evil(s)', 'unjust') were mentioned more frequently.

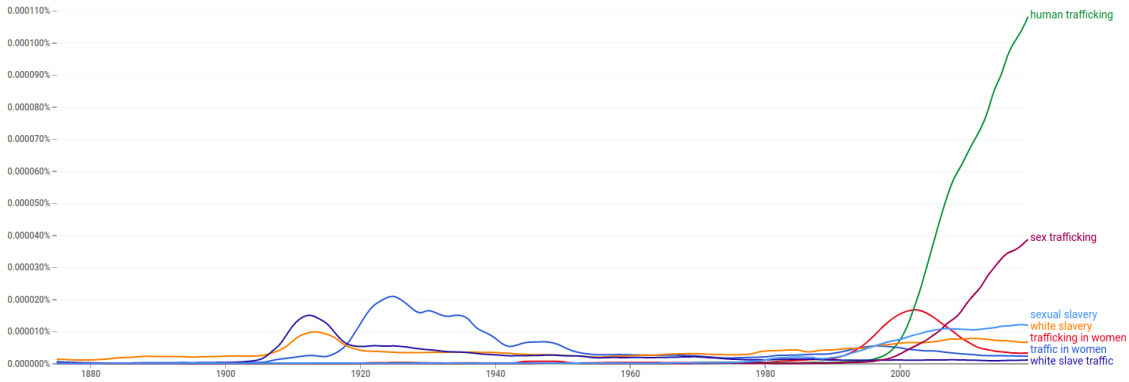

Figure 2: Frequency of references to 'traffic in women', 'trafficking in women', 'human trafficking', 'white slavery', 'white slave traffic', 'sexual slavery' and 'sex trafficking' in the scanned books available in Google Books and published between 1875 and 2019. Google Books N-gram. See chapter 4.

Overall, I sought to have a balance of documents of different kinds, by considering the year of the texts, their genre, author and source, as well as whether they focused on trafficking or torture at the international, regional or domestic levels. A total of 480 texts were sampled, 120 for each chapter, as shown in the table below.[41] Discourse analysis was conducted on these texts.

Table 1: Number of texts per genre group in chapters 3–6.[42]

	Positive legal texts	**Policymakers' documents**	**NGOs/civil society documents**	**Academic publications**
Chapter 3 (contemporary anti-trafficking discourses)	37	33	25	25
Chapter 4 (historical anti-trafficking discourses)	32	38	50	
Chapter 5 (contemporary torture discourses)	31	33	31	25
Chapter 6 (historical torture discourses)	34	30	56	

The discourse analysis consisted of a close reading of the statements in the texts forming the corpus, looking at what is sayable and visible (Foucault 1972a, 107–9). Statements were selected as the basic units of analysis (Foucault 1972a, 80) because they make social objects, subjects and techniques visible and, consequently, they become amenable to analysis. At the same time, in exploring these statements, we can learn something about the ways in which they are made visible in the first place: the relations of power that make certain forms of knowledge sayable and others unsayable (Nicholls 2009, 32). The discourse analysis also

41 The complete lists of texts can be found in the appendix.

42 With regard to chapters 4 and 6, I counted writings by members of civil society/NGOs together with academic publications as it is difficult, if not impossible, to distinguish the two categories for eighteenth- to early twentieth-century texts.

focused on regularities of statements (representations) forming a discourse and their correlation with other representations (Foucault 1972a, 28–31). Each text was examined in the same way. First, I located its context. Different dimensions of the context were considered: i) the situation of utterance (Who speaks to whom? When? Where? About what?); ii) the socio-historical context (institutional, socio-political, positional, relational context of the documents); and iii) the textual context (genre, paratext, intertext) (Alejandro, Laurence, and Maertens forthcoming). This process of contextualisation aimed to place each text within the larger field of meaning of which it is a part (Dunn and Neumann 2016, 106; Foucault 1972a, 97–98), rather than to imply a necessary correlation between a discourse and a particular author, institution or genre (Foucault 1991b, 60; 1984c).[43]

Next, I looked closely at the various statements that referred either to penality or to human rights (or, in older texts, similar notions, such as ethical objections to trafficking/torture and victim protection).[44] The key question driving the analysis was: 'how is it that one particular statement appeared rather than another?' (Foucault 1972a, 27). In particular, I focused on three analytical dimensions: i) formations of *objects*; ii) formations of *subject positions*; and iii) formations of *themes* (Foucault 1972a, 116; Nicholls 2009, 32–33).[45] In relation to formations of *objects*, I looked at how trafficking (in its different denominations) or torture formed the matter a text dealt with, as well as at whether and how they were understood as crimes and/or as moral/human rights abuses (cf. Foucault 1972a, 41–42). Questions relevant to this analytical dimensions were: how is trafficking/torture constructed, described, debated or questioned in the text? How is it related to other phenomena? The second analytical dimension concerned how the speaking subject of a text defined, privileged or marginalised certain *subject positions* (identities), namely ways of being and acting that individuals can assume, such as 'the victim' or 'the perpetrator' (Foucault 1972a, 52, 95–96). These questions oriented the analysis: who is authorised to speak? Who is served and who is disadvantaged by the process of speaking? (Foucault 1972a, 50–55) What type of perpetrators and what type of victims are portrayed and constituted in the text? Regarding formations of *themes*, I examined how different statements addressed and construed the role that human rights (or similar nations) should play in relation to, and in the context of, penality (cf. Foucault 1972a, 64). Questions that I considered were: are human rights presented as limits or constraints to expanded penality? What role is assigned to penality in case of moral/human rights abuses?

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43 It is also possible that in the same text some statements can be ascribed to one discourse and other statements to other discourses. Depending on the position or goal that an actor wants to take in a particular part of the text, they may articulate representations belonging to a certain discourse rather than to others.

44 As will become clearer in chapters 4 and 6, human rights became a vocabulary for conveying moral opposition to trafficking in the late 1960s and to torture in the late 1940s. For this reason, in older texts I decided to focus on the broader notions of ethical objections to trafficking/torture and victim protection.

45 I selected (and adapted to my study) these analytical dimensions from what Foucault (1972a, 38) calls 'rules of formation', that is, the principles that, taken together, govern the 'conditions of existence' of statements and determine whether a group of statements forms a discourse.

How are rights-oriented measures linked to penal solutions? Overall, I read and re-read the entire corpus of texts, highlighted parts of the texts, and extracted quotes and sections that illustrated what I found to be recurring objects, subjects and themes.[46]

The following step consisted of grouping statements with similar formations across the texts of a given historical period, in order to identify the basic discourses at that point in history (Foucault 1972a, 117; Dunn and Neumann 2016, 7). In line with Hansen (2006, 46), I analytically treated basic discourses as ideal-types. Doing so provided 'a lens through which a multitude of different representations … can be seen as systematically connected' (Hansen 2006, 46). Through my discourse analysis, I identified the following discourses:

Table 2: Historical and contemporary discourses (chapters 3–6).

	Contemporary discourses	
	Dominant discourses	*Counter-discourses/voices*
Human trafficking (ch. 3)	▪ 'law enforcement' discourse ▪ 'victims first' discourse	▪ 'incompatibility' discourse ▪ 'transformative justice' discourse
Torture (ch. 5)	▪ 'jus cogens' discourse ▪ 'national security' discourses	▪ critical utterances not forming a unitary discourse
	Historical discourses	
People trafficking (ch. 4)	▪ 'repeal' discourse ▪ 'social-purity' discourse ▪ 'social-hygiene' discourse ▪ 'penal-welfare' discourse ▪ 'sexual slavery' discourse	
Torture (ch. 6)	▪ 'abolition' discourse ▪ 'civilisation' discourse ▪ 'anti-totalitarian' discourse ▪ 'global' discourse	

46 I used a spreadsheet programme to collect and compare extracted quotes and excerpts of the texts, as well as to mark up points of interests (cf. S. Taylor 2013, 69).

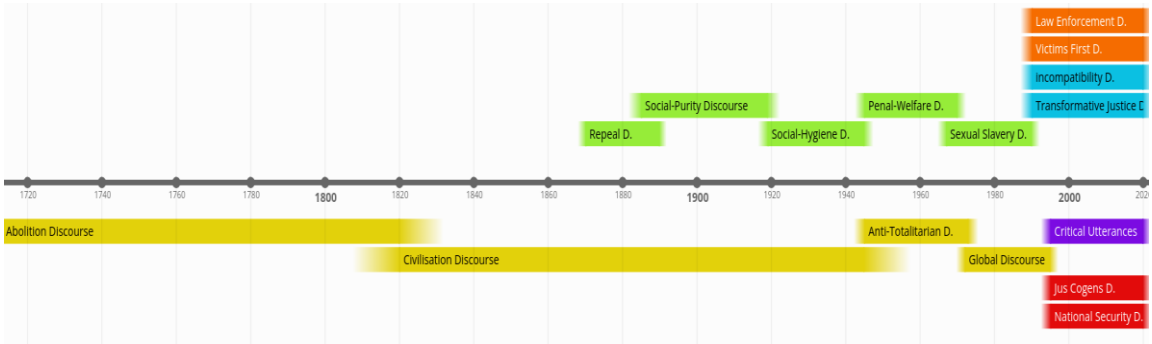

Figure 3: Timeline of anti-trafficking and torture discourses.

These discourses articulate diverse or competing understandings of the relationship between human rights (or similar notions) and penality, and, in turn, produce different social, legal and political orders (Foucault 1970).

As a final step regarding the analysis of *contemporary* discourses, I brought together existing academic discussions on anti-trafficking or anti-torture practice with the findings of my discourse analysis, in order to look at 'the effects of power generated by what was said' (Foucault 1978, 11). Here, I sought to retrace how the discourses under analysis have had certain effects and how these effects have been set into practice in initiatives against trafficking and torture (Hall 2001, 76). On the other hand, in relation to *historical* discourses, the final step of analysis consisted in mapping their transformations and correlations with contemporary discourses (Foucault 1991b, 54). To this end, I conducted a comparative analysis of discourses across different historical periods, looking for continuities as well as discontinuities (Foucault 1972a, 157; Vucetic 2011, 1301). I paid attention to the 'forms of *conservation*' and '*reactivation*' within discourses, namely how the same statements emerged, persisted, disappeared or circulated and how older discourses were retained, imported and reconstituted (Foucault 1991b, 60). I also looked at: i) changes that affected the discourses' objects, subject positions and themes over time; ii) changes within the discourses themselves; and iii) changes which concerned several discourses (Foucault 1991b, 56–57). Changes were neither 'treated at the same level', nor 'made to culminate at a single point', nor 'attributed to the genius of an individual, or a new collective spirit' (Foucault 2005, xiii). Rather, I identified how different practices of exercising power and acquiring knowledge influenced, and in turn were influenced by, the transformations of the discourses (Foucault 1991a, 28; 1978, 11–12).

After the analysis, when it came to writing up the results, I structured each chapter around a comparative presentation of the relevant discourses. I reported the discourses along the three dimensions of objects, subjects and themes that I used to analyse them. I simultaneously mobilised excerpts from the texts forming the corpus, the context to support each argument and secondary sources to corroborate it (Alejandro, Laurence, and Maertens forthcoming). Therefore, the quotes and citations that I used in the chapters to illustrate my findings are only a selection of the depth of data produced by my discourse analysis. A great extent of

my analysis remains hidden because I could not present all data involved for practical reasons of length (S. Taylor 2013, 71).

The method of this thesis is subject to caveats. First, the discourse analysis enabled me to explore *how*, for the subject-matters of trafficking and torture, human rights have become intricately intertwined with penality. However, it could not alone answer the question of *why* this entanglement has occurred (see chapter 7, which uses the empirical findings of chapters 3–6 as a base upon which I provide theoretical explanations) and *what* can be done to avoid it (Dunn and Neumann 2016, 11–14). Second, the theoretical orientations underlying my discourse analysis led me to treat all texts in the corpus similarly and decouple discourses from the authors of the texts. It is true that certain authors *tend* to produce statements that can be ascribed to a particular discourse rather than to another (e.g., human rights NGOs may articulate a discourse and policymakers another). However, following Foucault (1972a, 29), my aim was to go beyond a likely (but not necessary) correlation between author and discourse and capture regularities of meaning across diverse sources.[47] Of course, there would be merit in detailed discussions of the different sources of each discourse and of the socio-political circumstances that lead an author to make a certain statement. Yet such an undertaking is beyond the scope of this thesis. Third, only texts that employed the words 'human rights' (or similar notions) and 'criminal law' (or connected terms) could be identified using the discourse analysis. Certain voices that do not engage with the deployment of penality and the language of rights may have been overlooked. Fourth, besides the international level, the investigation was largely focused on Europe and the UK. Discussions of trafficking or torture in other regions and countries of both the global North and the global South were only marginally considered and insofar as they influenced the discussion in the geographical areas of my analysis. While similarities cannot be excluded, the findings are not necessarily applicable to other contexts. Put differently, my research is intended to be a study of dominant, and Eurocentric, discourses about human rights and penality. Although some marginalised discourses are considered, the thesis is not predominantly about them.

It is also acknowledged that the corpus is limited in the number of texts I could analyse or physically access.[48] For instance, in relation to NGOs/voluntary organisations, only a portion of the thousands of documents produced by large organisations—more likely to influence trafficking or torture policy—were explored (generally those with most references to 'human rights' and 'criminal law'), while reports produced by smaller NGOs or grassroots movements were generally not considered. The academic texts analysed are also a fraction of the large number of commentaries written on trafficking or torture. Comparing my

47 In any case, the authors' identity was not ignored, but considered as part of the context which gives meaning to a text.

48 This is also why, for historical discourses (when I had to deal with texts spanning hundreds of years), I chose to focus on discourses that had succeeded in becoming dominant and gave less attention to those that did not.

findings with the existing literature and my analysis with other discourse analysis studies (e.g., Hansen 2006; R. Jackson 2005; cf. Bauer and Gaskell 2000), I am confident that my corpus is appropriate and sufficient to address my research question.[49] A larger corpus, however, would probably have provided more details and enriched the analysis. Finally, the attention given primarily to penality and human rights may have at times sidelined other important issues surrounding the regulation of trafficking and torture. Connected issues (e.g., race, class, sexuality, religion, imperialism and colonialism, economy) were taken into account but without being the main focus of investigation.

Despite these caveats, the analysis allowed me to unearth the dominant modes of relating human rights to penality in respect of torture and trafficking. It also enabled me to examine their competition in ordering reality, their historical emergence and the transformations of meaning they have undergone.

4. Structure and outline

The thesis is organised in three parts, each answering one of the three research questions: the 'whether' (part 1), the 'how' (part 2) and the 'why' (part 3) questions. Part 1 comprises chapter 2, which examines *whether* human rights have become triggers of expanded penality. It will not surprise the reader who has read my opening remarks that my answer is an unequivocal yes. The purpose of this chapter is to set the relationship between human rights and penality in broad historical and transnational contexts, thus laying the foundations for the discourse analysis in chapters 3–6. To this end, I argue that, since the late 1970s, human rights have allowed penal power to move and expand around the globe. In particular, I trace five trends in which this development has been most visible: i) the rise of victims' rights in criminal proceedings; ii) the emergence of UN instruments focusing on the penal enforcement of human rights; iii) the development of transitional justice; iv) the promotion of human rights through international criminal law; and v) the imposition of state obligations in criminal matters by human rights bodies. By exploring these trends, I show that the universality of human rights has enabled penal projects to spread and expand over time and space, mixing domestic and international elements. A broad coalition of forces comprising victims'-rights advocates, human rights NGOs, legal practitioners and academics, judges and policymakers was central to this process. Yet the expansion of penality by means of human rights has generally appeared as uncontroversial, and important questions have been left unanswered. In particular, the assumptions underlying the idea that human rights require criminal accountability remain little explored and mostly unchallenged.

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49 When I tried to add new texts to my corpus, I found that the discourses I had identified also worked for the new texts. According to Milliken (1999, 234), when this happens, it means that an 'analysis can be said to be complete'.

In part 2, these assumptions are investigated both in the present and throughout their historical emergence. In this part, comprising chapters 3 to 6, I use discourse analysis and focus on human trafficking and torture to explore *how* it is possible that human rights have become intricately intertwined with penality. In chapter 3, I analyse how, since the 1990s, human trafficking has become a battleground for competing discourses on human rights and penality. While rights solutions are generally presented as being in opposition to a dominant crime-control model to combat trafficking, in fact rights-based initiatives and criminal governance are often linked together both discursively and in practice. Using discourse analysis, I explore how penality is framed as a crucial component of human rights. Two discourses have particular traction and become hegemonic in practice: the 'law enforcement' and the 'victims first' discourses. The 'law enforcement' discourse aims to protect the social-moral order of the state. It does so by justifying the exercise of penal powers by reference to human rights and by pulling rights-oriented measures into the criminal justice orbit. The 'victims first' discourse focuses on the moral dignity of the victim, but it also embraces penality for promoting human rights, saving victims, providing justice for the most vulnerable and apportion blame on the powerful. Despite their differences, the competition between these discourses aligns human rights to the state's penal action, seen as a necessary element for ensuring their effectiveness and signalling their moral authority. Although counter-discourses (the 'incompatibility' and the 'transformative justice' discourses) reject the appropriateness of penality for dealing with trafficking, I show that they end up preserving what they denounce.

Chapter 4 chronicles the steps that have led the state's penal action to become a necessary component of rights-based initiatives against trafficking. Through the discourse analysis of texts from the late nineteenth to the late twentieth centuries, I analyse how a century-long attempt to prohibit the trade in prostitution is at the root of today's anti-trafficking discourses. Five historical discourses are explored. The 'repeal' discourse sought to orient penality away from police control over prostitutes and towards prosecution of traffickers in 'white slaves' (namely, young, English, female prostitutes). The 'social-purity' discourse looked at penality as the main instrument for protecting the well-being of the nation from sexual vice. The 'social-hygiene' discourse deployed a moralistic language of health protection and racial survival to sustain crime-control agendas. By appealing to rehabilitative ideals, the 'penal-welfare' discourse both moderated and justified coercive measures against prostitutes and their procurers. Lastly, the 'sexual slavery' discourse anticipated current trends of using penal measures to protect victims' human rights. Overall, by juxtaposing these historical discourses and taking in the contemporary ones of the previous chapter, I demonstrate that today's discursive alignment of rights and crime control stems from a tight interconnection between moral claims and penal action. Not merely repulsion for sexual immorality but another moral language nowadays sustains a penal approach to trafficking: the language of human rights.

The next two chapters turn to torture. Human rights law is often mentioned as a driver of the progressive elimination of morally shocking penal means, including torture and ill-treatment. However, as much as human rights absolutely reject these means as instruments of criminal justice, they also require criminalisation and punishment when the prohibition of torture is violated. In chapter 5, using discourse analysis, I analyse the entanglement of human rights and penality within contemporary discourses around torture. The 'jus cogens' discourse unequivocally upholds the prohibition of torture as enshrined in human rights instruments. As I show, within this discourse, criminal accountability for torture is a legal but especially a moral imperative, to the point that lack of, or reduced, criminal law for dealing with torture is regarded as a form of torture-apology. The 'jus cogens' discourse opposes the 'national security' discourses, which, conversely, choose not to punish torture when doing so would supposedly damage the nation's reputation and security. Punishment of torture is rare and selective. Yet the fear that torture may go unpunished and its absolute ban be jeopardised continues to occupy a crucial space within anti-torture practice. In this way, torture prevention and repression are made dependent on the same penal institutions with the most capacity for practising state torture (e.g., military, police and prison). There are critical voices that condemn torture in absolute terms while rejecting penality. However, as I discuss in the chapter, they currently have little practical import.

Torture and penality have a complex relationship. While criminal liability is now given a crucial role in redressing acts of torture, until three centuries ago torture was a legitimate instrument of criminal procedure. Chapter 6 explores how we have moved from using torture in criminal investigations to using penality to respond to violations of the human right not to be tortured. Through the discourse analysis of texts from the eighteenth to the late twentieth centuries, I show that today's preoccupation with penality as the primary tool for addressing the wrong of torture derives from a gradual depoliticisation, individualisation and legalisation of torture discourses. The importance of penality has historically increased, eventually becoming a moral imperative, insofar as torture has become the archetypal violation of human rights law. These processes are retraced through the exploration of four historical discourses and their juxtaposition with contemporary ones. Within the 'abolition' discourse, torture was an immoral and inefficient penal practice, whose opposition was instrumental to the political legitimisation of the sovereign. The 'civilisation' discourse used the prohibition of torture to impose, through penal interventions, assumed civilised standards of justice and humanity on colonial subjects. Torture became a human rights violation with the 'anti-totalitarian' discourse, which preferred political—rather than penal—solutions to condemn the practice and mark a distinction between liberal democracies and totalitarian regimes. Penal enforcement assumed increased priority with the 'global' discourse, which rendered torture a worldwide humanitarian issue and a specific human rights violation above nearly all others.

Having identified the assumptions that sustain the entanglement between human rights and penality, part 3 of the thesis, comprising chapter 7, moves beyond discourse analysis and considers *why* human rights are made dependent on penality for their protection and promotion. The purpose of this chapter is twofold. It generalises the findings about human trafficking and torture and enriches the overarching arguments of the thesis with a discussion of the reasons underpinning human rights-driven penality. To this end, I read the findings of part 2 through the critical lens of works in sociology of punishment, political theory and human rights theory. Drawing on Nietzsche's (2006) and Wendy Brown's (1995) critiques of 'moralising politics', I illustrate and criticise the tendency within human rights discourses to moralise in the place of political engagement. This leads human rights discourses to stigmatise (rather than transform) situations of violence and domination; to distinguish (rather than emancipate) individuals to be protected from those to be condemned; and to moderate (rather than eliminate) the state's ability to commit abuses. In this context, human rights discourses 'accelerate' the use of penal solutions to strengthen the universality of human rights values. Building upon Durkheim's (1933) theory of punishment, I explain that the forces that make human rights 'accelerate' towards penality are not (only) rational but (mostly) emotional: the anger at the breach of universal values and the fear that letting human rights be violated with impunity would inexorably jeopardise their authority. The implications of this vision are assessed by moving from Durkheim's to Nietzsche's conception of punishment. Driven by human rights, penality is no longer an expression of the 'will to power' (and a political choice) but of the will of *ressentiment*: a necessary and inevitable instrument that is in fact highly symbolic.

The conclusion to the thesis provides a summary of my key findings, a reflection on my methodology and a discussion of my contribution to knowledge. In writing this thesis, I have brought to light the conditions of possibility and exposed the risks underlying human rights-driven penality. Starting from here, we may wonder whether and how we can reorient human rights away from penality or, rather, whether we should turn our efforts to other emancipatory projects. These questions, however important, require a new and future research project.

PART 1—THE ‘WHETHER’ QUESTION

2

Historical trends of human rights gone criminal

On 26 November 2018, Human Rights Watch filed a submission with the Argentinian prosecutors, calling for criminal investigations and charges against Saudi Crown Prince Mohammed Bin Salman, who was expected to attend the G20 Summit in Buenos Aires. The human rights nongovernmental organisation (NGO) highlighted Bin Salman's alleged complicity in war crimes in Yemen and in the murder of Jamal Khashoggi, the Washington Post columnist killed in Istanbul's Saudi consulate in October 2018. On 28 November, the Argentinean judiciary opened an investigation against the Saudi leader. Mohammed Bin Salman attended the summit, engaged in discussions with other world leaders and left Argentina on 2 December. He was not arrested but had to spend each night at the Buenos Aires's Saudi embassy, instead of in a hotel with his delegation.

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In recent years, the use of human rights to trigger the application of penality has proliferated around the world at the international, regional and domestic levels. This process transcends national borders not only because of the places where proceedings are held, the nationality of the victims and offenders, and the location of the wrongdoings, but also because of the widespread belief that the universal conception of human rights mandates criminal accountability, regardless of the context, implications and practicability. The case of Mohammed Bin Salman is emblematic, because it involves human rights violations committed in Yemen and Turkey, the alleged implication of Saudi nationals, a victim who was resident in the United States (US), and a complaint filed by an international NGO with Argentinian prosecutors. In addition, this submission was highly symbolic, since the likelihood that the Saudi crown prince would be arrested, prosecuted and punished in Argentina was quite low. Nonetheless, as Human Rights Watch executive director Kenneth Roth explained, human rights require 'a clear message' to be sent, that the international community is committed to criminal accountability for serious wrongdoings (Human Rights Watch 2018). This example illustrates how it has become 'almost unquestionable common sense' (Engle, Miller, and Davis 2016b, 1) at the international, regional and domestic level to ask that perpetrators of human rights violations are held criminally accountable (Payne 2015, 439).

This chapter shows that the first research question of the thesis, concerning *whether* human rights have become drivers of an expanded penality, should be answered affirmatively. It sets the relationship between human rights and penality in broad historical and transnational contexts, thus laying the foundations for the discourse analysis in part 2. In particular, it illustrates that domestic, regional and international courts, policymakers and civil society have invoked and used human rights to justify and expand penality since the late 1970s. It was, however, in the 1990s that this development became particularly evident. Penality is justified directly by appeal to human rights or indirectly when it is presented as necessary for human rights protection. As illustrated in the previous chapter, a number of studies have examined the growing importance of criminal prosecution in human rights projects (e.g., Seibert-Fohr 2009; Sikkink 2011; Engle, Miller, and Davis 2016a; Sattar 2019; A. M. Miller and Roseman 2019; Malby 2019; Lavrysen and Mavronicola 2020). Yet they generally focus on specific contexts or areas of law and do not explore wider historical trends at the domestic, regional and international levels that have made criminal law an essential element of human rights protection. An exception is Karen Engle (2015), whose article on 'the turn to criminal law in human rights' shows how judicial and scholarly interpretation of international law has changed since the early 1990s to facilitate the use of criminal law for human rights violations. Inspired by Engle's piece, this chapter both disentangles and outlines different trends in human rights protection through penal mechanisms that have occurred in a variety of geographical and institutional contexts. An effort is made to analyse the interaction between the international, regional and domestic levels and explore how discourses and practices of one level have influenced the others.

The chapter is divided into five sections, each exploring a different but interconnected trend of using human rights in the expansion of penality. Section 1 focuses on the growing relevance of victims' rights in criminal proceedings. Section 2 shows the emergence of UN instruments focusing on human rights enforcement by means of criminal law measures. Section 3 deals with the enduring relevance of penal mechanisms in transitional justice projects. Section 4 presents the justificatory role of human rights in modern international criminal law, while section 5 gives an overview on the incorporation of penality within the work of human rights bodies. The discussion I present in this chapter neither intends to suggest that all discourses of human rights justify and strengthen penality nor aspires to be exhaustive. Rather, it aims to explore whether human rights have historically enabled penality to expand while criminal law has become an instrument for advancing the human rights project. Ultimately, the chapter illustrates how the idea that human rights require penality has circulated through time and space in an unchallenged fashion. The actors involved have largely taken this phenomenon for granted, rather than reflect on the choices that have been

made and the effects that have derived. The role of human rights as sources of penality has gradually been normalised.[1]

1. The rise of victims'-rights language

Since the 1970s, the phenomenon of victims' rights in criminal proceedings has been at the heart of civil rights movements' and policymakers' concerns both on the national and the international stage (Spalek 2006, 14). While modern criminal trials have traditionally involved an exclusive relationship between the state and the defendant, in recent years many have argued that criminal justice should also take into account the interests of the parties affected by criminal offences (Crawford and Goodey 2000). The study of victims of crime adopted a more practical and policy-oriented perspective in the 1970s and 1980s, due to the combined efforts of both the women's-rights movement and conservative, 'law-and-order' advocates (Elias 1986, 20; Skogan, Lurigio, and Davis 1990, 8). This development first occurred in North America and the United Kingdom (UK) and, later, in various other countries as well as internationally (Aertsen 2012, 210). The emergence of victim surveys (measuring the extent and nature of victimisation) and academic interest in the characteristics of victimisation (victimology) sustained a new attention towards victim harm (Sebba 2008, 63). This focus, in turn, contributed to the rise of victims'-rights organisations which, since the 1980s, have tried to improve victims' interactions with the penal system and enhance the experience of those affected by crime (Sebba 2008, 64). Examples are Victim Support in England and Wales and Victim Support Europe (B. Williams and Goodman 2007, 248). Along with these 'official' organisations, victims' protection became the objective of numerous sectorial action groups 'formed around identities in relation to race, gender, sexuality, disability and so forth' ('single-issue' victim-advocacy groups) (Spalek 2006, 134).

Today, the victims'-rights movement is not homogeneous and, while in some countries victim advocates have not explicitly promoted punitive policies, in others (e.g., Austria, Germany, Japan, New Zealand, the US) they have at times expressed repressive impulses by conducting campaigns for harsher penalties or mandatory sentencing laws (Aertsen 2012, 211; Sebba 2008, 66; Dubber 2002, 1; Ashworth 2000, 185–86). This phenomenon has occurred especially within single-issue victim-advocacy groups, such as the women's-rights movement (Gruber 2020; 2007, 749–51; Martin 1998, 168). To address sexual violence, while some feminists sought radical substantive justice (Gruber 2020, 7), others started campaigning for more vigorous prosecutions and harsher punishment, along with broader protections for victims and their rights (Gottschalk 2006; Bumiller 2008). As Elizabeth Bernstein (2012; 2010; 2007) observes, feminists in different countries have increasingly turned to 'carceral

1 In Michel Foucault's (2007, 85) words: 'normalization consists first of all in positing a model … and the operation of … normalization consists in trying to get people, movements, and actions to conform to this model, the normal being precisely that which can conform to this norm, and the abnormal that which is incapable of conforming to the norm.'

politics' and 'carceral feminism' as a means of protecting rights concerning bodily and sexual integrity.[2] Activists in the US, India and China, for example, have sought to criminalise domestic violence, usually encouraging mandatory arrest of offenders and no-drop prosecution (Merry 2006b, 984; also Kapur and Cossman 2018). Hate crime legislation is another area where the intersection of victims' rights, human rights and criminal justice has given rise to an expanded criminalisation (Matsuda 1989; Moran 2001, 340–42; Spade 2015, chap. 2).

While the proposals of victims' organisations have been varied, they have mainly focused on reinforcing the position of victims in criminal proceedings (Geis 1990, 252). This process started in the 1980s at the domestic level, especially in the US with the Victims of Crime Act (1984) and the adoption of 'victims' bills of rights' in several states of the Union (Goodey 2000, 19). It then continued at the international level (Crawford 2000, 1). Between 1983 and 1987, the Council of Europe implemented the European Convention on the Compensation of Victims of Violent Crimes (1983) and made a series of recommendation for victims, including state compensation and assistance (Recommendation of the Committee of Ministers to Member States on Participation of the Public in Crime Policy 1983; Recommendation of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure 1985; Recommendation of the Committee of Ministers to Member States on Assistance to Victims and the Prevention of Victimisation 1987). In 1985, the UN published the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Victims' Declaration) and in 1999 produced the *Handbook on Justice for Victims* (UNODC 1999), while the European Union (EU) adopted the Framework Decision on the Standing of Victims in Criminal Proceedings in 2001, subsequently replaced by Directive 2012/29/EU (2012). The Rome Statute (1998) and the Rules of Procedure and Evidence (2002) of the International Criminal Court (ICC) also codified a comprehensive list of victims' rights in criminal proceedings.

Thanks to these provisions, and similar developments at the level of individual countries, today's victims of crime have a far-reaching catalogue of fundamental rights in different stages of the criminal process, including participatory rights, the right to receive information and rights to reparation (Doak 2008, 115–58). Discussion of victims' rights within criminal proceedings has often been distinct from human rights discourses, although human rights law increasingly deals with the matter (Sorochinsky 2009). Since the late 1980s, the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the UN Human Rights Committee (UNHRC) have interpreted provisions on the rights to fair trial and to an effective remedy as providing victims' rights within the criminal process (Aldana-Pindell 2004, 622–46; Seibert-Fohr 2009; Pinto 2018). The recognition of victims'

2 Bernstein (2012, 236) defines 'carceral feminism' as 'a [feminist] cultural and political formation in which previous generations' justice and liberation struggles are recast in carceral terms'.

rights has sometimes gone beyond procedural rights to grant substantive rights as well, including the right to have the offender prosecuted and punished by a court (Basch 2007, 227–28).

Though not always overlapping, victims' rights and human rights have many points of contact (Elias 1986, chap. 8; Walklate 2017). First, certain crimes are also human rights violations and the category of 'crime victim' may overlap with the category of 'human rights victim'. For instance, violence against women and children, torture, enforced disappearance and trafficking are all both crimes and human rights abuses. In line with Robert Elias (1986, 205, 208), we can consider criminal victimisation as also violating human rights, even though the perpetrator is a private individual and not the state. Second, the victims'-rights movement has developed in parallel with the emergence of the human rights movement (Elias 1993, 59–61). Unsurprisingly, in several circumstances the two groups have coincided, such as in the case of the anti-trafficking campaigns (see chapters 3–4; Bernstein 2012), the battered-women's movement (Friedman and Shulman 1990; Polavarapu 2019) and the feminist efforts to respond to sexual violence in conflict (Engle 2020). Today, several victim-support activists describe their cause as a human rights campaign, by equating criminal victimisation with human rights violations. While presenting their struggle in the language of human rights, these victim groups tend to turn away from social support and political struggle, and towards the promotion of penality (Bernstein 2010, 50). Third, in some cases, international bodies have recognised victims of human rights abuses as victims of crime, although the abuses to which the latter were subject were not criminalised in their country (Sebba 2008, 67). For instance, the UN Victims' Declaration (1985), implicitly referring to the human rights violations committed in Latin America during the dictatorships, urges states to criminalise abuses of power and to provide remedies to victims of such abuses, as if they were victims of crime (Holder 2017, 421). Finally, victims'-rights rhetoric is akin to the human rights one (as we see in chapters 3 and 5). Both victim and human rights discourses tend to present victims (of either crimes or human rights abuses) as innocent and sympathetic, as opposed to the evil and predatory offenders or perpetrators (Mutua 2001, 30; Dubber 2002, 3). The media spread images of insecurity, abuses and victimisation and thereby help create the trope of the 'ideal victim' (Christie 1986) who needs vindication for their suffering (Simon 2007, 135). This 'ideal victim' is applied to a wide variety of human misfortunes, from ordinary crimes to human rights violations (Aertsen 2012, 204). It creates a 'culture of victimhood' (Furedi 1997) that is often used to support expanded penal policies and 'law-and-order' thinking (Garland 2001).

Contemporary criminal justice discourses are soaked in the language of victims' rights. This trajectory was not inevitable (Roach 1999, 715). In its early days, the victim movement was primarily concerned with the recognition of victims' *basic needs* rather than with victims' *rights*, by offering emotional support and assistance to victims as well as concentrating on the causes of abuses (Doak 2008, 9). Only in the 1980s and 1990s did it become increasingly involved

with promoting better provision for victims within the terrain of criminal justice (Doak 2008, 9; Elias 1993, 52). At the time, the movement could question the ability of the criminal law to protect victims' needs and interests, whilst focusing on alternative, non-criminal responses to victimisation. Despite criticism of criminal justice institutions for being blind in respect of those affected by crime, victim-support organisations designated the criminal law and its sanctions as the primary responses to victims' suffering (Roach 1999, 705–6). The risk of 'secondary victimisation' deriving from the penal system was generally not ascribed to the inability of penality to provide social justice and victims' restoration, but to the failure of the adversarial model (and, to a lesser extent, the inquisitorial model) to grant the victim effective participatory rights (Sebba 2008, 64). By advocating for the 'rebalancing' of the criminal justice system towards the victim (Walklate 2017, 74), not only do victim activists lobby for a reform of the penal system, but they also lend authority to it and endorse its expansion (Roach 1999, 703). Although many victims' expectations are said to be in the procedural sphere rather than in the achievement of a punitive outcome (Aertsen 2012, 207), relying on penal institutions in practice means embracing them at the expense of other, non-punitive, solutions (Gruber 2007, 800). Even restorative measures are usually incorporated into the existing punitive framework (Zedner 1994).

More victims' rights do not automatically mean more punitiveness, but their indirect influence (both conceptual and rhetorical) can result in expanded penality (Aertsen 2012, 219; Sebba 2008, 65). As observed by Leslie Sebba (2008, 60), 'victim-driven' criminalisation has ultimately resulted in the inclusion of new offences (e.g., stalking, sexual harassment, new forms of child abuse, hate crimes, holocaust denial and human trafficking), the expansion of the scope of some existing crimes (e.g., rape) and compression of traditional defences (e.g., self-defence and provocation). Governments may also use the rhetoric of victims' rights to disguise policies that are primarily aimed at benefiting the interests of the state rather than the victims (see chapter 3; Doak 2008, 11). This phenomenon has been labelled 'populist punitiveness' (Bottoms 1995) or 'penal populism' (Pratt 2007; Lacey 2008, chap. 1) and involves expanding penality and curbing defendants' due-process rights by invoking better protection for victims (Dubber 2002). The state takes advantage of the request for more victims' rights and citizens' fear of crime to express increased penal control (Ramsay 2009; Simon 2007, 96). As Markus Dubber (2002, 6) puts it, '[i]t's the very real suffering of personal victims of violent crime that justifies the state's usurpation of ever greater powers of investigation and control'.

To sum up, academics, criminal justice reformers, victim-support activists, victim surveys and the media have all played a role in making the victim of crime socially visible (Aertsen 2012, 203). Yet the language of victims' rights, intertwined with human rights discourses, has also become, in Bernstein's (2012, 235) words, a 'key vehicle both for the transnationalization of carceral politics and for folding back these policies into the domestic terrain in a benevolent … guise'. Victims'-rights discourse has played a role in strengthening penality

domestically and internationally and giving crime repression a 'new and powerful human and rights-bearing face' (Roach 1999, 691). But it has also contributed to reshaping the concept of crime as a private matter of interpersonal violence as opposed to an offence against the public interest (see also chapter 3; Dubber 2002, 4). This perspective, compared to the traditional state-centred approach to criminal law, is also more consistent with the acceptance of a human rights framework. No longer the instrument to preserve solely public security and public interests, penality can now be used to secure victims from not just ordinary crimes but also atrocities and human rights violations. It turns into a tool of social justice and a mean of protection for vulnerable individuals (Aviram 2020).

2. The upsurge of penality in the UN human rights project

In the last forty years, various bodies under the aegis of the UN have promoted a number of conventions, declarations and other non-binding instruments expressing the idea that states ought to provide penal mechanisms for serious breaches of human rights standards. Around the same time as the rise of victims' rights at the national level, at the global stage the UN has been a key actor in promoting human rights and ensuring their enforcement through criminal law. Efforts to set out state obligations to criminalise, prosecute and punish human rights violations in international treaties might even be dated back to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), adopted in 1948 in the wake of the Second World War. However, the context of the postwar period, marked by the horror of the Nazi genocide and the Nuremberg trials, may explain the early drafting of this treaty (Roht-Arriaza 1990, n. 87). In addition, the Genocide Convention is not part of the UN human rights project, both because it does not specify rights of individuals (Malby 2019, 14) and because it was originally presented in opposition to the Universal Declaration on Human Rights (1948), passed the day after (Moyn 2010, 82).

Within the UN system, the first obligation to criminalise human rights breaches can be found in the International Convention on the Elimination of all Forms of Racial Discrimination, adopted in 1965. Article 4 requires that states 'declare an offence punishable by law' various forms of hate speech and racial discrimination. The drafting of this article was deemed controversial at the time and its adoption was criticised by a number of states (Malby 2019, 71–73). It was the adoption of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Declaration) in 1975, followed by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), adopted in 1984, that marked the embrace of penality within the UN human rights project (see chapter 6; Sikkink 2011, 59; Evans 2014). Article 10 of the Torture Declaration demanded that 'criminal proceedings' be instituted against torture offenders. A similar provision is also present in the Torture Convention (art. 7). Yet the Convention goes further than the Declaration by

providing for effective criminal repression of serious wrongdoings by universal jurisdiction (Nowak, Birk, and Monina 2019, 3–4).[3] Article 4(1) obliges states to 'ensure that all acts of torture are offences under [their] criminal law' (Rodley and Pollard 2006). Moreover, pursuant to articles 5–7, state parties must submit any case involving acts of torture to their competent authorities for the purpose of prosecution, without any regard for the place of commission of the acts, if suspects are in their territory and are not extradited. These provisions lay down the legal principle of *aut dedere aut judicare* (a duty to extradite or prosecute), the purpose of which is to ensure that no safe haven from criminal prosecution is granted to perpetrators of torture (Bassiouni and Wise 1995). Furthermore, the duty to institute criminal proceedings against alleged torturers appears to preclude state parties from passing amnesty laws that hinder such prosecutions (Orentlicher 1991, 2567; Scharf 1996, 46–47).

The Torture Convention represents a watershed in the promotion of criminal law for the purpose of human rights protection (Evans 2014, 137). The principle of *aut dedere aut judicare* had previously been deployed almost exclusively outside the human rights framework. The Swedish Government, which proposed it, used as a model the corresponding provisions in a number of treaties against various forms of terrorism (Convention for the Suppression of Unlawful Seizure of Aircraft 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents 1973; International Convention against the Taking of Hostages 1979; see Burgers and Danelius 1988, 35). The Torture Convention is also innovative with regard to the outcome that criminal proceedings for torture should have. Pursuant to article 4(2), states are required to punish torture 'by appropriate penalties which take into account their grave nature'. This implies a severe sentence (Katona 2019, 186–87). No previous human rights treaty had made it mandatory to punish human rights violations with harsh criminal penalties. Also in this case, the drafting parties took enforcement provisions from anti-terrorist conventions and applied them to the Torture Convention, a human rights treaty (Burgers and Danelius 1988, 130). Although we might not find it strange, this drafting seemed unusual at the time. As Malcolm Evans (2014, 37) has noted, many states that had no difficulty in accepting jurisdictional and extradition obligations in the context of anti-terrorist conventions nevertheless did not accept them easily in a convention that they perceived to be about human rights.

Several examples following the adoption of the Torture Convention reflect an increasing concern on the part of the UN to make prosecution and punishment of gross human rights

3 Universal jurisdiction refers to the authority of a state to exercise its criminal jurisdiction over crimes regardless of the place of commission or any link to nationality (Chehtman 2010, 115–16). Although the Torture Convention is generally interpreted as establishing universal jurisdiction, some authors have argued that the principle of *aut dedere aut judicare* should be distinguished from the universality principle. See, e.g., Ryngaert (2014, 124).

violations legally obligatory (Roht-Arriaza 1990, 499). In 1985, the UN General Assembly (UNGA) unanimously adopted the UN Victims' Declaration. This instrument calls on states 'to enact and enforce legislation proscribing acts that violate internationally recognized norms relating to human rights, corporate conduct, and other abuses of power' and 'to establish and strengthen the means of detecting, prosecuting and sentencing those guilty of crimes' (s 4(c)-(d)). In 1989, the UN Economic and Social Council included obligations to investigate, prosecute and punish human rights violations among the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. The duty to resort to penality against grave human rights abuses also appears in a number of international instruments drafted since the late 1980s and modelled on or inspired by the Torture Convention. These include the Inter-American Convention to Prevent and Punish Torture (1985); the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990; the Declaration on the Protection of All Persons From Enforced or Involuntary Disappearances, adopted by the UNGA in 1992; the two Optional Protocols to the Convention on the Rights of the Child, respectively on the Sale of Children, Child Prostitution and Child Pornography (2000) and on the Involvement of Children in Armed Conflict (2000); and the International Convention for the Protection of All Persons from Enforced Disappearances (2006).

It was during this same period that penality emerged as a necessary instrument of any UN human rights policy seeking to promote accountability and combat impunity (Engle 2015, 1083–84). For instance, in 1993 the Vienna Declaration and Program of Action, arising from the UN World Conference on Human Rights, urged states to 'abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law' (para. 60). The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities has also reiterated the same issue since 1991, when it requested Louis Joinet and El Hadji Guissé to undertake a study on the impunity of perpetrators of human rights abuses (Haldemann and Unger 2018). The study was subsequently split into two parts and produced two reports concerning violations of civil and political rights and breaches of economic, social and cultural rights, respectively (Guissé 1997; Joinet 1997). Joinet's report, in particular, included a *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (*Joinet's Principles*), whose content was taken 'note of' by the UN Commission on Human Rights in 1998 (Impunity 1998).

In 2003, the UN Secretary-General invited Diane Orentlicher to update the Joinet's Principles (UN Secretary-General 2004a). In 2005, Orentlicher submitted the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (*UN Principles to Combat Impunity*), which was endorsed by the UN Commission on Human Rights. By considering impunity as hindering the implementation of human rights and calling for

the prosecution and punishment of human rights abuses (principles 1, 19, 21, 22, 24), these principles have served as an important point of reference on debates on criminal accountability for human rights violations within and beyond the UN (Haldemann and Unger 2018, 15, 19; Roht-Arriaza 2018, 51). For instance, responding to the influence of the *UN Principles to Combat Impunity*, in 2009 the Council of Europe's Parliamentary Assembly approved a recommendation on the 'State of Human Rights in Europe: The Need to Eradicate Impunity'; while in 2011 the Council of Europe's Committee of Ministers adopted a series of guidelines titled *Eradicating Impunity for Serious Human Rights Violations*. The *UN Principles to Combat Impunity* emerged in parallel with another key UN document dedicated to state obligations, namely the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Van Boven/Bassiouni Principles). Adopted by the UNGA in 2005, this instrument includes an obligation on states to punish human rights violations constituting international crimes, along with provisions on victims' rights (para. 4).

In brief, in the last forty years, a wide array of activities of the UN and other intergovernmental organisations have promoted the view that penality plays a necessary part in protecting human rights (Orentlicher 1991, 2583). Following the adoption of the Torture Convention, there has been growing tendency to urge states to criminalise, prosecute and punish serious human rights violations.

3. Transitional criminal justice

The use of human rights in encouraging increased penality is also visible in the developments of transitional justice. Transitional justice has been defined as 'the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes' (Teitel 2003, 69). By its very definition, it is concerned with accountability for human rights abuses of the past. Amongst many forms of accountability, criminal prosecution frequently figures as 'the preferred choice' (Dugard 1999, 1001; Lessa and Payne 2012b, 5; see also Aukerman 2002, 40). Transitional justice is a field of scholarship, policy and practice that began to emerge in the late 1980s (Arthur 2009; McAuliffe 2011; Zunino 2019, chap. 3).[4] It is the result of a debate among human rights activists on how to deal with past violence in countries where democratic governments supplanted long-rooted dictatorships (Arthur 2009, 324), following the 'third wave of democratisation' between 1974 and 1990 (Huntington 1991). An important contribution comes from the case of Argentina, where, with the end of the military dictatorship in 1983, the new elected Raul Alfonsín tried to prosecute the *junta*'s top leaders (Nino 1996; Latcham

4 For Teitel (2003), transitional justice starts with the Nuremberg Trials, although none of those involved would have described it as such.

1989). A commission of inquiry, convened by Alfonsín's government, published a report on 'disappearances' by state security forces. The judiciary conducted a series of trials. However, between 1986 and 1987, under pressure from the military, the government decided to terminate the prosecutions. A subsequent government passed an amnesty law for those sentenced to prison. Alfonsín's project failed but it paved the way for a new debate among activists, scholars and policymakers concerned with human rights and 'transitions to democracy'. A series of conferences between the late 1980s and early 1990s marked the birth of the field of transitional justice (Arthur 2009, 324–25; Zunino 2019, 70–71).

Transitional justice represents a further move from 'naming-and-shaming' and toward criminal accountability among human rights activists (Arthur 2009, 334). Until the mid-1980s, in addressing repressive governments, human rights organisations had rarely called for criminal accountability, since the power to conduct criminal trials was in the hands of the same leaders that were denounced (Engle 2016, 18–21). With the end of the Cold War and the collapse of oppressive regimes in Latin America, Africa, Asia and Eastern Europe, a new attitude toward criminal law emerged, as no longer a source of abuses but as a way to remedy them. Once accountability for past wrongdoings became possible, human rights organisations did not hesitate to choose as a model the criminal legal system already in place for ordinary crimes. The recourse to criminal law was not debated but perceived as the obvious avenue for human rights enforcement (Sikkink 2011, 20).

Given the deficiencies of most domestic legal systems involved in transitions, the source of an obligation to conduct criminal proceedings was looked for from within international law (Roht-Arriaza 1990). Orentlicher (1991) wrote that international human rights law required the prosecution and punishment of especially atrocious crimes. Carlos Nino (1991) responded that Orentlicher's analysis failed to account for the complex factual context successor governments may confront in deciding whether to conduct trials for human rights violations. Nino (1991) suggested that the urge for prosecution should be counterbalanced with the aim of preserving the democratic system. Thus, in the early 1990s, the discussion revolved around the tension between punishment and political stability, between the demands of justice and the needs of a sustainable peace (McEvoy and Mallinder 2012, 412). In the words of José Zalaquett (1989, 24), 'measures which are straightforward from the standpoint of human rights norms could have undesired political implications'. A number of countries recognised the dilemma between peace and justice and decided to forgo criminal proceedings in favour of other methods of accountability (Teitel 2003, 77). The South African experience is a prominent example. In 1995, South Africa established a Truth and Reconciliation Commission (TRC), whose purpose was, among others, to grant amnesty and waive criminal and civil liability for those who disclosed their wrongdoings during the apartheid period, if associated with a political objective (Promotion of National Unity and Reconciliation Act 1995, art. 3(1)(b)). Called to decide upon the constitutionality of the TRC's provisions, the South African Constitutional Court did not deny that perpetrators

deserved punishment, but it saw amnesty as crucial to the aim of reconciliation (*Azanian Peoples Organization (AZAPO) and Others v President of the Rep of S Afr* 1996).[5]

Over time, however, most human rights NGOs, courts and scholars came to dismiss the tension between peace and justice, and criminal justice started being seen as complementary and no longer in opposition to peace (Engle 2015; Hannum 2006). The atrocities that occurred in the Balkans prompted the UN Security Council (UNSC) to establish the International Criminal Tribunal for the former Yugoslavia (ICTY) (UNSC RES 827 1993). The tribunal was supposed not merely to try the worst offenders, but also to contribute to reconciliation, create a historical record and deter ongoing atrocities (Roht-Arriaza 2006, 6). Its mandate was 'to impose justice before peace, and as a means to achieve peace' (Teitel 2014, 82). The ICTY added an international dimension to transitional justice, leading the way for the establishment of other international institutions, including the International Criminal Tribunal for Rwanda (ICTR) (UNSC RES 955 1994) and eventually the ICC (Rome Statute of the International Criminal Court 1998). The demand for more judicialisation and institutionalisation at the international level is to be seen as an attempt to relieve the tension between legal and moral obligations to punish and the need for political stability. International bodies are deemed to provide a neutral and apolitical response to chaotic local politics (Engle, Miller, and Davis 2016b, 5–6; McMillan 2016, 166). They administer criminal justice in external settings (e.g., in The Hague) and in an ostensibly impartial manner, through universal rules and procedure (Z. Miller 2016, 150–51). They are also opposed to domestic political powers, which are seen as incapable of managing complex social problems, including the protection of human rights (Z. Miller 2016, 159–62).

The turn of the century marked what has been called the 'justice cascade' (Sikkink 2011) or the 'revolution in accountability' (Sriram 2003): individual criminal accountability by reference to human rights gained momentum and became an integral part of all international, regional and national projects of justice. The general perception was that a 'new age of accountability' was replacing an 'old era of impunity' (Ban Ki-moon 2010). The dilemma between peace and justice became less relevant (Laplante 2009, 920). Criminal justice had to be done, not only to hold perpetrators accountable, but also to report the truth and vindicate the victims (Roht-Arriaza 2006, 1). Two events in 1998 have been described as the trigger moments: the creation of the ICC and the arrest of Chilean general and dictator Augusto Pinochet in London on a Spanish extradition warrant for torture and other human rights violations (see chapter 5; Sikkink 2012, 33 and 37). For Noemi Roht-Arriaza (2005), the latter event represented the most significant move towards a transnational fight for accountability, whereby leaders who committed gross abuses could no longer escape from prosecution and punishment for their actions. The Pinochet case gave practical effect to the Torture

5 Critics of the South African model have also shown how the TRC still relied on 'anti-impunity' logics, see Madmdani (2000) and Sander (2020, 334–36).

Convention and revitalised the principle of universal jurisdiction, namely the idea that the courts of one country can hold foreign perpetrators criminally accountable for wrongdoings committed abroad. In recent years, human rights obligations have been invoked in the prosecution and punishment of individuals responsible for mass abuses (Lessa and Payne 2012b, 1–2). Despite criticism and claims that it was doomed to disappear (Reydams 2011), universal jurisdiction today appears to be a common jurisdictional basis for preventing impunity for human rights abuses—especially if committed by mid-level perpetrators (Langer and Eason 2019). A 2021 study reports that universal jurisdiction has been endorsed by 109 states and that the number of prosecutions is growing, with eighteen prosecuting countries and about sixty cases in 2020 (Lefranc 2021, 576).

A recent debate involves the question of the legitimacy of amnesty laws under international law and their persistence 'in the age of human rights accountability' (Lessa and Payne 2012a).[6] In an earlier era, human rights advocates had often pleaded for amnesty for political prisoners (Engle 2016, 17). Conversely, today, amnesties are viewed with disfavour by those who believe that perpetrators of atrocities should be held criminally responsible for their acts (UN 1999, para. 12). While, for a minority of authors, amnesties can still have a place in the international system as an effective tool for social reconciliation (Burke-White 2001; Snyder and Vinjamuri 2004; Freeman and Pensky 2012), most human rights NGOs, courts, scholars and policymakers see amnesty laws as contrary to international law when they restrict duties to prosecute and punish the gravest human rights abuses (Méndez 2012; Dugard 1999). Even the South Africa TRC experience is no longer regarded as a legitimate model. Juan Méndez (2012, xxiii) wrote that, as a result of 'the rapid evolution of international law', today 'the South African-style "conditional amnesty"' would be unacceptable 'if it covered war crimes, crimes against humanity (including disappearances), or torture'.

Nowadays, even though countries continue adopting amnesties, conducting sham trials or undertaking selective prosecutions (Mallinder 2012), legal doctrine and legal institutions at the international, regional and local levels generally consider criminal accountability as the main option for addressing past atrocities. The duty to employ criminal law, justified through human rights law and language, has become the new norm (Payne 2015, 467; Sikkink 2011, 11). Other non-punitive measures (truth commissions, fact-finding inquiries, reparation programs or limited amnesties) may still be used as pragmatic compromises, provided that they do not block criminal proceedings or jeopardise the call for criminal accountability (Payne 2015, 454; Olsen, Payne, and Reiter 2012, 346–47). While a number of scholars and activists acknowledge the need for forms of structural accountability (Sedacca 2019) and the importance of local solutions beyond prosecutions (Orentlicher 2007), they nonetheless keep placing the emphasis on criminal justice (Z. Miller 2020). There is a general sense that

6 Amnesties can be defined as 'legal measures adopted by states that have the effect of prospectively barring criminal prosecution against certain individuals accused of committing human rights violations' (Lessa and Payne 2012b, 4).

conducting more criminal trials in the aftermath of atrocities is beneficial for democracy and the rule of law, inasmuch as trials adhere to due-process principles (Sikkink 2011, 26–27; Kim and Sikkink 2010, 953).[7] Not by chance, since the first days of Russia's war in Ukraine, both Ukrainian authorities and international actors have repeatedly highlighted the 'imperative' of prosecuting those responsible for atrocities to ensure accountability and 'show the law in action' (K. A. A. Khan 2022). Even those governments which otherwise would have no interest in prosecution are pushed towards criminal proceedings for past atrocities. In so doing, they incorporate the fight against impunity into their efforts to gain legitimacy and consolidate authority (Z. Miller 2016, 150–52; Vinjamuri and Snyder 2015).

The language of human rights is crucial to the enduring relevance of penal mechanisms in transitional justice projects. The global crisis of the radical Left at the end of the 1970s marked not only an ideological shift away from political ideology and towards human rights (Moyn 2010, 213) but also an abandonment of projects of radical social justice in favour of legal-institutional reforms aimed at defending the rights of individuals (Arthur 2009, 339–40). State violence has been read in terms of human rights violations that require legalistic responses (especially prosecution and punishment of past leaders) rather than as an expression of class domination that mandates large-scale redistribution or a profound transformation of society (Arthur 2009, 347; Meister 2011, 1). Legalistic conceptions of rights and justice also dominate the field of transitional justice (McEvoy 2007; Zunino 2019, 43–43). Human rights are framed as legal standards that prioritise retributive notions of justice over political calls for forgiveness and reconciliation (McEvoy 2007, 420; Bass 2000, chap. 1). Conversely, the absence of punitive measures is often regarded as a failure to uphold legal obligations which, in turn, paves the way to further violence (Borneman 1997). This approach has had two consequences. First, the prosecution of massive and systemic human rights abuses has conferred a legitimacy on criminal law that it could have never gained in addressing common crimes (Stolle and Singelnstein 2007, 49). Second, as Engle (2015, 1118) has noted 'the correspondence between criminal prosecution and human rights has become so ingrained that expressing opposition to any particular international prosecution is sometimes seen as anti-human rights'.

4. Promoting human rights through international criminal law

The history of international criminal law is often narrated as a triumphant story of human rights protection (e.g., Lee 1999). The story begins with the failure of the international community to respond to mass violence for centuries. Then, for the first time with Nuremberg and Tokyo—the story goes—we succeeded in imposing individual criminal responsibility for atrocities. Finally, after fifty years of impunity during the Cold War, this

7 For a different view, see Snyder and Vinjamuri (2004).

story culminates with the establishment of the ad hoc tribunals and the ICC as the 'stupendous achievement in the world community' for the protection of individual rights (Cassese 2011, 272). However, international criminal law has not always been concerned with human rights. As Samuel Moyn (2020) observes, the Nuremberg Trials were primarily focused on aggression, while the Holocaust and other atrocities remained marginal. It was only in the 1990s that international criminal adjudication was reinvented as part of the human rights project and shifted its attention to accountability for human rights violations (Moyn 2020; Mégret 2018b).

Notwithstanding the above, the first international criminal tribunals after the Cold War were not created for breaches of human rights law, but primarily for wartime atrocities. In 1993, the UNSC established the ICTY 'for the prosecution of persons responsible for serious violation of international humanitarian law committed in the territory of the former Yugoslavia' (UNSC RES 808 1993). The ICTR was created in 1994 'for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda' (UNSC RES 955 1994). Yet, albeit primarily violations of the Geneva and Genocide Conventions, the mass atrocities committed in the Balkans and Central-East Africa were also read in terms of human rights violations due to their universal moral repugnance (Kirk McDonald 1999). With the ICTY and the ICTR, the distinction between humanitarian law and human rights became increasingly blurred (Meron 2011, chap. 17). Human rights law started being applied in armed conflicts and war crime trials became a new means to promote human rights (Méndez 2000, 68). Because the Geneva Conventions (1949) laid down criminal accountability for grave breaches of humanitarian law, its application to other egregious abuses appeared as compelling (Davids 2012, 238–42).

The institutionalisation of the ad hoc tribunals reinvigorated a long-standing interest in creating a permanent international criminal court.[8] This court would prosecute not only violations of humanitarian law in armed conflicts, but also gross human rights abuses that occurred in peacetime (Méndez 2000, 73). A decisive impetus for the creation of the ICC came from global civil society. In 1995, a group of human rights NGOs created the Coalition for an International Criminal Court (CICC) (Glasius 2006, 26–27). In the following years, this advocacy network undertook a decisive range of activities: lobbying with state representatives; producing expert documents; organising conferences; distributing information; raising funds; and organising public demonstrations (Glasius 2006, 37–44). A great push toward institution-building also came from women's-human-rights activists who saw the ICC as an opportunity to expand the criminalisation of sexual violence both in armed conflict and in peacetime (Halley 2008; Engle 2020). The Rome Statute was eventually adopted on 17 July 1998 and entered into force on 1 July 2002. The ICC was applauded as

8 Projects for an international criminal court had been around for decades. See, e.g., Bassiouni (1987).

'a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law' (Annan 1998). Since then, the Court has been presented as the cornerstone of a broad human rights agenda, namely the 'fight against impunity' (R. Roth and Tulkens 2011, 571; see also Engle, Miller, and Davis 2016a; Drumbl 2020). This emerges prominently from the Preamble of the Rome Statute, which refers to the determination to put an end to 'unimaginable atrocities that deeply shock the conscience of humanity'. The Court has also been entrusted 'with almost mythical powers' including the management of transnational order and justice through criminal law (Mégret 2001, 201). Yet, serious acts of violence are only captured through the lens of crimes (Branch 2011, 182). While human rights may be offered new prospects for enforcement through international criminal trials, the structural factors and socio-economic injustices that contribute to human rights violations are systematically overlooked or reduced to 'context' (Nouwen and Werner 2015).

Initially, the widespread enthusiasm surrounding the ICC's creation obfuscated the limits of international criminal process in delivering justice for mass atrocities (Akhavan 2003, 712). In the last decade, however, disenchantment and criticism have substituted the initial euphoria (Powderly 2019; Sander 2015; Robinson 2015). Great expectations of justice have been left unfulfilled by reality. International criminal justice promised to deter crime, end conflict and bring about justice (UN Secretary-General 2004b, para. 38). However, only a little part of this has been delivered. Atrocities have not been deterred and the majority of international crimes remain unpunished. Focusing only on African countries has fomented accusations of racism and neocolonialism (Clarke 2009; 2019). Victims have hardly found redress (Kendall and Nouwen 2013), while the defendant's trial has been accused of embracing illiberal criminal doctrine (Robinson 2008; Fletcher and Ohlin 2005). Yet, the common explanation for the 'crisis' of international criminal justice is either lack of state support or deficiency in effectiveness, due to inadequate investigations or poor decision-making (Schwöbel 2014b, 3–4). In other words, the aspirations of international criminal justice have reportedly been frustrated because there is *not (good) enough* international criminal law. The general commitment to international criminal justice stands firm because—it is said—'[c]ertain things are simply wrong and ought to be punished' (Koller 2008, 1033; Tallgren 2002, 564, quoting Von Hirsch 1976, xxxix).

Human rights NGOs, in particular, deeply rely on international prosecution in their fight for justice (Lohne 2019). The advocacy work of many of them is so much framed in the terms of international criminal justice that they devote more time in lobbying support for international criminal institutions than in monitoring states' human rights compliance (Lohne 2017, 459). There is also a different critique that questions the assumptions underlying international criminal law (Kendall 2014, 66; see generally Schwöbel 2014a). For instance, some scholars have contended that not only are international criminal trials structurally incapable of addressing the socio-economic causes of atrocities, but they also

risk fostering other forms of impunity (Krever 2015). However, the connection between human rights and international criminal law is rarely contested (Schwöbel 2013). Academics, practitioners and NGOs overwhelmingly agree that human rights are sources and raisons d'être of international criminal justice (Lohne 2018, 127; Meron 2011, chap. 17; G. Simpson 2012, 124). Although prosecution of international crimes may arguably raise threats to other human rights (especially defendants' rights), it remains undisputed that international criminal law pursues to some extent a human rights cause (Clapham 2016, 14–15).

International criminal law is 'a penal regime without a state, and more generally without a sovereign' (Dubber 2011, 928). While domestic criminal law may find its normative legitimacy in the power of a central sovereign institution, international criminal law needs something else. Relying on a cosmopolitan approach, mainstream commentators argue that international criminal adjudication may rest on a value-based order of humanity founded on 'universal, indivisible and interculturally recognised human rights' (Ambos 2013, 308; see also Corrias and Gordon 2015).[9] International criminal law also derives part of its sociological and political legitimacy from a politics of representation of those who suffer human rights violations (Mégret 2016, 207; Kendall and Nouwen 2013). Notably, victims and their 'human rights entitlement to criminal justice' are one of the main justifying figures of the work of international criminal tribunals (Mégret 2018a, 445; see also Kendall 2015, 375; Lohne 2019, chap. 6). These institutions invoke 'the victim' as a means of backing the power they exercise, giving trials a human face and showing why international criminal justice is valuable and needs financial support (Rigney 2018; Clarke 2009, 108). As Sarah Nouwen and Sara Kendall (2013, 254) put it, the victim 'acts in some ways as the absent "sovereign" of international criminal law'. Statute provisions and procedural rules on victims' protection, participation and reparation have reinforced this focus. The ICC, in particular, was created with the aim of being a 'victims' court' (ICC n.d.), which would combine criminal accountability with humanitarian and restorative practices for those who suffered as a result of mass violence (Kendall 2015). Exercising justice on victims' behalf enables international criminal tribunals to act but it also places a high burden on them when they fail to provide effective justice (Branch 2011, 183).

The fight to end impunity in international criminal law is not limited to prosecution in international fora. International criminal law purports also to pervade the domestic level, by encouraging national prosecution and the implementation of penal mechanisms against serious human rights violations. The jurisdiction of the ICC, for example, is based on the principle of complementarity (Stahn and El Zeidy 2011). On the one hand, the Court has jurisdiction over international crimes when states are unwilling or unable to prosecute (Rome Statute of the International Criminal Court 1998, arts. 1, 17; Nouwen 2013). On the other,

9 For a critique, see Lohne (2019, chap. 7), arguing that, despite its claim to universality, the ICC represents only segments of 'humanity' in a way that resembles colonialism and its civilising mission.

states are induced to undertake effective criminal investigations and trials if they want to avoid the intervention of the ICC (positive complementarity) (ICC Assembly of States Parties 2010, para. 16). In this way, complementarity encourages 'heterogeneity in terms of the number of institutions adjudicating international crimes, but homogeneity in terms of the process they follow and the punishment they mete out' (Drumbl 2007, 143). Moreover, while the 1990s were marked by a turn to international institutions on the assumption that domestic justice responses would have been inadequate (Stahn 2019, 164–65), in more recent years critiques and limitations of trials at the international stage have fostered the creation of tribunals that integrate both domestic and international structures (Mégret 2005). Hybrid and internationalised institutions include the Sierra Leone Special Court; the Extraordinary Chambers in the Courts of Cambodia; the Special Crimes Panels in Kosovo, followed by the Kosovo Specialist Chambers and Specialist Prosecutor's Office; the Special Panels and Serious Crimes Unit in East-Timor; the Special Tribunal for Lebanon; the War Crimes Chamber in Bosnia and Herzegovina; the Special Court in the Central African Republic; and the Extraordinary African Chamber (Stahn 2019, 197–210).

To conclude, as long as international criminal trials adhere to due-process standards, international criminal law is considered 'the most civilized response' to advance the human rights regime (Cassese 2011, 271). For this reason, the same advocates of prisoners' rights at the domestic level are often the most strenuous proponents of the desire to punish at the international level (Beresford 2001, 89; Robinson 2008, 930). International criminal law appears to fulfil a dual human rights mandate. It promotes fair trial and high standards of detention as models for national systems and it employs the preventive, retributive and expressive functions of criminal sentences to promote human rights standards. Whether international criminal law succeeds in these aims is another matter.[10]

5. The penal policy of human rights bodies

During the last three decades, the IACtHR, the ECtHR, the UNHRC and other human rights bodies have interpreted their mandates to monitor compliance with international conventions as to enable the imposition of obligations on states to criminalise, prosecute and punish human rights violations (Pinto 2018; Seibert-Fohr 2009). These institutions increasingly rely upon human rights law to order states to ensure criminal accountability at the domestic level, in a process that Alexandra Huneeus (2013) has named 'international criminal law by other means'. The recourse to human rights instruments for enhancing criminal accountability is rooted in the doctrine of 'positive obligations' and the theory of 'horizontal applicability of human rights' (Tulkens 2011, 583). Since the 1980s, the traditional notion of human rights as freedom from state interference has shifted to a conception of

10 For a critique, see Koskenniemi (2002), arguing that the desire to punish in international criminal law creates a dilemma between conducting a fair trial and performing a show trial.

rights that includes the state's positive duty to remove barriers and ensure the full exercise of freedom (Fredman 2008; Lavrysen 2016, 1–5). In addition, the growing awareness that mass abuses also originate from the conduct of private parties other than the state has resulted in an extension of human rights to relations between individuals. Today, wrongdoings committed by private actors may give rise to state responsibility if public authorities have failed to prevent them due to negligence or tolerance (Chirwa 2004).

The emergence of transitional justice in Latin America and Eastern Europe has also contributed to the development of case law on state obligations in criminal matters. Since the late 1980s, victims of mass abuses, often supported by NGOs, have relied on human rights bodies to seek criminal accountability when domestic systems have failed to try and punish wrongdoings committed by authoritarian regimes or in the aftermath of civil conflicts (Aldana-Pindell 2004, 608). In Latin America, deficiencies in accountability and widespread impunity encouraged many victims to seek remedies before the Organisation of American States (OAS) institutions (Sorochinsky 2009, 182). In Europe, the ECtHR evolving case law on criminal accountability is also a response to Turkey's and Russia's failures in bringing perpetrators to justice during and after the Kurdish and Chechnyan conflicts (Teitel 2015, 390; Turković 2016).

In the context of the OAS, *Velàsquez Rodríguez v Honduras* (1988) is not only the first IACtHR decision in a contentious case but also the leading case of the Court's invocation of criminal accountability. The IACtHR found that states have a dual duty, namely to refrain from violations and also to prevent, investigate and punish them, regardless of whether state authorities are directly involved in the abuse (para. 166). Yet the OAS institution did not order Honduras to adopt penal measures as a remedy and acknowledged that '[t]he objective of international human rights law is not to punish those individuals who are guilty of violations' (para. 134). However, the authority of this statement did not last long. In the mid-1990s, the Inter-American Court started prescribing states to effectively punish individual perpetrators (*Caballero-Delgado and Santana v Colombia* 1995, para. 72(5)). Today, the IACtHR case law refers to the failure to deploy criminal sanctions as a violation of human rights per se. In cases of torture and enforced disappearance the duty to punish has even attained the status of *jus cogens* (*Goiburú et al v Paraguay* 2006, para. 84).

The ECtHR has also developed a body of case law, crystallised in what has been described as a 'coercive human rights' doctrine (Lavrysen and Mavronicola 2020), requiring states to mobilise their criminal law to protect against and provide redress for human rights violations (Kamber 2017; Ashworth 2013, chap. 8). The seminal case is *X and Y v Netherlands* (1985). Here, the Court held that the 'effective deterrence [that] is indispensable' to protect sexual integrity 'can be achieved only by criminal-law provisions' (para. 27). Following this decision, the state duty to criminalise human rights abuses has been reiterated in the sphere of sexual life (*MC v Bulgaria* 2003, para. 150), and also with respect to the right to life (*Kiliç v Turkey*

2000, para. 62), for cases of torture and ill-treatment (*MC v Bulgaria* 2003, para. 174), as well as for forced labour (*Siliadin v France* 2005, para. 89; *CN v United Kingdom* 2012, paras. 81–82) and human trafficking (*Rantsev v Cyprus and Russia* 2010, para. 285). Moreover, the ECtHR orders states to enforce their criminal law through 'thorough and effective investigation capable of leading to the identification and punishment of those responsible' (*Kaya v Turkey* 1998, para. 107). The European Court has clarified that, in case of serious bodily harm, civil compensation is not enough and prosecution is required (*Jeronovičs v Latvia* 2016, para. 105). Finally, the ECtHR has begun to demand severe punishment for serious human rights violations (*Gäfgen v Germany* 2010, para. 124). In the view of the European Court, the duty to resort to criminal law would lose much of its meaning if perpetrators were punished with too lenient a sanction (*Armani Da Silva v United Kingdom* 2016, para. 286).

The UNHRC, for its part, has developed a similar case law concerning the duty to institute criminal proceedings for the defence of human rights, including for arbitrary killing, enforced disappearance, torture and ill-treatment, sexual and domestic violence and human trafficking (UNHRC 2004, para. 18). Whereas in the 1980s the Committee merely required states 'to bring to justice' those responsible for human rights violations (*Barbato v Uruguay* 1983, para. 11), since the early 1990s the UNHRC has explicitly demanded prosecution and punishment (*Njaru v Cameroon* 2007, para. 8). The UN Committee Against Torture (UNCAT) is another human rights body which has consistently ordered states to investigate and punish acts of torture and ill-treatment (*Communication No 353/2008 (decision on Ukraine)* 2011). Finally, it is worth noting the ongoing efforts to imbue the African Court on Human and Peoples' Rights with a fully fledged criminal jurisdiction through the Malabo Protocol (2014) (Nimigan 2019).

From the jurisprudence of human rights bodies, criminal liability now appears as an indispensable element of human rights protection, especially in cases of serious human rights abuses. The underlying rationales are mostly deterrence, prevention and restoration of the rule of law (*Opuz v Turkey* 2009, para. 128; *Paniagua Morales et al v Guatemala* 1998, para. 173; UNHRC 2004, para. 18). For human rights bodies, criminal law safeguards society as a whole by ending impunity and providing *general* human rights protection. All human rights bodies have also a tendency to require criminal accountability in the interests of *individual* victims. The OAS bodies, in particular, have the most radical approach. Since the decision in *Paniagua Morales et al v Guatemala* (1998), the IACtHR has had no hesitation in considering criminal justice as an instrument to protect the rights of the victims and give them restoration (para. 171–174). For the Inter-American Court, prosecution and punishment ensure retrospective restoration of the infringed right but also enable the fulfilment of victims' right to have the perpetrator properly tried and punished (*Villagrán Morales et al v Guatemala* 1999, para. 253(8); Sanchez 2008). In the jurisprudence of the UNHRC, criminal investigation and prosecution are also a necessary remedy for human rights violations (*Felipe and Evelyne Pestaño v Philippines* 2010, paras. 7.2–7.6). Yet, unlike the IACtHR, the Committee does not explicitly

recognise victims' right to the punishment of their offenders. In the ECtHR case law, criminal accountability is also at times deemed a measure of *individual* redress and satisfaction. In *Al Nashiri v Romania* (2018, para. 706) and *Abu Zubaydah v Lithuania* (2018, para. 673), for instance, the ECtHR held that 'the notion of an "effective remedy"' for the victim entails criminal proceedings 'leading to the identification and punishment of those responsible'.

In the jurisprudence of the IACtHR the duty to deploy criminal sanctions is absolute. The Court has often declared measures that frustrate criminal justice to have no legal effect, including amnesty laws, statutes of limitations, the principle of non-retroactivity and the prohibition against double-jeopardy (*Almonacid Arellano et al v Chile* 2006, paras. 151, 154). Notably, opposition to amnesty appears entrenched in the OAS bodies' case law (Sandholtz and Padila 2014; Binder 2011). Since *Barrios Altos v Peru* (2001), the IACtHR has extended the ban from self-amnesty laws to every amnesty shielding human rights abuses, regardless of their nature, origin and purpose (*Massacres of El Mozote v El Salvador* 2012). Even amnesties upheld by popular referenda (*Gelman v Uruguay* 2011) or aimed at promoting peace and reconciliation (*Gomes Lund et al v Brazil* 2010) have been found inadmissible (Gargarella 2013; Veçoso 2016). Aversion to the state's use of amnesty is also visible in the case law of other human rights bodies. To date, the ECtHR has admitted that amnesties for serious human rights abuses might be acceptable in exceptional circumstances (*Marguš v Croatia* 2014, para. 139; M. Jackson 2018), whereas the UNHRC (2001, para. 11) has imposed an absolute ban on amnesties shielding gross human rights violations. The UNCAT (2008, para. 5) and the African Commission on Human and Peoples' Rights (*Zimbabwe Human Rights NGO Forum v Zimbabwe* 2006, para. 215) have adopted a position similar to the UNHRC.

The case law on state obligations in criminal matters has had a considerable impact on domestic legal systems. Pursuant to human rights bodies' decisions, states have started new criminal investigations, overturned amnesties, introduced new offences and created new institutions to facilitate prosecution (Huneeus 2013, 2; Tittemore 2005, 449–60). In *Simón, Julio Héctor y Otros* (2005), for instance, the Argentinian Supreme Court relied on the IACtHR case law to exclude the application of amnesty, statutory limitations and the principle of non-retroactivity. In Italy, following an ECtHR decision, the Parliament approved a bill which aimed to introduce the crime of torture in the Italian Criminal Code (Carolei 2017). In the UK, ECtHR case law on state obligations to criminalise labour exploitation influenced the adoption of the Modern Slavery Act (2015) (Pinto 2020; Mantouvalou 2018; see also chapter 3).

To sum up, the case law of human rights bodies has evolved over time towards viewing criminal justice as a necessary means to promote and safeguard human rights. For some commentators this development is to be welcomed (Ohlin 2018; Răduleţu 2015; Starmer 2014; Binder 2011; Tittemore 2005). Others, on the contrary, have argued that an expanded criminalisation by means of human rights law may weaken the traditional commitment to

the rights of the defendant (Pinto 2018; Basch 2007; Pastor 2006; Malarino 2012, 681–84), enhance state coercive power (Lazarus 2012; Mavronicola 2017) or promote a 'culture of conviction' (Mégret and Calderón 2015, 438; Pinto 2020). Either way, criminal punishment has become one of the main objectives of human rights law. An in-depth analysis of human rights bodies' case law shows a tendency to assume an outright obligation to employ penal mechanisms. This obligation appears as something self-evident that needs no serious assessment concerning its practical and theoretical implications (Pinto 2018, 176).

6. Conclusion

Prince Mohammed Bin Salman is still ruling Saudi Arabia, but the human rights movement is not sitting on its hands. In June 2019, the UN Special Rapporteur on extrajudicial, summary or arbitrary killings, Agnès Callamard (2019b; 2019a), submitted to the UN Human Rights Council her final report of a human rights inquiry into the killing of Jamal Khashoggi. First, Callamard found that Saudi Arabia bears responsibility for the extrajudicial killing of the journalist, in violation of the right to life, the prohibition against enforced disappearance, the protection of freedom of expression and, probably, the prohibition of torture. Second, she maintained that Saudi Arabia and Turkey have failed to comply with the obligation to investigate Khashoggi's killing, and that Saudi Arabia has also violated its duty to prosecute human rights violations and provide reparation to the journalist's family. Third, relying on a possible violation of the Torture Convention, she found that Khashoggi's murder constitutes an international crime over which states should claim universal jurisdiction. Finally, Callamard called on various UN bodies to initiate an international criminal investigation into Khashoggi's death and, possibly, establish an ad hoc or hybrid tribunal for providing judicial accountability.

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While the traditional understanding of human rights is to restrain state power to prevent abuses against the individual, in the last few decades human rights have been recast in a way that has made penality one of the main instruments for their promotion. Since the late 1970s, human rights have allowed penal power to move across borders and, through the interactions among different actors, norms and law levels, they have shaped penal policies around the world. In many countries, the language of victims' rights, at times combined with human rights discourses, has become a vehicle for the promotion of penal measures. The same language has also played a key role in justifying a new focus of international criminal law on atrocities and human rights bodies' recourse to criminal justice. Furthermore, since the adoption of the Torture Convention, a number of international instruments adopted under the aegis of the UN have prescribed penal mechanisms for serious breaches of human rights. These instruments have been invoked to foster accountability for human rights abuses of past regimes, when many countries around the world began their transition to democracy at the end of the Cold War. Finally, human rights bodies have assumed obligations in criminal

matters under human rights conventions. In so doing, not only they have complemented the role of international criminal tribunals in enforcing human rights through penality, but they have also encouraged states to deploy their domestic penal system to counter impunity.

Driven by the universality of human rights discourses, penal projects have expanded over time and across spaces, mixing domestic and international elements. Victims'-rights advocates, NGOs, academics, judges, policymakers, and other state and non-state actors have been involved in this process. While deployed to protect human rights, penality has been strengthened, defended and justified. Rather than moderating state penal policies, the more human rights have permeated conceptions of justice around the globe, the greater has been the dissemination and legitimation of penal responses (see also chapter 7). The expansion of penality by reference to human rights has been welcomed almost universally with few critical voices raised and limited serious debate. Yet we have become accustomed to requiring penal action for human rights abuses without interrogating *how* it is possible that human rights and penality, two bodies of law that appear very different, have become so entangled. In the next four chapters, using discourse analysis and focusing on human trafficking and torture, I problematise this taken-for-granted relationship to understand the historical and contemporary assumptions that support, and lie behind, it.

PART 2—THE 'HOW' QUESTION

3

Discursive alignments of trafficking, rights and crime control

'*Class A drugs bring death and misery to the streets of the UK and those who involve themselves willingly in the supply chain must face the consequences of their actions. A distinction must be drawn between the individual put under some kind of pressure to become involved in drugs smuggling and the genuine victim of human trafficking.*'—R *v Joseph (Verna Sermanfure)* (2017)

'*A criminal justice response to trafficking that prioritizes rights and seeks both to end impunity for traffickers and to secure justice for victims deserves to take its rightful place as a critical component of any lasting solution to trafficking.*'—OHCHR (2010).

'*It is sad to see that most of these initiatives and actions are of criminal concern and grossly neglect the human rights of trafficked persons. They protect the interest of the state, rather than the interest of the affected people.*'—Siriporn Skrobanek (2000) in a GAATW report.

Since the 1990s, human trafficking has become a battleground (Munro 2005, 91) for competing discourses on human rights and penality. Trafficking in human beings is generally framed as both a human rights violation and a crime (O'Connell Davidson 2010, 244). However, the vagueness of these terms has left policymakers, practitioners and scholars free to impose distinctive meanings on human rights and penality in relation to trafficking. The confrontation of different approaches has contributed to the fixation of dominant discourses, with other voices placing themselves in a position of criticism.

Through my discourse analysis, I identified a dominant discourse, usually advanced by governments, courts and organisations interested in global security, that posits criminal justice as the primary instrument to end trafficking. In this discourse, which I term ***the 'law enforcement' discourse***, human rights are used to provide a justification for a broad range of penal measures. Penality is necessary to punish 'organised criminals' and to protect 'helpless' individuals, who can either be 'the genuine victim' of trafficking or the general population affected by 'the crime of trafficking'. As it appears from *R v Joseph (Verna Sermanfure)* (2017) mentioned above, the prosecution of traffickers prevails over protective measures. Trafficked people cease to be 'innocent' victims and become 'willing' lawbreakers

once they commit a crime and pose a threat to the state's security. Human rights advocates reject this discourse with a competing one, which I call ***the 'victims first' discourse***. The statement of the OHCHR (2010), cited above, is an example. While the emphasis is on victims' support, penality plays a role in the fight against trafficking insofar as it complies with human rights. While human rights complement and moderate penal measures by shifting the focus from the state to the victims, criminal law gives enforcement to human rights principles. Critical academics and nongovernmental organisations (NGOs), as well as sex workers' grassroots movements, have questioned these two dominant discourses, by advancing alternative voices. There is a counter-discourse, epitomised by the statement in the Global Alliance Against Traffic in Women's (GAATW) report, which highlights the incompatibly of human rights measures with penal policies. I call it ***the 'incompatibility' discourse***. Another, more radical, counter-discourse, which I term ***the 'transformative justice' discourse***, claims that both human rights and penality are inadequate for contending with the structural causes of trafficking. This discourse calls for a more transformative approach to challenge the vulnerabilities of a neo-liberal world. Although counter-discourses have recently gained more space, especially within academia, they remain marginal compared to dominant discourses.

Several scholars have analysed the discourses that are produced around human trafficking. Much of this research, conducted from a feminist and sex-as-work perspective, has been concerned with the construction of narratives about gender, sex, agency and consent (Berman 2003; Sanghera 2005). For instance, Jo Doezema (2010) examines current debates surrounding sex trafficking by drawing historical comparisons to 'white slavery' at the end of the nineteenth century. Carole Vance (2012), in her analysis of a series of documentaries about sex trafficking, illustrates how melodramatic representations of male villains and female victims influence law and policy on the matter. Discourse analysis has also been conducted from the perspective of migration (Ausserer 2008; Dauvergne 2008). Finally, Erin O'Brien (2019) focuses on the victims, villains and heroes of trafficking stories, to show how the dominant trafficking discourse relies on cultural assumptions about gender and ethnicity, and wider narratives of border security, consumerism and western exceptionalism. This chapter continues the scholarly conversation about anti-trafficking discourses: my focus is on discourses about human rights and penality. The analysis of these discourses aims to unearth and problematise how, in the field of anti-trafficking, the relationship between rights protection and crime control is thought about, discussed and put into practice.

While the use of human rights to achieve penal aims has widely concerned the field of human trafficking (see chapter 2; Pinto 2020; Kapur 2018, chap. 3; Bernstein 2012), the literature has generally presented human rights solutions as in opposition to a dominant crime-control model to combat trafficking (Giammarinaro 2020; Boukli 2012; Hathaway 2008; Obokata 2006). In other words, whereas much has been written about the differences between a human rights and a crime-control approach to trafficking, there have been few attempts to

reflect on the commonalities between the two. Aiming to fill this gap, this chapter shows how, from an analysis of anti-trafficking texts, different discourses emerge, each of which can be more focused on crime control or human rights. While even the 'law enforcement' discourse widely invokes human rights, the 'victims first' discourse is pervaded by the language of penality. Although the two poles remain human rights and penality, currently the characterisation of the debate fails to acknowledge that both discourses, no matter which language they use, are committed to a similar premise, namely the necessity of penal intervention. As this chapter shows, the interesting division is not between crime control and human rights, but between discourses that are favourable to penality and counter-discourses that reject it. Yet, once we move from discourse to practice, we notice that penal intervention is hegemonic and counter-discourses have little impact on anti-trafficking action. The result is that, in contemporary discourses about human trafficking, penality is constructed as a crucial expression of human rights. The 'law enforcement' and the 'victims first' discourses frame human rights as inescapably linked to the state's penal intervention, seen as a necessary component of their effectiveness. The two alternative voices identified above criticise the relations of knowledge and power constituted by these discourses but fail to advance a real challenge to them (Foucault 1978, 11).

The previous chapter has shown that, in recent decades, human rights and penality have become closely intertwined, by presenting five historical trends in which human rights have 'gone criminal'. Moving on from the question of *whether* this has happened (with my answer being clearly 'yes'), this and the following three chapters explores *how* it is possible that human rights and penality have become so entangled. To this end, I use the discourse analysis method explained in detail in chapter 1 to understand the assumptions underlying the entanglement between human rights and penality. This chapter provides a first answer, in relation to the subject-matter of human trafficking. As indicated in chapter 1, human trafficking is an area of human rights advocacy and practice where the resort to penality is particularly marked and promoted by a very diverse range of actors (states, international organisations, NGOs and individuals). It thus offers a clear illustration of the phenomenon of human rights-driven penality. The chapter contributes to the overarching arguments of the thesis, by showing how the alignment between human rights and penality is sustained by the competition between victim-centred and state-oriented discourses ('victims first' and 'law enforcement' discourses, respectively) and their resort to moralising language (be it to protect the dignity of the victim or the social-moral order of the state). The scope of the chapter is limited to exploring the present-day discourses, since their historical roots and antecedents are addressed in chapter 4. Contemporary discourses around trafficking are examined following the three analytical dimensions that have been outlined in chapter 1: formations of objects (section 1), formations of subject positions (section 2) and formations of themes (section 3). Section 4 concludes the chapter by considering how knowledge produced through the analysed discourses relates to anti-trafficking practice.

Although my analysis centres on human rights and penality, it is important to bear in mind that in the past three decades other discursive frames have been promoted in the anti-trafficking field. These additional frames include sex work and prostitution; migration, smuggling and border control; and forced labour and modern slavery (Kotiswaran 2019a, 55). Over the years, emphasis has shifted from certain frames to others, following both social change and dominant ideologies. The late 1990s and early 2000s were defined by a focus on sex trafficking and the association of trafficking with forced migration for sex work (Andrijasevic 2007). Labour exploitation started being included in the dominant understanding of trafficking by 2009, due to the growing visibility of the International Labour Organisation's interventions on forced labour and the change of priorities (and presidency) in the United States (Kotiswaran 2019a, 63; Bernstein 2017, 329–30). This new phase rendered visible the competing frames of 'modern slavery' and 'forced labour'. Since 2014, trafficking interventions have been promoted explicitly in terms of slavery and forced labour both at the national and international levels (Kotiswaran 2019a, 61–68). The Modern Slavery Act, enacted in the United Kingdom (UK) in 2015, is a clear example. Notwithstanding these developments, throughout the last three decades trafficking has consistently been viewed as an issue of both human rights and penal concern.

1. Formations of objects

Since the 1990s, human trafficking has been the object of attention, debate and regulation from disparate groups, individuals and states. However, human trafficking remains an overdetermined concept, around which everyone can mobilise whilst having a different understanding of the targeted phenomenon (O'Connell Davidson 2006, 7). Under article 4 of the United Nation Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (UN Trafficking Protocol) (2000), supplementing the UN Convention against Transnational Organized Crime (2000), trafficking is composed of three elements: i) an action—'the recruitment, transportation, transfer, harbouring or receipt of persons'; ii) certain means—'the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person'; and iii) the purpose of exploitation. This definition is sufficiently broad to cover diverse situations and demand disparate responses (Chuang 2014, 610). This section explores whether and how trafficking is framed as a 'crime' and/or a 'human rights violation' in the four discourses under analysis. It also examines how it relates to other phenomena and how understanding of trafficking is so constituted.

Table 3: Contemporary anti-trafficking discourses. Formations of objects.

'Law enforcement' discourse	'Victims first' discourse	Counter-discourses
Trafficking =	**Trafficking** =	**Trafficking** =
• transnational organised crime • crime against the state's social-moral order	• human rights violation • crime against the dignity of the victim	• complex human rights issue (*'incompatibility' discourse*) • systemic problem (*'transformative justice' discourses*) … deriving from the shortcomings of labour and migration policies

The 'law enforcement' discourse

The 'law enforcement' discourse understands trafficking as a criminal phenomenon, which, as such, may be a source of human rights violations. International treaties and legal instruments define human trafficking as a 'serious crime' (Trafficking in Women and Girls 2018). The UN Trafficking Protocol (2000) took the lead. While article 3 provides for a definition of trafficking which is first and foremost the definition of a criminal offence (Knust and Lingenfelter 2020, 1766), article 5 imposes on states a duty to criminalise. Such provisions do not intend to create a new offence, but they rather aim to promote harmonisation across jurisdictions and stronger penal action against the phenomenon. Subsequent legal instruments confirm the central role of penality. The EU Trafficking Directive (2011, recital 1) describes trafficking as 'a serious crime, often committed within the framework of organised crime'. The UK Modern Slavery Act (2015) defines human trafficking as the offence of arranging or facilitating travel for the purpose of exploitation (sec. 2(1)) and punishes it with the maximum penalty of life imprisonment (sec. 5(1)(a)).

The 'law enforcement' discourse targets trafficking as a public moral wrong: its criminalisation relates to it being 'heinous' (UN Global Plan of Action to Combat Trafficking in Persons 2010, 5), 'nefarious' (Traffic in Women and Girls 1995; Traffic in Women and Girls 1995), 'horrendous' and 'terrible' (Home Office and Scottish Executive 2007, 4), and, as such, threatening the security of the state (Kara 2011). As mentioned above, the 1990s to 2010s saw a shift from an initial concern with prostitution (Reanda 1991; Leidholdt 1993; Raymond 2001, 10), to including other forms of trafficking and associating it with the idea of modern slavery (cf. Lewis and Waite 2019, 223; Kempadoo 2015, 8–9). Both sex trafficking and modern slavery appear as 'global health' risks (Pati 2011, 139) that, through illegal immigration and the sale of sexual services, corrupt the morality of Western culture (cf. Broad and Turnbull 2019, 10). Consider, for instance, this description in the UK case of *R v L* (2013):

> It is surely elementary that every court … understands the abhorrence with which trafficking in human beings … is regarded both in the United Kingdom and throughout the civilised world.

Accordingly, when the 'law enforcement' discourse addresses trafficking as a crime that entails the 'violation or abuse of human rights' (UNSC RES 2331 2016, 2; UNSC RES 2388 2017, 2; Trafficking in Women and Girls 2018), the frame of 'human rights abuse' is only subsequent to the one of 'crime' and is explicitly employed to highlight the seriousness and moral repugnance of the offence (Kara 2011).

In the UN Trafficking Protocol (2000), human trafficking is not a simple offence but a form of transnational organised crime. Such conceptualisation seems obvious, if we consider that the Protocol was adopted under the aegis of the UN Office on Drugs and Crime (UNODC) and supplementing the UN Convention against Transnational Organised Crime (2000). In this way, not only is trafficking discursively associated with other global criminal trends (UN Global Plan of Action to Combat Trafficking in Persons 2010, art. 43(c); OSCE Declaration on Trafficking in Human Beings 2002), but its repression is made dependent upon the fight against other illegal phenomena, including sexual violence, smuggling of migrants, trafficking in arms and drugs, corruption, money laundering and terrorism (UNSC RES 2331 2016, para. 2(c); UNSC RES 2388 2017, para. 6; cf. Boukli 2012, 97–98). In the 'law enforcement' discourse, the element of 'organisation' is often related to the financial benefit traffickers may gain (European Commission 2017). Various texts insist on how human trafficking is 'a high profit, low risk crime' (UN.GIFT 2008; OHCHR 2010, 101; Anti-Slavery International 2005, 3) which needs to be fought 'just as vigorously' as other profit-driven offences—such as drug trafficking or money laundering—'are currently fought' (Pardo 2009, 9).

The 'victims first' discourse

In the 'victims first' discourse, human trafficking is primarily a human rights issue (OHCHR 2010, 4; Adams 2011, 202). The connection between trafficking and human rights is presented as something that occurs naturally through the 'definition' of trafficking (UN Secretary-General 2003, para. 49). In the words of Conny Rijken and Eefie de Volder (2009, 52):

> It is generally acknowledged that [trafficking] is both a cause and a consequence of the violation of human rights and, therefore, that [it] should be explicitly characterized as a 'human rights violation'.

Both the 'law enforcement' and 'victims first' discourses consider trafficking as a human rights abuse. While the former derives this characterisation from the seriousness of trafficking as a crime, the latter does so because it sees trafficking as caused by social conditions of poverty, discrimination, exploitation and inequality (European Commission 2012, 2). The Council of Europe Convention on Action against Trafficking in Human Beings (CoE Anti-Trafficking Convention) (2005) defines human trafficking as 'a violation of human rights and an offence to the dignity and the integrity of the human being' (preamble). Thus construed, trafficking appears as a dehumanising practice which 'destroys individuals' lives' (European Commission 2021, 1), by depriving victims of their moral dignity and

integrity (Amnesty International 2008, 29). In the words of the European Court of Human Rights (ECtHR) in *Rantsev v Cyprus and Russia* (2010, para. 281), trafficking is a human rights abuse because, 'by its very nature and aim of exploitation', it 'treats human beings as commodities to be bought and sold'. Within the 'victims first' discourse, there is also tension between those who view (migrant) sex work as a right (Pearson 2000, 30–31) and those who always view prostitution as sex trafficking and, thus, a human rights abuse (Raymond 2001).

In addition, the 'victims first' discourse treats trafficking as a criminal offence (CoE Anti-Trafficking Convention, art. 18). Yet the approach is the opposite of the 'law enforcement' discourse. Human trafficking is a crime because it is one 'of the most serious challenges facing human rights today' (UN Secretary-General 2003, 2). Penality is here accessorial to human rights and it is used to provide further victims' protection (Ditmore and Wijers 2003, 53; Piotrowicz 2012, 184). Trafficking is not a 'widespread criminal phenomenon' (OHCHR 2014, 12) because it affects *public* security and morality but because it causes *private* harm, namely violations of bodily, sexual and mental integrity of other human beings. It is a 'crime against persons' (Skrobanek 2000, 2) or, given its seriousness and transnational nature, an 'international crime' (Obokata 2006, 37).[1]

Counter-discourses

The frame of trafficking as both a crime and a human rights violation is criticised by counter-discourses. On the one hand, the 'incompatibility' discourse treats human trafficking as a 'complex human rights problem' which should not be a matter for criminal law (J. Kaye, Millar, and O'Doherty 2020, 616). In particular, it is suggested that trafficking 'has to be understood and addressed as part of the broader social, political and economic systems linked to migrants', women's and workers' rights' (GAATW 2011, 5). It derives from the shortcomings of labour and migration policies to respond to globalisation, rather than from criminal behaviours of deviant individuals (Chuang 2010, 1702–3). On the other hand, in the 'transformative justice' discourse, trafficking is not an aberration to normal society but a systemic problem within contemporary labour markets (Rittich 2017). Instead of conceptualising it as a violation of human rights law or a criminal offence, the 'transformative justice' discourse understands it as 'a broad[er] migration, labour and social justice issue' (International Committee on the Rights of Sex Workers in Europe 2021a, 5). The attempt to frame trafficking as a human rights violation and an abhorrent crime—this discourse claims—fails to capture the true 'harms and injustices of trafficking', which are connected to 'exploitative labor conditions, coercive processes of labor migration, global inequality, oppressive restriction on immigration …, and patriarchal gender roles and attitudes' (Christman 2014, 321). Finally, both the 'incompatibility' and the 'transformative justice'

1 In the Statute of the International Criminal Court (1998), human trafficking is mentioned as part of the definition of enslavement, a predicate crime against humanity (art. 7(2)(c)). For a critical discussion, see Halley (2008, 93–108).

discourses locate the core elements of trafficking in 'the presence of deception, coercion or debt bondage' (Foundation Against Trafficking in Women, International Human Rights Law Group, and GAATW 1999, 6), thus requiring a certain degree of force to be exercised against trafficked people. Accordingly, trafficking should not include sex work—other than forced prostitution—and migration of individuals who are aware of their future work conditions (Smith and Mac 2020, chap. 3; International Committee on the Rights of Sex Workers in Europe 2021b).

2. Formations of subject positions

Anti-trafficking discourses create knowledge about the people who are involved in the phenomenon of trafficking (Kapur 2007; Andrijasevic 2014). Both traffickers and trafficked people are rendered subjects of various forms of interventions and, thus, provided certain identities that justify certain possibilities of action and exclude others (Andrijasevic 2007). Certain subject positions have an 'active' role: they are conferred 'the right to speak' and to define their role in relation to anti-trafficking initiatives. Other subject positions, for example 'the victim', have a 'passive' role: they are acted upon and determined by the speech and the practice of others (Aradau 2004). This section explores how the discourses under analysis frame the subjects they want to regulate, support or punish.

Table 4: Contemporary anti-trafficking discourses. Formations of subject positions.

'Law enforcement' discourse	'Victims first' discourse	Counter-discourses
Victim = woman or child • helpless • unaware of her rights **Criminal** = • Organised trafficker • Victim who commits crimes	**Victim** = • blameless • in need of protection and assistance **Criminal** = • Human rights violator • Corrupted public official	**Trafficked person**: • migrant worker **Oppressor**: • the state through its punitive laws and policies

The 'law enforcement' discourse

The Victim

The UN Trafficking Protocol (2000), even by its name, makes clear that the main subjects of its regulation are trafficked persons, '[e]specially [w]omen and [c]hildren'. They are described as 'vulnerable' victims (preamble) forced into prostitution or practices similar to slavery (art. 3(a)). Similar characterisations are visible in many other texts (see generally Haverkamp 2019). Victims are depicted as 'young', 'desperate' (*O v Commissioner of Police of the Metropolis* 2011), 'virgin[s]' who were sexually exploited (*R v O* 2008) or children who were 'sold by [their] family' (*R (PK (Ghana)) v Secretary of State for the Home Department* 2018). They come from underdeveloped or developing countries and are unaware of their prospective involvement in commercial sex work (Leidholdt 1993, 135).

Although trafficked persons are presented as the bearers of human rights (UN Trafficking Protocol 2000, preamble and art. 2(b); EU Trafficking Directive 2011, recital 1), they are also portrayed as too helpless to exercise their rights independently or even to be aware of them (Trafficking in Women and Girls 2018, 5; cf. Aradau 2004, 276). Their voices are disregarded in relation to their own trafficking—'[t]he consent of a victim of trafficking in person to the intended exploitation … shall be irrelevant' (UN Trafficking Protocol 2000, art. 3(b))—but they are also deprived of political agency in relation to the enjoyment of their rights. In the 'law enforcement' discourse, victims of trafficking are conceived as excluded from society and in need of reintegration by the state (UN Global Plan of Action to Combat Trafficking in Persons 2010, para. 26), even when they refuse to identify themselves as victims. Lord Justice Simon explains it clearly in the British case of *R v Connors and others* (2013):

> [S]ome [victims] … believed that they were better off working and living as they did than they could have been outside this environment. In many ways, … this evidence underlined their vulnerability.

Their voice is listened to only when it supports, or concurs with, the punitive action of the state. '[I]t seems implausible'—the British judge Wyn Williams says in *O v Commissioner of Police of the Metropolis* (2011)—that victims want 'no action against' their traffickers. Moreover, trafficking individuals do not enjoy protection and assistance just for the fact of being exploited but rather only once they are identified as victims (*R (PK (Ghana)) v Secretary of State for the Home Department* 2018). The process of 'identification' by the state has the performative role of transforming some individuals—generally seen as prostitutes or illegal migrants and, thus, treated as criminals—into right-holder deserving state action to be rescued (cf. Lewis and Waite 2019, 232–36).

The Criminal

If 'the victim' is the rights-holder, 'the trafficker' is 'the criminal'. While victims are presented as powerless, traffickers are described as organised foreign exploiters engaged in an immoral and illegal business (Jarbussynova 2015, 19, 30). In the 'law enforcement' discourse, traffickers retain all agency: they are 'rational economic agents' (Kara 2011, 141) who exercise 'control of the mind' over their victims (CSJ 2013, 32) with the purpose of financial gain or sexual gratification. Traffickers are also a threat to national and international security as they foster prostitution (*R (QSA) v Secretary of State for the Home Department* 2018) or illegal migration (Traffic in Women and Girls 1995), and 'have recourse to ever more sophisticated techniques, increasing financial resources and growing networks' (OSCE Action Plan to Combat Trafficking in Human Beings 2003, preamble).

The victim can at times become an offender, as it is not uncommon for people who have been trafficked to commit offences or become involved in trafficking themselves (Rodríguez-López 2018, 68). The shift from 'victim' to 'criminal'—and from protection to punishment—is constructed by conferring agency to the subject. As long as the trafficked person is a

'genuine' victim, *she* is innocent and vulnerable. Once the same person commits a crime or is involved in an illegal aspect of sex work, *she* is retroactively required to act as a 'reasonable person in the same situation' (Modern Slavery Act 2015, sec. 45(1)). Trafficking in itself—Lords Carnwath and Hughes explain in the UK Supreme Court case of *Hounga v Allen* (2014)—'does not … take away the illegality of what she *knowingly* did' (emphasis added). In other words, through the commission of a crime, a trafficked individual ceases to be a 'credible' victim worthy of state protection and becomes a 'voluntary abuser' for whom prosecution is justified (*R v LM* 2010).

The 'victims first' discourse

The Victim

In the CoE Anti-Trafficking Convention (2005), the category of victim of trafficking is still circumscribed to 'especially women and children' (art. 6). Victims are vulnerable due to human rights violations and, therefore, in need of protection and assistance (art. 1(1)). They are also blameless, even when involved in unlawful activities, because they do not have control over their actions but are 'compelled' by overpowering criminals (art. 26). Within the 'victims first' discourse, victims' identification is of paramount importance (*VCL and AN v United Kingdom* 2021, para. 160). The discourse sees the phenomenon of trafficking as involving the transformation of victims into criminals, such as illegal migrants, drug-mules and workers in cannabis farms (Whitehouse 2013, 2). Only NGOs or the police can unmake such transformation when they rescue victims and recognise their suffering (OHCHR 2002b, guideline 2(1)). In so doing, they also make sure that victims 'are treated as "rights holders"' (European Commission 2017, 6). Conversely, failures in the identification may result in a trafficked person being 'branded a criminal …, deprived of access to basic services, unemployed, dehumanised and penalised' (*EOG v Secretary of State for the Home Department* 2020, para. 33). Clearly—the 'victims first' discourse seems to say—human rights are particularly attached to victimised people, who have been subjected to cruelty and extreme suffering (cf. Aradau 2008, 35). Yet the enactment of rights cannot be left to the victims themselves who 'are no longer free to decide their fate' (Pardo 2009, 36) and often not even able to 'see themselves as "victims"' (Pearson 2002, 32).

The 'victims first' discourse acknowledges that some trafficked individuals may be male adults (GRETA 2012, 5) or even 'imperfect' victims who cannot easily be distinguished from perpetrators (Ezeilo 2012, para. 24). Nonetheless, the emphasis on vulnerability is maintained:

> Trafficking victims … have either never consented or, if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive actions of traffickers (Pardo 2009, 26).

The construction of victims as incapable of consent is explicitly fostered because—it is said—it 'could improve the implementation of the anti-trafficking provisions and provide victims with greater confidence in self-reporting to NGOs and public authorities' (GRETA 2018, 37). Agency can be restored once trafficked people decide to collaborate with authorities. Here they are supported 'to take an active and meaningful role in efforts to convict their exploiters' (Ezeilo 2012, para. 91) or to 'bravely and generously' share their stories and experiences to inform and advise others (OHCHR 2014, 2). Yet, ultimately, the discourse fixes trafficked people in their identity as vulnerable victims because 'the brutality and traumatization of trafficked sex slaves are unique and unrepairable' (Pati 2011, 139).

The Criminal

There are two types of criminals in the 'victims first' discourse: traffickers and corrupted public officials. Traffickers are perpetrators of human rights violations, who act 'in flagrant violation of domestic laws and international standards' (Traffic in Women and Girls 2000, 3). They are seen as operating 'through secret and extremely well organized networks' (Warzazi 2000, para. 90) and preying on 'social inequalities as well as economic and social vulnerability of people' (European Commission 2021, 2). Traffickers are often described as 'very smart' because they change 'their behaviours as fast as countries change their laws to criminalise trafficking' (Anti-Slavery International 2005, 20). Characterised by 'human greed and moral corrosion' (Pati 2011, 140), they exercise control not only by using violence but also by showing 'emotional attachment' to their victims (M. Kaye 2003, 6). Public officials implicated in trafficking are deemed as dangerous as traffickers. These corrupted public officials are said to 'facilitate this trade through their inaction, inertia or occasional active involvement' (OHCHR 2010, 76) and, moreover, to contribute to the victims' lack of 'confidence in the police and the judicial system' (OHCHR 2002b, guideline 5).

Counter-discourses

The two counter-discourses are more conscious of their role in constituting subject positions. Accordingly, they shape the identities of people who are involved in trafficking with a view to sustaining their critical agenda (cf. Shamir 2012, 134–35; Chuang 2010, 1701). Counter-discourses see trafficked people as essentially 'migrant workers' (Rijken and de Volder 2009, 60) who 'make decisions about their lives, including the decision that working under abusive or exploitative conditions is preferable to other available options' (Foundation Against Trafficking in Women, International Human Rights Law Group, and GAATW 1999, 8). They are portrayed as individuals who 'combine multiple identities' (Sanghera 2007, ix) and 'can both express consent and feel force in their migration decisions' (GAATW 2011, 41). As a report of Anti-Slavery International puts it:

> People who migrate in search of employment or a better life, and end up being trafficked, tend to be those who had the initiative and courage to change their

> situation, by seeking better fortune and opportunity in migration (Pearson 2002, 33).

Trafficked people are 'anything but victims' (Sanghera 2007, ix) and 'have the ability to regain control of their lives and make decisions based on their own interests and life projects' (Giammarinaro 2020, para. 23). Consequently, they should not be rescued but rather empowered so they can speak up 'for their own rights' (Wijers and Lap-Chew 1999, 211).

In counter-discourses, the agents of trafficking are not 'criminal villains doing evil' (Shamir 2012, 134). Rather, these discourses see 'the mythology of a few bad apples' as having 'the self-serving effect of concealing the larger point that exploitation arises from the smooth functioning of global capitalism and official policies, rather than amoral individuals and corrupt institutions' (Quirk and O'Connell Davidson 2015, 16). Counter-discourses present 'a common misunderstanding' that 'traffickers harm victims and governments rescue and protect them' (Pearson 2000, 41). Conversely, states are not regarded as 'saviours, but oppressors' (Pearson 2002, 33) which either subject trafficked people to serious rights violations (by criminalising sex workers and irregular migrants) or treat them as 'powerless pawns' (Dottridge 2007, 1).

3. Formations of themes

As mentioned in the introduction, the literature tends to distinguish between a crime-control and a human rights approach as solutions to trafficking. The former arguably addresses human trafficking as an issue of law enforcement. The latter appears to emphasise victim support over punitive measures. However, this distinction, though not unfounded, is somewhat misleading. In the context of anti-trafficking interventions, rights-based initiatives and criminal governance are often promoted and linked together both discursively and in practice. Governments use the language of rights to give a humanitarian face to their law-enforcement action; human rights actors rely on criminal sanctions to provide justice for victims. This section explores the roles that anti-trafficking discourses ascribe to both rights-based interventions and penal measures.

Table 5: Contemporary anti-trafficking discourses. Formations of themes.

'Law enforcement' discourse	**'Victims first' discourse**	**Counter-discourses**
• More crime control = more human rights protection • Human rights provisions incorporated into the crime control framework	• Human rights used to humanise penality • Penality used to give force and recognition to human rights	• Incompatibility of crime control and human rights protection (*'incompatibility' discourse*) • Inadequacy of both crime control and human rights (*'transformative justice' discourse*)

The 'law enforcement' discourse

In the 'law enforcement' discourse, criminal justice is the primary instrument to end human trafficking. Nonetheless, human rights have an important role to play. Acting as the 'sword' of criminal law (van den Wyngaert 2006), human rights provide a justification for crime-control measures and are rhetorically adduced as the goal of anti-trafficking strategies. The 'law enforcement' discourse constructs two relations between penality and human rights: i) a far-reaching penality ensures greater human rights protection; ii) human rights provisions are incorporated into the existing punitive framework.

Penality as ensuring human rights protection

In the 'law enforcement' discourse, penality is construed as an essential element for achieving 'elevated human rights protections' (Kara 2011, 123). In the UN Trafficking Protocol (2000), the adoption of law-enforcement provisions is explained with the need to protect victims' human rights (preamble). The UN Global Plan of Action to Combat Trafficking in Persons (2010, para. 3) associates 'the promotion and protection of the human rights of victims' with 'the strengthening of the criminal justice response'. In these and other documents, the deployment of the penal machinery appears as a core component of the state's human rights obligations towards victims: effectiveness in human rights protection is made dependent upon effective criminalisation, prosecution and punishment.

First, the creation of new offences criminalising a range of trafficking conduct is framed as a way to close the victims' 'vulnerability gap' between protection and exploitation (*R v Connors and others* 2013). In addition, article 19 of the CoE Anti-Trafficking Convention (2005) and article 18(4) of the EU Trafficking Directive (2011) suggest that human rights are better protected when states criminalise the demand of victims' services. This approach is an extension of the 'Nordic model' from the matter of prostitution (and the criminalisation of buyers of sexual services) (CATW 2010) to other areas of human trafficking (GRETA 2018, 55).[2] Criminalisation of demand has at once a punitive and protective function. While those who buy and use victims' services are punished as part of the trafficking chain, human rights of the victims are reportedly upheld. Second, criminal prosecutions are regarded as 'remedies' for victims, which are 'triggered' by credible allegations of human rights violations (*R v L* 2013). To be successful, the 'maximum enforcement of the law' is required (UN.GIFT 2008, 2). Conversely, when 'investigations are not launched', it is often claimed that 'victims do not receive the justice and support they need or deserve' (Independent Anti-Slavery Commissioner 2017, 15). Finally, the 'law enforcement' discourse associates the promotion

2 Several countries and influential organisations have endorsed the 'Nordic model' (or 'Swedish model'), which criminalises sex buyers and treats sex work per se as a form of male violence against women. For a critique, see Smith and Mac (2020). In 2014, the Council of Europe adopted a resolution endorsing this model and inviting member countries to 'consider criminalising the purchase of sexual services … as the most effective tool for preventing and combating trafficking in human beings' (Resolution 1983 (2014) 2014, para. 12.1.1).

of human rights with its commitment to penal severity. The imposition of harsh punishment is regarded as necessary not only to deter traffickers and condemn their wrongdoing, but also to send a clear message that human rights violations are not tolerated (see chapter 7). Consider the following statement by Lord Justice Simon in *R v Connors and others* (2013):

> [S]entences must make clear … that every vulnerable victim of exploitation will be protected by the criminal law, and they must also emphasise that there is no victim, so vulnerable to exploitation, that he or she somehow becomes invisible or unknown to or somehow beyond the protection of the law.

Article 23 of the CoE Anti-Trafficking Convention (2005) and article 4(4) of the EU Trafficking Directive (2011) require the adoption of 'effective, proportionate and dissuasive sanctions', involving deprivation of liberty. The concept of proportionality is relevant here because it is a fundamental tenet of human rights law. In the context of human trafficking, this principle—usually employed to anchor punishment within clear limits (Von Hirsch and Ashworth 2005)—is used to promote longer custodial penalties (OHCHR 2002b, guideline 4.3).

In sum, crime-control measures are widely portrayed as having a rights-protective role. Such characterisation has a clear strategic purpose: it renders criminal measures less controversial and even desirable. By portraying human trafficking as 'a crime with a victim at the centre' (CSJ 2013, 13), the state's law-enforcement machinery designed to contrast it is justified and strengthened.

Human rights in a punitive framework

The 'law enforcement' discourse establishes a second relationship between human rights and penality: rights-oriented measures are generally embedded in a criminal justice paradigm. The UN Trafficking Protocol (2000) lays down various rights for trafficked individuals. However, victims' assistance and protection are mostly ensured by means of criminal proceedings (art. 6). Moreover, while criminalisation provisions are obligatory, states are merely required to 'consider implementing' and 'endeavour to provide' measures for victims—and only 'in appropriate cases and to the extent possible under … domestic law' (art. 6).[3] By the same token, the OSCE Action Plan to Combat Trafficking in Human Being (2003) recommends that states ensure victims' protection 'in the criminal justice system' (sec. III.4) and 'especially during pre-trial investigations and in court proceedings' (sec. V.2.1). In various other documents, victims' redress is correlated to criminalisation and punishment, and at times even included under the same heading: 'Criminalization, punishment and redress' (OHCHR 2002b, 4).

3 Measures for victims were rendered obligatory under the CoE Anti-Trafficking Convention (2005) and the EU Trafficking Directive (2011).

Pulling most of the assistance and protection into the criminal justice orbit has various consequences. First, it transforms crime-control measures into 'human rights enhancing measure[s]' (Home Office 2014, para. 5). Take, for instance, the case of victims' detention, which in some cases is viewed as a way to protect victims from further harm. In the British case of *R (TDT) v Secretary of State for the Home Department* (2018), Lord Justice Underhill observes that trafficked people 'are at high risk of falling back into the control of their traffickers if released from detention'. Therefore, he continues, human rights obligations provide that victims 'should not' be 'released without proper protection against the risk of being re-trafficked'. Moreover, support for victims is made conditional on cooperation with law enforcement. In England and Wales, victims of trafficking are generally granted temporary residence permits and shielded from prosecution insofar as they can support criminal investigations. When this function ceases, they can be returned to their country of origin (*MS v Secretary of State for the Home Department* 2020) or even tried and punished (*R v LM* 2010; *R v L* 2013). In this regard, the 'law enforcement' discourse accepts that trafficked individuals can be prosecuted. Even when non-criminalisation provisions are in place (e.g., Modern Slavery Act 2015, sec. 45), 'the status of a person as a victim of trafficking … does not automatically exempt him or her from criminal liability' (*R (PK (Ghana)) v Secretary of State for the Home Department* 2018). The 'law enforcement' discourse also has a tendency to assess the extent to which victims' rights are protected on the basis of conviction rates (Kara 2011). The (relatively) small number of convictions is usually compared to the much higher number of trafficked people (Jarbussynova 2015, 31; GRETA 2012, 8). The low figures for trafficking-related criminal trials are deployed as evidence that state efforts to fight human trafficking and provide adequate remedies to victims are unsatisfactory (Weatherburn 2016, 188).

In sum, the 'law enforcement' discourse shows interest in human rights insofar as they serve crime-control goals (cf. Chuang 2014, 615). As stated in the background paper of a workshop organised by the UN Global Initiative to Fight Human Trafficking (UN.GIFT) (2008, 2)—and unsurprisingly called *From Protection to Prosecution*:

> Protection and support measures for trafficked victims are not only necessary to respond to the violations of the victims rights, but also to support the law enforcement response to human trafficking.

The 'victims first' discourse

The 'victims first' discourse supports a more 'holistic' approach which aims at safeguarding human rights through a solution encompassing prosecution, prevention and protection ('the three Ps') (Obokata 2006). While the emphasis is primarily on victims' unconditional assistance and support, this discourse does not entirely diverge from the 'law enforcement' discourse and embraces penality as an essential element of human rights protection (Adams 2011, 202–3; OHCHR 2010, 183). The 'victims first' discourse uses human rights as both

the 'shield' and the 'sword' of penality (van den Wyngaert 2006): i) as a 'shield', human rights mitigate penal measures; ii) as a 'sword', criminal law enforces rights-oriented solutions.

Human rights as complementing penality

In the 'victims first' discourse, human rights are construed as tempering and correcting the state's deployment of penality. The *UN Recommended Principles and Guidelines on Human Rights and Human Trafficking* (OHCHR 2002b) set out how human rights can be integrated within prevention and criminal justice strategies (cf. Van Dyke 2019, 55). Penal norms are also retained in the CoE Anti-Trafficking Convention (2005), but they are softened by prioritising '[m]easures to protect and promote the rights of victims, guaranteeing gender equality' (ch. III), and by laying down a non-punishment provision for trafficked individuals (art. 26). The mantra is: 'prosecuting trafficking in persons cases while ensuring respect for the human rights of trafficked victims' (Ezeilo 2012, para. 3). According to the 'victims first' discourse, when trafficking is seen as a crime against public order, not only are victims less likely to receive redress or compensation (Pearson 2002, 38), but they are also treated as tools of law enforcement or deported as illegal migrants (Anti-Slavery International et al. 2003, 7). Conversely, by configuring trafficking as a human rights violation and a crime against the dignity of the person, the 'victims first' discourse supports a 'victim-centred, gender-specific and child-sensitive' criminal law (European Commission 2019). Criminal justice measures are linked to victim support (OHCHR 2010, 222), while ending impunity for traffickers and securing justice for victims become the main purposes of punishment (OHCHR 2014, 17).

The 'victims first' discourse does not advocate for less criminalisation and punishment but for a different kind of criminalisation and punishment (Gallagher 2010, 370). Confronted with the fact that traffickers are rarely arrested, investigated and punished, the discourse deploys state obligations under human rights law to put pressure on governments to mobilise their criminal law more effectively (Obokata 2006, 35). The discourse still supports proactive investigations and prosecutions against traffickers but curbs criminalisation of victims (*VCL and AN v United Kingdom* 2021). Simply put, a human rights approach 'ensure[s] that traffickers, rather than victims, are the ones put behind bars' (Annison 2013, 14). Integrating human rights in crime-control initiatives has another important role: it ensures that penal responses to human trafficking are effective (UN.GIFT 2008; Amnesty International and Anti-Slavery International 2004). As far back as 1991, a Seminar on Action against Trafficking in Women organised by the Council of Europe considered the proposal of providing further victims' support 'to facilitate the denunciation of the traffickers' and 'to make it possible for [trafficked people] to testify in court' (Brussa 1991). Twenty years later, the EU Trafficking Directive (2011) reaffirmed this point, by explaining that the aim of victim protection is both 'to safeguard the human rights of victims' and 'to encourage them to act as witnesses in criminal proceedings' (recital 14). In the words of the Inter-Agency Coordination Group Against Trafficking in Persons (ICAT) (2012, 8):

> [I]n the course of a criminal investigation and prosecution, not only is the protection of victims right in principle but also right in practice as it is not effective to prosecute traffickers without placing the protection and assistance of victims at the heart of the intervention.

Finally, the 'victims first' discourse reads the failures of the penal system in responding to trafficking as problems that exist largely because of insufficient awareness of the phenomenon of trafficking among police and border guards (Trafficking in Women and Girls 2018, para. 30; Annison 2013, 10; Nelken 2010, 485). Training of law-enforcement agents, generally under the auspices of human rights, is perceived as a solution for improving knowledge of trafficking and improving the penal response (UN Trafficking Protocol 2000, art. 10(2); CoE Anti-Trafficking Convention 2005, art. 29(3); OHCHR 2002b, guideline 5). A recent GRETA report (2018, para. 109), for example, states that 'training is being provided to a growing range of professionals to raise their awareness of indicators of human trafficking and to provide them with tools to detect vulnerable persons'. These initiatives rest on the assumption that 'human rights norms and practices can be institutionally transplanted by way of carefully crafted training efforts' (Musto 2010, 390). In other words, the 'victims first' discourse deploys human rights principles as educational tools to transform 'a previously unsympathetic police force' (Musto 2010, 390) into one that is able to detect victims of trafficking 'accurately and with sensitivity' (Ezeilo 2012, para. 34).

In conclusion, the 'victims first' discourse aims to demonstrate that 'the protection of the rights of trafficked people' and 'successful prosecution' are 'by no means contradictory' but mutually reinforcing (Jarbussynova 2015, 31; see also M. Kaye 2003, 10). A human rights approach is regarded as 'a major precondition for effective investigation and prosecution' (Jarbussynova 2015, 12) and as a way to correct the harshness of criminal law. Far from being separated from crime-control measures, human rights are framed as 'intrinsic' to the process of prosecuting and punishing traffickers (Pearson 2002, 13). The aim is to align the goals of penality with the interests and concerns of the victims, and, in this way, end trafficking (cf. Boukli 2012, 212–13).

Penality as complementing human rights

In the 'victims first' discourse, penality is just one element of a broader set of instruments to be applied in support of trafficked people (*SM v Croatia* 2020, para. 306; *Rantsev v Cyprus and Russia* 2010, para. 285; Rijken and de Volder 2009, 79). Although the state's function does not end at criminalising the act of trafficking (Pati 2011, 134; Piotrowicz 2012, 195), penal measures still have an important role in the context of rights-oriented solutions (McQuade 2019, 40; Mantouvalou 2018, 1018). According to the OHCHR (2010, 51):

> Prioritizing human rights does not mean that other objectives or approaches are to be considered unimportant or invalid. For example, States remain entitled to develop strong criminal justice responses to trafficking.

The 'victims first' discourse maintains that, by combining law enforcement with 'a rights-based, victim-centred approach' (L. J. Mann 2011, 13), penality becomes acceptable and even desirable, while human rights are given weight and substance. While the 'law enforcement' discourse shows interest in human rights insofar as they serve crime-control goals, for the 'victims first' discourse the opposite is true. Penal measures are welcome to the extent they comply with international human rights standards. The *UN Recommended Principles and Guidelines on Human Rights and Human Trafficking* (OHCHR 2002b) spell out the human rights standards applicable, in the contexts of criminal proceedings, to both trafficked people and those suspected of trafficking. The 'victims first' discourse also demands that 'trafficking cases are prosecuted and adjudicated fairly' and 'in accordance with international human rights' (OHCHR 2010, 201). The human rights of suspects and offenders are to be 'respected and protected' (Gallagher 2010, 406), whilst too draconian sanctions avoided (OHCHR 2010, 213).

Despite acknowledging the limits of penality, Janie Chuang (2014, 641) argues that, 'when pursed in a victim-centred, rights-protective manner, criminal justice interventions offer much needed accountability and restitution for egregious wrongs'. This statement summarises another function that the 'victims first' discourse assigns to penality, that is to enable states to use their methods of enforcement to vindicate human rights violations. The discourse in fact acknowledges 'the inherent political, legal, and structural weaknesses of the international human rights system' (Gallagher 2009, 792), which alone has proven itself 'incapable of taking serious steps towards eliminating trafficking' (Gallagher 2009, 847). First, the 'victims first' discourse recognises that trafficking would never have received the same level of attention from governments had it only stayed within the realms of the human rights system (Chuang 2014, 641). Second, because human rights law is designed to hold states (rather than individuals) accountable, the 'victims first' discourse concedes that this framework is limited in addressing the harm done by traffickers (Knust and Lingenfelter 2020, 1768). Third, the discourse regards the human rights system as lacking proper enforcement mechanisms to uphold rights violations (Obokata 2006, 36). Therefore, it accepts that the deployment of penality can help compensate these weaknesses. The government's willingness to use criminal law is seen as a demonstration of a serious commitment to dealing with trafficking (cf. Chacón 2010, 1626). Crime-control measures are regarded as tools that communicate that trafficking is a serious human *wrong* and, therefore, morally unacceptable (see chapter 7; Mantouvalou 2018, 1019). Moreover, the prohibition of trafficking becomes directly enforceable at the domestic and international levels with the inclusion of individual criminal responsibility (Gallagher 2009, 799).

A rights-oriented penality is also seen as a means of redressing the unequal distributions of power that underlie trafficking. The state's penal machinery compensates the vulnerability of trafficked individuals and 'change the equation of fear and power': 'when would-be traffickers are afraid of the consequences of their actions, potential victims start to become

less vulnerable' (CSJ 2013, 150). The punitive machine—subject to human rights considerations—is also discursively and emotionally turned against the powerful (cf. Aviram 2020), such as sex workers' clients and exploiters, public officials and multinational corporations which are implicated in trafficking. A rights-focused penality is said to pierce the shield of privilege and immunity of these subjects and upholds equality before the law (Amnesty International and Anti-Slavery International 2004, 10). By seeing mighty individuals convicted and punished under the criminal law, trafficked people are deemed to gain some sort of reparation (*Siliadin v France* 2005, para. 144).

In sum, the 'victims first' discourse sees penality as a necessary component of a human rights response to trafficking (Obokata 2006, 151). The underlying logic is that human rights regulate the states to ensure they use their penal action to respond to and acknowledge the wrong of trafficking, since human rights in themselves provide only for a limited enforcement against trafficking.

Counter-discourses

Counter-discourses place themselves in a position of criticism vis-à-vis the relations between human rights and penality exposed so far. The 'incompatibility' discourse contends that penal policies are unsuited to the nature of trafficking and inevitability damage the rights of trafficked people (cf. Gallagher 2010, 431). The 'transformative justice' discourse goes even further. It argues that both human rights and penality are incapable of addressing the root causes of trafficking and seeks to advance a different, more transformative, approach.

The 'incompatibility' discourse

According to the 'incompatibility' discourse, states generally address trafficking from a crime control, rather than a human rights, perspective (Giammarinaro 2020; Anti-Slavery International 2005, 11; Dottridge 2007, 1; Skrivankova 2007, 204). The UN Trafficking Protocol (2000), which was developed within a crime-prevention framework, is deemed to foster a 'law-and-order approach to trafficking' around the globe (Ertürk 2009, para. 41). The 'incompatibility' discourse criticises immigration policies 'that restrict free movement', the 'criminalization of work in the sex sector' and the 'detention and deportation' of trafficked people (Ertürk 2009, para. 40). Penality, in particular, is viewed as a 'blunt instrument' to address the complex social issue of trafficking (J. Kaye, Millar, and O'Doherty 2020, 616). Not only are penal responses deemed to be inadequate to 'cope with the systemic nature of exploitation' (Giammarinaro 2020, para. 32), but they overshadow 'rights protections' (GAATW 2011, 82). Prosecuting and punishing those who traffic or buy victims' services neither appear to 'offer protection to the victims, nor ensure that their human rights are respected' (Skrivankova 2007, 224). Moreover, according to the 'incompatibility' discourse, when anti-trafficking legislation is centred on criminal prosecution, it may conflict with a rights-based, victim-centred response and 'disproportionately and systematically impact the

poor and vulnerable' (Leigh 2015, 35). Political pressure to prosecute traffickers may also 'lead to over-enforcement, shortcuts and unacceptable trade-offs' (Ezeilo 2012, para. 101).

For the 'incompatibility' discourse, 'enforcing the law and upholding human rights' do not 'amount to the same thing' (Dottridge 2007, 2). On the contrary, the discourse insists on going beyond 'law and order' (Ertürk 2009, 39) and 'shift the working paradigm from one of criminal sanction to human rights promotion' (Skrobanek 2000, 2). The discourse calls for 'action to address the wider, more systemic processes or root causes that contribute to trafficking in persons, such as inequality, restrictive immigration policies, and unfair labour conditions' (Giammarinaro 2015, para. 20). Strategies aimed at empowering trafficked individuals and sex workers are regarded as the only ways to promote the enjoyment of human rights (Dottridge 2007, 21). This 'authentic' human rights approach contrasts with the current models of protection offered to trafficked persons, which—it is said—'too often prioritise the needs of law enforcement over the rights of trafficked persons' (Pearson 2002, 35). Such strategies are accused of 'treating the symptoms rather than the cause of the problem' (M. Kaye 2003, 10), as well as unleashing a border control agenda 'in the name of human rights' (Sanghera 2007, viii; see also Hathaway 2008, 26). As Mike Dottridge (2007, 16) puts it:

> Governments and others routinely refer to their anti-trafficking work as 'rights based' or based on a 'human rights approach' when … it is clear that their policies and approaches do not place respect for the human rights of trafficked persons at the centre.

The 'transformative justice' discourse

The 'transformative justice' discourse does not limit its critique to penality but extends it to human rights-based responses to trafficking. Unlike the 'incompatibility' discourse, it does not view the dominant approach as only limited to criminalisation and anti-immigration, but rather as a combination of a transnational crime framework with a human rights-oriented approach (Shamir 2012, 93–94). Yet the latter approach, far from correcting the limits of penality, is considered 'part of the problem' (cf. Kennedy 2002).

The 'transformative justice' discourse is troubled that human rights language is deployed in such a way that disempowers the very same individuals anti-trafficking initiatives aim to help, whenever trafficked people are cast as vulnerable victims devoid of agency (Kapur 2018, 99–100). By treating them as *victims* of human rights violations, rights-based responses assign the role of main agent of change to the state, and in particular to its law-enforcement apparatus (Sanghera 2007, ix). Human rights are also criticised for failing 'to deal with the economic, social, and legal conditions' that create people's exploitation (Shamir 2012, 80). Despite the rhetorical power of the human rights framework—Hila Shamir (2012, 94) observes—the latter 'helps few and, even for those few, to a doubtful extent'. The 'transformative justice' discourse further notes that human rights promote an individualistic approach whereby

social issues can be solved by tackling single acts of abuse and violence (cf. Kotiswaran 2019a, 70). In this way, trafficking is treated 'as an exceptional crime' (Shamir 2012, 129) that can only be fought through effective law enforcement (J. Kaye, Millar, and O'Doherty 2020). Accordingly, any attempt to moderate penality through an insistence on victims' rights is said to reinforce, rather than challenge, 'the use of criminal justice frameworks' to address trafficking and sexual exploitation (Fudge 2015, 20).

For these reasons, the 'transformative justice' discourse seeks to advance new perspectives which would go beyond the language of human rights (Kapur 2018, chap. 3) and directly address the vulnerabilities of an unjust global economic order. Various proposals have been made, such as a labour (Shamir 2012), a development (Kotiswaran 2019b) and a postcolonial approach (Sanghera 2007, ix). These responses to trafficking are presented as 'transformative' and better suited for addressing the structural conditions of exploitation. They also tend to be more collective-oriented and to focus more on the empowerment of those subjected to the trafficking cycle (see, e.g., International Committee on the Rights of Sex Workers in Europe 2021a, 13).

4. Anti-trafficking practice

The form that anti-trafficking endeavours have taken in the past three decades has not been shaped by robust empirical studies but mainly by a discursive terrain made up of assumptions about sex, exploitation, migration, (im)morality, crime and human rights (Kotiswaran 2021, 46). This section explores how anti-trafficking discourses have materialised in concrete actions against trafficking. Of particular interest is how the relations that are discursively established between human rights and penality have been put into practice as part of the solutions to eradicate trafficking in human beings.

Dominant anti-trafficking practice

Anti-trafficking policy and practice are the product of the struggle and contestation between the competing discourses, with multiple goals and positions advanced at the same time. However, in this struggle not all discourses are instantiated in concrete anti-trafficking endeavours. The 'law enforcement' and the 'victims first' discourses establish between them an 'agonistic' engagement, which presupposes one another's legitimacy. Conversely, they are in an 'antagonistic' relationship with the counter-discourses: each group treats the other as presumptively illegitimate (Mouffe 2013, 7). The dominant discourses have different aims and remain in contestation, but they accept and strengthen one another. The reason is because they are grounded on the same premises, namely the necessity of state intervention and the construction of penality as a fundamental tenet of human rights. In the 'law enforcement' discourse, appeals to human rights are instrumentalised to justify broader agendas of criminalisation. In the 'victims first' discourse, rights protection is the primary goal but penality is required for it to be effective. Yet both discourses frame human rights as

dependent upon the state's control mechanisms and coercive action, which in turn are regarded as necessary conditions to achieve victims' rights and protection. As much as it is useful to try to disentangle the two dominant discourses, when they are translated into practice, they sustain each other and become hegemonic. As a result, their reiteration in different contexts and by different actors contributes to generating and perpetuating anti-trafficking endeavours that are imbued with a close connection between human rights and penality.

The call for action to address human trafficking is primarily accommodated by passing new statutes or adopting new treaties (OHCHR 2002b, guideline 4; CSJ 2013).[4] Far from being the result of a single mind and politics, anti-trafficking laws generally represent the combination of the 'law enforcement' and the 'victims first' discourses. This is true for the UN Trafficking Protocol (2000) and the CoE Anti-Trafficking Convention (2005), both of which originated from a debate between state representatives, troubled by organised crime and mass migration, and human rights activists, interested in protecting and securing justice for trafficked individuals (Ditmore and Wijers 2003; Fudge and Strauss 2017). Similarly, the UK Modern Slavery Act (2015) resulted from the lobbying of a wide range of human rights actors—from British and international NGOs to monitoring bodies like GRETA—on the British government to establish a new anti-trafficking law (Van Dyke 2019, 66–67). The UK had already introduced the various offences of 'slavery, servitude, and forced or compulsory labour' in section 71 of the Coroners and Justice Act (2009). However, as already mentioned in chapter 2, some decisions of the ECtHR (*Siliadin v France* 2005; *Rantsev v Cyprus and Russia* 2010; *CN v United Kingdom* 2012), together with criticism of the UK policy and its implementation, fuelled interest in the promotion of a more comprehensive act (Haynes 2016, 37), which would 'equip the United Kingdom to fight modern slavery' (CSJ 2013). The outcome—the Modern Slavery Act (2015)—is the perfect combination of the two discourses (Pinto 2020). It provides penal measures along with provisions for the protection of trafficked individuals, including a new defence for victims who commit an offence under compulsion due to exploitation (sec. 45).

Demands for stronger state action have not only contributed to the enactment of new treaties and statutes but also resulted in criminal justice reforms, with the institution of specialised task forces and implementation of police trainings to investigate the crime of trafficking (Dottridge 2021). These developments have led to an increase in prosecutions and convictions of traffickers[5] but, simultaneously, to heightened police control for the most

4 Between 2003 and 2020, 136 countries passed new laws criminalising human trafficking (UNODC 2016, 11; 2020, 61). For Quirk (2021), '[t]his constitutes one of the most intense periods of legislative activity in the history of human rights'.

5 According to the UNODC (2020, 63), over the years, 'the conviction rate for trafficking in persons has increased in parallel to a broader adoption of the offence of trafficking in persons in national legislations. Globally, the number of persons convicted per population (conviction rate) has almost tripled since the year 2003.'

marginalised, including sex workers and migrants (cf. Bernstein 2018, 30; Farmer 2019, 30). Emphasis on proactive policing as the solution to human trafficking does not only come from the 'law enforcement' discourse (EU Trafficking Directive 2011, recital 15). The 'victims first' discourse also supports increasing use of covert surveillance, new technologies and hi-tech forensic tools (Ezeilo 2012, para. 97), as well as the creation of police task forces 'specialised in the fight against trafficking and the protection of victims' (CoE Anti-Trafficking Convention 2005, art. 29(1)). In England and Wales, the police response was consolidated in November 2016, when the Home Secretary approved an investment of £8.5 million for the Modern Slavery Police Transformation Programme (NPCC 2019, 8). In the words of a Senior Policy Advisor of the Crown Prosecution Service, this programme 'has worked to drive up policing activity' and led to 'more effective intelligence development and improving investigative case work' (NPCC 2019, 8). The critique that interception of communications and intensification of controls and intelligence-led investigations would result in further surveillance and criminalisation of the already over-policed is generally overlooked. '[T]he imagined victimization, rescue, and ultimately "empowerment"' of trafficked victims' has in fact moralised anti-trafficking surveillance and made it human rights-compliant (Bernstein 2018, 145–46). In this way, human rights and surveillance have been co-constitutive. The latter has (at least rhetorically) provided better victim protection while human rights have served to moralise the extension of new modes of policing and legitimise these practices as human rights-oriented.

In this context, policing and other penal interventions are no longer (merely) tools of crime control but also forms of social security for trafficked individuals. Two examples illustrate this point. First, anti-trafficking strategies are increasingly promoted through 'penal welfare', namely the practice of states providing social benefits to trafficked people through penal institutions (Gruber, Cohen, and Mogulescu 2016). In the words of Loïc Wacquant (2001, 402, using a metaphor developed by Bourdieu 1998), '"the left hand" of the state, symbolised by education, public health care, social security, social assistance and social housing' has been supplemented 'by regulation through its "right hand", that is, the police, courts and prison system'. As illustrated by a report of the UN Special Rapporteur on trafficking in persons (Ezeilo 2012, paras. 60–64), various countries have created police agencies with the two-fold mandate of law enforcement and providing victims with assistance. They secure convictions and, at the same time, 'rehabilitate' trafficked people (Ezeilo 2012, para. 61). Second, anti-trafficking efforts are often carried out through forms of 'responsibilisation strategy', namely partnerships between civil society and police 'in order to help reduce criminal opportunities and enhance crime control' (Ward and Fouladvand 2018, 140, quoting Garland 2001, 126). As explained by the UK Independent Anti-Slavery Commissioner (2017, 29), 'an emphasis on partnerships' is supposed to 'deliver concrete results through increased identification of victims, better outcomes for victims and a high rate of successful prosecutions'. NGOs and individual citizens that are involved in these collaborations do not perceive their role as

punitive in nature, but rather as contributing to victims' support (cf. Amnesty International 2008, 33; Foundation Against Trafficking in Women, International Human Rights Law Group, and GAATW 1999, 19).

The construction of trafficking as an issue of human rights and penality not only allows the enactment of particular politics but also constrains the prospect of different political actions (Aradau 2008, 15). As the 'law enforcement' and the 'victims first' discourses have been widely taken up, ideas incompatible with their parameters have been set aside and dropped out of mainstream anti-trafficking initiatives. Casting the state's legal action as the solution justifies substantial allocation of resources to penal institutions and increased power to state officials (cf. Home Office 2019, 43; OHCHR 2010, 198). It also diverts attention from exploitative practices that the state's law and policy in fact enable, including criminalisation of sex work, policing of borders, unregulated labour markets and cuts to social protection programmes, such as public housing and welfare (cf. Chuang 2010, 1694).[6] Moreover, positioning additional state regulation as the principal antidote discourages seeking (and funding) other non-state-led responses, including community interventions and long-term organising plans (International Committee on the Rights of Sex Workers in Europe 2021a).[7] It also promotes top-down initiatives which exclude engagement with the very marginalised populations anti-trafficking policies are supposed to benefit (cf. Broad and Turnbull 2019, 12).

In conclusion, though apparently in opposition, the 'law enforcement' and the 'victims first' discourses become entangled and bolster each other in practice. While the state is designated as the protector of both national security and victims' human rights, its crime controlling arm is reasserted as the solution to human trafficking. In this context, human rights have not (only) been co-opted, but in fact have been integral ingredients in demanding the state's coercive intervention (Bernstein 2018, 66). Either constructed as a language of moralisation of state power or made dependent on it, human rights have increasingly served to facilitate, rather than counter, the strengthening of the criminal justice system (cf. Musto 2010, 387).

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6 In the UK, the Modern Slavery Act (2015) was debated simultaneously with the Immigration Act (2014), which criminalises illegal working and prevents illegal migrants from accessing public and private services. The British government could claim that anti-trafficking legislation sufficiently protected migrant workers against extreme abuses such that they did not need labour and migration rights, which were in fact limited or removed by the Immigration Act (Fudge and Strauss 2017, 526).

7 The EU Strategy on Combating Trafficking in Human Beings (2021–2025), which mostly reproduce dominant anti-trafficking discourses, nonetheless invites states to '[e]nable funding for community-led and peer-mentoring empowerment programmes' (European Commission 2021, 17). According to the International Committee on the Rights of Sex Workers in Europe (2021a, 14), it is the first time that European institutions have recognised the role of community-led and peer-support programmes in the anti-trafficking framework.

Counter-discourses

Counter-discourses argue that anti-trafficking legislation and related measures have had little to no impact on countering human trafficking. In many cases, the 'collateral damage' of anti-trafficking initiatives is said to be even greater than their success (GAATW 2007). According to alternative voices, human trafficking is not (merely and only) what mainstream discourses say it is, namely an organised crime or a human rights abuse. Rather, human trafficking is a multi-faceted social issue (involving questions of migration, labour, race, gender, sexuality and political economy) that cannot be addressed (merely) by means of criminalisation and rights protection (cf. Nelken 2010, 490). But is the critique of counter-discourses ever translated into practice? While at the local level there are some examples in evidence, such as community-based initiatives to prevent sex trafficking (GAATW 2018; International Committee on the Rights of Sex Workers in Europe 2021a), counter-discourses remain generally unheard at the national and international levels (Gerasimov 2019, 8).

Counter-discourses advance a powerful critique of state coercive intervention in the matter of trafficking, but they tend to remain a dead letter in terms of concrete actions to eradicate trafficking. States and international organisations rhetorically preach a human rights approach but keep neglecting what the 'incompatibility' discourse considers 'the true human rights abuses' (Leigh 2015, 33). Transformative responses are praised by many academics but are rarely put into practice. As a result, human rights are not dislodged from the politics of crime control and alternative models of justice are not implemented. Human rights remain as interwoven as ever with penal agendas (Bernstein 2012, 251). The reasons why counter-discourses have only a marginal role in practice are varied. Not only are alternative voices fewer in number than hegemonic ones, but their antagonistic and critical—rather than agonistic and normative—approach reduces their ability (and, at times, willingness) to influence policymaking.[8] They are also perceived as too radical or at odds with states' political and socio-economics interests. Moreover, as observed by Joel Quirk (2021), the fact that critical voices are formulated as part of an antagonistic stance towards mainstream approaches renders the current anti-trafficking framework the foundational starting point of any critique and alternative vision. In this way, counter-discourses tend to operate within a symbiotic relationship to dominant discourses and practices, which, in turn, limits the ability of critical voices to generate authentic change.

8 The anti-trafficking law and policy advisor Marika McAdam (2021) has highlighted this point in a recent blogpost: 'Midst all the counter-trafficking counter-narratives, it is increasingly difficult to discern what the actual narrative is'. While endorsing counter-discourses' argument that 'the criminal justice approach has so far largely failed', McAdam ultimately dismisses this critique by assuming that penality remains necessary and its failures are due to its inadequate implementation.

5. Conclusion

Drawing on the findings of discourse analysis, this chapter has highlighted how the relationship between human rights and penality develops within anti-trafficking discourses. The scope of the investigation has been limited to exploring present-day discourses. Two dominant discourses and two alternative voices have been retraced along three analytical dimensions: objects, subject positions and themes.

The 'law enforcement' discourse frames trafficking as a form of organised crime and a threat to the state, which may generate human rights abuses. This discourse maintains a rigid separation between victims (helpless and silenced) and criminals (organised and manipulative). These constructions enable penality to receive justification from human rights, while rights-oriented measures are incorporated in a criminal justice paradigm. The 'victims first' discourse views trafficking primarily as a human rights issue and subordinately as a crime against the person. The subjects are vulnerable victims and deviant individuals who inflict violence on the victims. Whilst emphasising victims' support, the 'victims first' discourse embraces penality as an instrument of rights protection. Criminal law—a 'humanised' criminal law that respects victims' rights—is no longer for protecting the state's interest but for promoting human rights, saving victims, providing justice for the most vulnerable and apportioning blame to the powerful. Counter-discourses challenge these dominant visions. For them, trafficked people are migrant workers whose sexual or labour exploitation is embedded in the structures of global capitalism. The 'incompatibility' discourse treats trafficking as a complex human rights issue which should not be addressed through penal tools, while the 'transformative justice' discourse aims to go beyond both the law-enforcement and the human rights frameworks.

The articulation and reiteration of these discourses have fostered anti-trafficking endeavours that mirror specific relations between human rights and penality. Dominant discourses have constructed human rights as sources of penality, while alternative voices have not succeeded in dismantling this relationship. In initiatives to eradicate trafficking, human rights are constructed to align with the state's penal action, which in turn becomes a necessary element for the fulfilment of rights and the protection of morality—be it the dignity of the victim or the social-moral order of the state. This chapter has not addressed the question of how the contemporary discursive terrain around trafficking has come about. Yet, if we want to understand how human rights and penality have become interwoven, an investigation of discourses throughout their historical development becomes essential. What is needed—and is addressed in the following chapter—is a 'history of the present' (Foucault 1991a, 30–31) of anti-trafficking discourses. The choice of starting from the present and then moving backwards aims to put the focus on the contemporary discourses of this chapter and to understand how they have emerged out of previous discourses and representations.

4

Punishing vice and protecting virtue

In 1877, a group of people met in Geneva to discuss the issue of state regulation of prostitution and devise strategies leading to its abolition. It was the first International Congress of the British, Continental and General Federation for the Abolition of Government Regulation of Prostitution. The English feminist Josephine E. Butler (1910, 152), who organised and was present at the Congress, recalled the event as follows:

> [T]he equal rights and responsibilities of the weaker half of humanity … were solemnly and publicly acknowledged in an assembly of over 500 male and female delegates representing the most advanced minds of Europe and the United States.

During the Congress, various resolutions were passed. The delegates condemned all systems of policing aimed at regulating prostitution. They also decried how the law, opinion and customs of society did not sufficiently respect the economic interests, rights and independence of women. Among the various solutions proposed, they demanded that the state continue punishing 'incitement to debauchery' and 'treat procurers with special severity' (J. E. Butler 1910, 173).

These resolutions resemble some of the themes of contemporary anti-trafficking discourses. They established similar relations between rights protection and the need for penal measures. As with the 'victims first' discourse I have exposed in chapter 3, the delegates criticised penality when it affected the freedom of vulnerable individuals, but they still invoked the state's penal power as a means of protection against the true culprits: the procurers. Yet these resolutions differed in two main ways from contemporary discourses. The focus was not on human trafficking, as we conceive it today, but on 'the state regulation of vice', namely the state control and supervision of prostitution. Moreover, 'the equal rights and responsibilities of the weaker half of humanity' mentioned by Butler do not exactly correspond to the notion of human rights that we currently have. The Congress in Geneva anticipated some contemporary discursive formations, but its underlying discourse did not reach us untouched.

In this chapter, I trace a history of dominant contemporary anti-trafficking discourses (the 'law enforcement' and the 'victims first' discourses) exposed in chapter 3, in an effort to understand how today's alignment of human rights with the state's penal action has come about. The roots and antecedents of these discourses are historically situated between 1877, when the Congress in Geneva was held, and the early 1990s, when human trafficking became the crucial matter of international and national debate that it is today. During this time span, I identify five historical anti-trafficking discourses that emerged around various legal events and that contributed to the formation of contemporary anti-trafficking discourses. ***The 'repeal' discourse*** was central when the British Parliament adopted the Criminal Law (Amendment) Act (1885), which can be considered the first modern anti-trafficking legislation. ***The 'social-purity' discourse*** underpinned the approval in 1904 and 1910 of the first international treaties against the 'white slave traffic', namely the trade in female prostitutes. In 1921 and 1933, two further international instruments emerged under the aegis of the League of Nations (LoN) and the influence of ***the 'social-hygiene' discourse***. In 1949, the United Nations (UN) produced the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1950), which became a point of reference for ***the 'penal-welfare' discourse***. Finally, ***the 'sexual slavery' discourse*** is closely linked to the anti-trafficking provision (art. 6) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979.

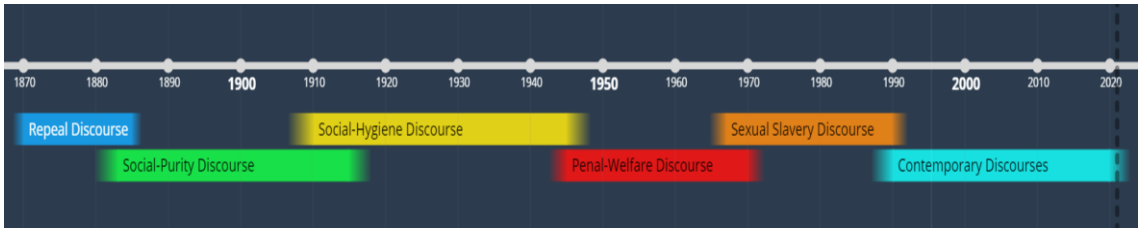

Figure 4: Timeline of anti-trafficking discourses.

These legal events are generally regarded as at the origin of the current legal framework on human trafficking (Reanda 1991; A. Edwards 2007; Gallagher 2010; Siller 2017; Allain 2017b; 2017a; Lammasniemi 2020; Farmer 2019).[1] The legal scholarship mentions them to show how the subject-matter of human trafficking has its roots in the trade in prostitution: what is today termed sex trafficking. This scholarship usually narrates the history of human trafficking as a progressive story of 'inclusion' towards its 'logical conclusion' (Allain 2017b,

1 The chapter does not consider the history of the legal prohibition of slavery. While today human trafficking and slavery are often conflated, their genealogies are separate. As Anne Gallagher (2010, 55) rightly puts it, 'the raft of international agreements on slavery, which were concluded in the latter part of the nineteenth century and the first decades of the twentieth century, did not purport and were never considered to cover the practices that are now associated with trafficking, including sexual exploitation, forced labor, debt bondage, and child labor.'

9):[2] from a focus exclusively on prostitution of women and children, human trafficking (or 'traffic' as it was called until the mid-1990s) was extended first to men and then, with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN Trafficking Protocol) (2000), to all types of exploitation including forms of movement, transportation or harbouring (Obokata 2006; Pati 2011). Historians of prostitution, of the women's movement and of sexuality have also discussed widely the context surrounding the legal events I have mentioned. A number of works have explored the international or transnational dimensions of the campaigns against the traffic in women and children (Rodríguez García 2012; Legg 2012; Knepper 2016). Some scholars approach the late nineteenth- and early twentieth-century international movements against the traffic as a key step towards women's mobilisation and emancipation (Metzger 2007; Gorman 2007). Others provide a more negative account or highlight the contradictions of these first anti-trafficking campaigns (Limoncelli 2010; Pliley 2010). Further work has focused on how the discourse of 'white slave traffic' reproduced images of women involved in prostitution as passive, innocent and racially white victims (Attwood 2015; 2016; 2021; Laite 2012; 2017). This scholarship has argued that the anti-trafficking legal regime designed to protect such victims became in fact a way to regulate female and non-white sexuality (Walkowitz 1980; 1992; Irwin 1996; Doezema 2010). Notwithstanding these works (some of which have been pivotal for this study), there has been no systematic analysis of how the discourses underlying the aforementioned events have shaped current debates about human rights and penality in the context of trafficking.

As we have seen in chapter 3, dominant anti-trafficking discourses accept as uncontroversial that trafficking is a matter for both human rights and penality. By problematising this premise, this chapter chronicles the steps that have led to penal action becoming a necessary component of rights-based initiatives against trafficking and to criminal governance being framed as a crucial tenet of human rights. Furthermore, it shows how the mutual relation between rights and penality, which today's dominant discourses articulate and reiterate, was not an inevitable outcome of anti-trafficking endeavours of the past. While certain aspects of the contemporary discourses were taking shape, other elements incompatible or in contrast with them were sidelined and forgotten. The unambiguous critique of the police that, for instance, was voiced in the 1877 Congress has given way to a more optimistic approach towards policing, seen as a necessary component of rights protection.

The contribution of this chapter to the overarching arguments of the thesis is twofold. It offers a first illustration of the 'acceleration' of human rights towards penality and elucidates its conditions of possibility. Specifically, the chapter demonstrates that the discursive alignment of human rights and crime control that characterises today's anti-trafficking regime

2 For a critique of the standard linear narrative of anti-trafficking legal history, see Askola (2021) ('the history of anti-trafficking … is full of contestations between groups of activists, civil society associations … and states over sexuality, morality, work and migration' (152)).

stems from a tight interconnection between moral claims and penal action, which has characterised anti-trafficking interventions since their inception. Nowadays, it is not merely a fight against vice and sexual excess but another moral language that increasingly sustains, and 'accelerates', the penalisation of human trafficking: human rights. While in the 'victims first' discourse human rights have replaced more nationalistic and religious conceptions of vice and virtue, they still justify a morality-driven penality against trafficking. In the 'law enforcement' discourse, on the other hand, human rights are deployed to give a moral justification to old penal policies aimed at anti-immigration or anti-prostitution. Ultimately, the 'law enforcement' and the 'victims first' discourses emerge as contemporary moments in a much longer history: the complex interweaving of rights, protection and morality with the surveillance, policing and criminalisation of trafficking. Today's knowledge about human rights and penality in relation to trafficking brings with them the complexities of such a past: the tension between protection and punishment; social and moral anxieties about sexuality and deviance; and regimes of control and discipline that are both humanitarian and punitive.

In order to present these arguments, the chapter proceeds as follows. Sections 1–5 analyse each of the historical anti-trafficking discourses, by focusing on their objects, subject positions and themes. Section 6 highlights the correlations between historical and contemporary discourses, as well as the role that human rights play in preserving a morality-driven penality.

1. The 'repeal' discourse

The British Parliament enacted the Criminal Law (Amendment) Act in 1885. Commonly known as the law that was used to imprison Oscar Wilde,[3] this statute also constitutes the first anti-trafficking legislation. The Act sought to make 'provision for the Protection of Women and Girls' (preamble). It criminalised international and domestic trafficking, defined as the procuring of a woman or girl to either 'leave' the United Kingdom (UK), 'with intent that she may become an inmate of a brothel elsewhere' or to 'leave her usual place of abode … (such place not being a brothel), with intent that she may … become an inmate of a brothel within or without the Queen's dominions' (secs. 2(3)–(4)).

The 1885 Act can be correlated to the first anti-trafficking discourse, which in just a few years had made the issue of procuring young women and selling them into prostitution a major national concern. This discourse, which I term the 'repeal' discourse, initially arose out of the campaign for the repeal of the Contagious Diseases Acts (1864; 1866; 1869). These Acts regulated prostitution by entrusting undercover policemen with powers to identify and register women as 'common prostitutes', to force them to undergo internal examinations and to intern in medical prisons those found suffering from venereal disease. Between 1870 and

3 Section 11 criminalised indecent acts between consenting male adults, thus forming the basis of prosecutions against male homosexuals for the following eighty years.

1886, when the Acts were eventually repealed, a wide public campaign, led by Butler and other suffragists, was mobilised to abolish state regulation of prostitution. The campaigners aimed not only to *repeal* the legislation in place but also to do away with the official recognition of double standards of morality, whereby women were blamed and victimised for men's vice (Walkowitz 1980). In the early 1880s, the 'repeal movement' sought to reinforce its position by arguing that regulated prostitution transformed women into sex slaves and stimulated a 'white slave traffic', particularly to legalised brothels in Brussels. Trafficking was said to be 'an inevitable and necessary accompaniment of the establishment of licenced houses of ill-fame under government patronage all over the world' (J. E. Butler 1888, 262). Young British women were induced to go abroad under promise of obtaining employment but, on their arrival, they were registered as prostitutes and forced to work accordingly (Snagge 1881). In the following years, the repeal movement stimulated increasing public interest around the new issue of trafficking. The campaigners urged action against 'white slavery' and invoked measures to 'make it impossible' for any British girl to 'be deprived of her liberty by fraud or force, and to be kept [abroad], in bondage for the vilest of purposes' (London Committee for the Exposure and Suppression of the Traffic in English Girls 1881, 33). As a result of such public pressure, a House of Lords Select Committee (1882) conducted an investigation and recommended changes to the law. The Criminal Law (Amendment) Bill was enacted in 1885. This section explores the discourse that underpinned the adoption of the first anti-trafficking legislation. As we shall see, some of the elements and contradictions of contemporary discourses were already present.

Table 6: The 'repeal' discourse.

Objects	Subject positions	Themes
Trafficking = • state-regulated prostitution = white slavery • crime against the virtue of the victim	**Victim** = • white slave, helpless virgin • victim of class and sex discrimination **Criminal** = • regulationist states; and • procurers	• Morality used to reorient penality away from prostitutes and towards procurers • Penality used to protect young women from moral degradation

Formations of objects

The 'repeal' discourse defined trafficking as 'white slavery'. Yet, this term was not merely employed for the trade in prostitution. It was also what repeal activists called regulated prostitution: a 'consecration of police despotism over the weaker sex—the protection of a white slave-trade—in a word, the organisation of female slavery' (Amie Humbert quoted in J. E. Butler 1910, 98). In this way, the 'repeal' discourse could present the campaigns against both state regulation of prostitution and trafficking as part of the same abolitionist campaign that a half-century before had successfully put an end to the Atlantic Slave Trade. In an 1870 letter to Butler, the writer Victor Hugo (quoted in J. E. Butler 1910, 13) wrote:

> The slavery of black women is abolished in America, but the slavery of white women continues in Europe; and laws are still made by men in order to tyrannise over women.

In comparing the 'evil' of 'negro slavery' with 'white slavery', the 'repeal' discourse often placed higher value on white slaves' sufferings (Irwin 1996). The publisher and repealer Alfred Dyer wrote that exploitation of English girls was 'infinitely more cruel and revolting than negro servitude' because it was done 'not for labour but for lust' and was directed at 'the young and helpless of one sex only' (Dyer 1882, 6). As is often the case with contemporary discourses, the 'repeal' discourse labelled trafficking as slavery to express the moral repugnance of the phenomenon (Knepper 2010, 98). 'White slavery' was a demoralising and dehumanising practice which not only deprived 'a virtuous maiden' of her freedom but especially transformed her 'into an animal, who returns like a dog to its vomit' (Dyer 1882, 32).

Trafficking was also conceived as a crime '*known and not avenged*' and an offence 'against childhood' (J. E. Butler 1881). The frame of crime was important because repeal campaigners generally opposed state interference with the individual private sphere. Framing trafficking as a moral wrong was not enough: they needed to show that they were not requesting 'police interference with the liberty of vice' but that they were attacking 'crime' (Stead 1885a, 2). Nonetheless, trafficking was said to 'spring from vice' (Stead 1885a, 2). While mere 'vice' appeared as a *private* matter, the wrong of trafficking was deemed to be so serious and self-evident that it had to be acknowledged *publicly* through criminalisation. In other words, and similarly to the contemporary 'victims first' discourse, the 'repeal' discourse used the label 'crime' to highlight the magnitude of the (moral) harm and provide further victim protection.

Formations of subject positions

The construction of the victim within the 'repeal' discourse served to oppose the then dominant medical discourse, which aimed to protect the army—and, in turn, the nation—from being dangerously impaired by venereal diseases (Walkowitz 1980). While the law in force promoted the image of the prostitute as source of disease and corruption, the 'repeal' discourse opposed this with the image of the 'white slave' as innocent victim of sex and class discrimination (Doezema 2010, 58). In the 1880s, state regulation of prostitution was equated to procuring for prostitution. The 'white slave' was not only the 'poor, weak, helpless' girl who did not minister 'to impurity in accordance with official rules' (J. E. Butler 1910, 78), but also the 'betrayed, terrified and helpless virgin' trafficked to Continental brothels (Dyer 1882, 6). The 'repeal' discourse portrayed this victim as a 'degraded' sister who had to be rescued from a life of vice that no woman could ever freely and rationally choose (J. E. Butler 1888, 261). Yet this desire for protection also showed an impulse to control 'these victims, voiceless and unable to plead their own case', and speak on their behalf (J. E. Butler 1881, 20). Likewise, the defence of prostitutes went hand in hand with

attempts to discipline the 'sinning women' (Powell 1888, 252) who refused to be reformed (Doezema 2010, 59).

The victim was not only constructed in terms of gender and race, but also of class. In the 'Maiden Tribute of Modern Babylon', written to document 'white slavery' in London, the journalist W. T. Stead (1885b, 1) presented the story of the 'yet uncorrupted daughters of the poor' seduced by the degenerated wealthy man (a trope in the popular literature of the time). Despite being conceived as a class issue, the trade in prostitution was viewed as resulting from moral decline, and only later as deriving from specific socio-economic conditions. The 'repeal' discourse's attention to poverty did not translate into proposals for improving working-class life. Rather, the contrast between 'the immolation of the daughters of the poor' and 'the vices of the rich' was cut down to the dichotomy 'virtuous poor'/'lascivious rich' (Stead 1885b, 1). Such an approach—which finds in poverty and other social conditions the causes of trafficking but fails to structurally engage with them—has remained entangled in anti-trafficking discourses until today.

Another subject position within the 'repeal' discourse was the criminal. With this figure, the discourse did not refer only to the 'merchants of vice', 'slave-dealers and slave owners' of 'modern times' (J. E. Butler 1910, 210 and 228). The 'greatest Criminals'—and the real cause of trafficking—were 'those Governments which continue[d] year by year to grant licences to the public bastilles of vice and of every crime' (J. E. Butler 1899, 182).

Formations of themes

The 'repeal' discourse understood penality as a source of either abuse or protection, depending on whether it was used against prostitutes or their procurers. Its central claim was that police powers to arrest and control alleged prostitutes were incompatible with 'the dignity and liberties of women' (J. E. Butler 1910, 42). Yet, when the discourse was transposed from state regulation of prostitution to trafficking, this rights-driven resistance to state penality was set aside. Rather, the state was called upon to intervene with its criminal law. As a matter of fact, even those campaigning against state regulation of prostitution did not always refrain from invoking criminal penalties. They attacked the double standard of morality which led 'to punish the sex who are the victims of a vice, and leave unpunished the sex who are the main cause, both of the vice and its dreaded consequences' (J. E. Butler 1910, 9). That considered, in the passage from state regulation of prostitution to trafficking something got lost. Wariness towards the police and their penal function could have become part of mainstream anti-trafficking discourses, but never did.

This discursive transformation clearly emerges from the influential pamphlet *The European Slave Trade in English Girls*, where Dyer (1882) described details of a trip to Brussels and his unsuccessful attempt to rescue an English woman from a brothel there. The police were criticised but not because they victimised women. Rather, Dyer accused them of not doing

enough 'to strike at the root of the diabolical traffic' (29). For Dyer, nothing short of repression was needed: the government had to prohibit 'the introduction of female British subjects' to brothels abroad, while Parliament was urged to 'make the moral crime' of trafficking 'a heavy legal offence' (33). Dyer also highlighted the importance of imposing 'a severe penalty' on procurers in order 'to reach the agents of this infamous slave traffic' who otherwise 'may escape unpunished' (33–34). As is also often the case today, Dyer constructed penality as essential for upholding 'the interests of justice, mercy and liberty' (34).

In Stead's 'Maiden Tribute of Modern Babylon' we also see a tension between the risk of 'increasing the arbitrary power of the police in the streets', on the one hand, and demands for repression, on the other (Stead 1885d, 1). Stead (1885d, 2) wrote:

> To increase by one jot or one tittle the power of the man in uniform over the women who are left unfriended even by their own sex is a crime against liberty and justice.

However, this critique of the police did not restrain him from invoking the enactment of penal reform to protect 'English girls' from 'inexpiable wrong' (Stead 1885b, 1). Criminal law was required both to deter potential criminals and to educate to a moral life:

> The preventive operation of the law is much more effective than I anticipated, for it is almost the sole barrier against a constantly increasing appetite for the immature of both sexes (Stead 1885c, 2).

In sum, the 'repeal' discourse wanted to redirect, rather than reduce, penality: from a criminal law driven by male corruption to one promoting virtue and aimed at the protection of women and girls; from police control over prostitutes to prosecution of traffickers. In line with the 'victims first' discourse, state penal power was problematic when directed against the victims but welcomed when the protection of the weak became its underlying moral goal.

2. The 'social-purity' discourse

With the 1885 Act in place, what had started as a feminist movement against double standards of morality became a social-purity crusade to remove vice from the UK (Walkowitz 1980, 246–56). To raise morals, not merely regulation or trafficking but prostitution in its entirety had to be repressed. A Christian vigilance organisation, the National Vigilance Association (NVA), was established in 1885 to oversee the enforcement of the Act (Coote 1910, 4). Yet the NVA soon turned its attention to 'the moral well-being of young people', that is, 'suppression of houses of ill-fame', destruction of 'bad photographs and obscene books', prosecution of 'art exhibitions where indecent pictures or models were on view', attacks on 'music halls', as well as campaigns for new laws against immorality (Coote 1910, 5). The 'repeal' discourse's distinction between vice and crime was dismissed: the new 'social-purity' discourse attacked both 'criminal vice' and 'public immorality' (NVA 1899, 2).

In relation to 'white slavery', purists promoted criminal measures both at the domestic level and at the international level. In England and Wales, they campaigned for the enactment of the White Slavery Bill, which became law as the Criminal Law (Amendment) Act (1912). The Act strengthened police power to 'take into custody without a warrant any person' suspected of trafficking (sec. 1); expanded the scope of the offence of procuring (sec. 2); and increased penalties for male procurers, by subjecting them to the additional punishment of flogging (sec. 3). The NVA (1899, 16–17) also launched a campaign to make 'white slavery' a crime under international law. The first anti-trafficking treaty, the International Agreement for the Suppression of the White Slave Traffic, was adopted in 1904 and presented as a 'Women's Moral Charter' (Coote 1910, 147). It did not criminalise 'white slavery' but established obligations 'to have a watch kept' at ports and railway stations 'for persons in charge of women and girls destined for an immoral life' (art. 2). It also provided for collection of information to facilitate cross-border cooperation (art. 1) and a mechanism for identification and repatriation of foreign prostitutes (arts. 3–4). It was the following treaty, the International Convention for the Suppression of the White Slave Traffic (1910), that set the basis for the international penalisation of traffickers. Article 1 criminalised any person '[w]ho, to gratify the passions of others, has hired, abducted or enticed, even with her consent', a woman or a girl under twenty years of age, 'for immoral purposes'. Article 2 made a punishable offence the procurement of women and girls above twenty years, provided that it was done 'by fraud or by the use of violence, threats, abuse of authority, or any other means of constraint'. This section examines this 'social-purity' discourse, dominant at the time, which reveals elements of continuity and discontinuity with both the 'repeal' discourse and contemporary discourses.

Table 7: The 'social-purity' discourse.

Objects	Subject positions	Themes
Trafficking = • white slavery but ≠ state-regulated prostitution • crime against the race and the nation	**Victim** = • white slave, English helpless girl • ≠ common prostitute = moral threat **Criminal** = Procurer • procurers • foreign and organised	• More crime control = more protection of morality • Women's moral protection incorporated into the crime control framework

Formations of objects

The 'social-purity' discourse continued labelling trafficking as 'white slavery'. However, unlike the 'repeal' discourse, the recruitment to prostitution by force or fraud was separated from the issue of state regulation of prostitution. As the NVA secretary William Coote (1910, 73) recalled:

> [O]urs was a … movement … in which those who did not believe in abolition were invited to work with those who did. … [W]e did not touch the question of abolition, but simply dealt with the Suppression of the White Slave Traffic.

By ignoring the state's role in fostering the traffic through licensed brothels, the 'social-purity' discourse constructed 'white slavery' as a moral threat to Christian nations and 'a disgrace to civilisation' (Bunting 1899, 68; cf. Attwood 2012, 145). In the words of the Chief Rabbi Adler (quoted in Coote 1910, 176): 'The evil must be regarded as a veritable cancerous growth in the body politic which must be excised'. 'White slavery' was still presented as a moral wrong: 'a system contrary to all morality and all right' (Bunting 1899, 68). However, in line with the contemporary 'law enforcement' discourse, the 'social-purity' discourse targeted trafficking not merely because young girls were exploited, but because, by alimenting promiscuous sexuality, it endangered 'the well-being of the race' (Willis 1912, 88). The 'social-purity' discourse also understood trafficking as a criminal phenomenon 'more internationally organised than any other' (Fawcett 1899, 139). Trafficking entailed 'migration from one country to another' (Bunting 1899, 69) and, thus, required international law that could criminalise and punish the perpetrators even when the various acts constituting the offence were committed in different countries.

Formations of subject positions

The 'social-purity' discourse conveyed a rigid distinction between the passive, innocent white slave and the sexually active foreign prostitute. The discourse depicted the genuine victim of 'white slavery' as a young, friendless and helpless English girl 'duped and trapped and sold into American or Continental brothels' by a highly organised gang of 'White Slave Traffickers' (Willis 1912, 71). This figure was pitted against the sexually experienced female migrant who travelled to pursue her vocation in vice accompanied by other criminal individuals (Attwood 2012, 151–60). '[T]he life of a prostitute, or a brothel-keeper, or a *souteneur*', wrote the social reformer Percy Bunting (1899, 70), 'is not good behaviour, nor is there any reason why the hospitality of a friendly country should be extended to her or him so long as she or he carries on a disreputable business'.

To expel foreign prostitutes, purists campaigned for the enactment of the Aliens Act (1905), which introduced the first rigid measures on immigration in the UK.[4] Questioned by the Royal Commission on Alien Immigration (1903), Coote distinguished victims of trafficking, 'brought over by "souteneurs" and other men' and 'thrown on the streets and kept there' (para. 12581), from the 'vicious aliens' (para. 12572) who came to England 'of their own accord' after becoming 'demoralised in their own countries' (para. 12581). Coote's distinction is today reflected in the 'law enforcement' discourse: as long as the trafficked person is a

4 Anti-Jewish sentiment seems to have been the main reason behind the Act (Gainer 1972), but 'white slavery' also played a part (Laite 2012, 104–5).

'genuine' victim, she is to be protected; once she poses a threat, she should be expelled or punished.

Similarly to the 'repeal' discourse and dominant present-day discourses, the other subjects of regulation for the 'social-purity' discourse were the traffickers as criminals (Attwood 2012, 169–76): foreign men and women 'possessed by the devil', who made 'large fortunes by alluring innocent young women and girls from their home' (Rev. J. P. Wilson quoted in Willis 1912, 45). They were 'the criminal' and had to be punished mercilessly:

> [Traffickers] are of an entirely different class. They, as a rule, are fairly educated; their surroundings have generally a certain refinement about them; … I do not feel that large fines or even lengthened terms of imprisonment or deportation from this country will suffice so to empty England of this curse that we may give up all idea of flogging as part of the punishment (Bishop of Birmingham 1912, xii–xiii).

Formations of themes

What appears to bring together the 'social-purity' discourse and the contemporary 'law enforcement' discourse is a construction of similar relations between penality and morality. For both discourses i) a far-reaching penality ensures greater protection of morality; and ii) women's (moral) protection is incorporated into a punitive framework. A substantial difference is the framing of morality: as ideals of purity in one case, as human rights in the other.

First, the 'social-purity' discourse invoked penal enforcement as a moral safeguard for the nation, the religion and the family. Penality appeared as an educational tool for 'raising the standards of moral conduct' (NVA 1899, 2): it could act on the causes of vice, by preventing minors from falling into immorality, and censure sexual licentiousness when manifested (Mort 2000, 81). As Coote (1903, 69–70) said:

> There is a very popular cant-phrase, that you cannot make men good or sober by Act of Parliament. It is false to say so. … You can, and do, keep men sober simply by Act of Parliament; you can, and do, chain the devil of impurity in a large number of men and women by the fear of the law.

Accordingly, the 'social-purity' discourse increasingly relied on penality as the primary method for preventing and suppressing the trade in prostitution. The operation of the penal machinery was seen as a 'cleansing process' that served to wipe out this form of vice from the streets of England (Willis 1912, 6). As the Archbishop of Canterbury (1912, viii) put it:

> [T]he best spirit of the whole nation is behind it in giving to police and magistrates all power that is necessary of inflicting upon those cowardly villains [the procurers]—on conviction, consequences which shall be not only punitive to them, but deterrent to them and others. We want two things—the increased powers and the increased punishment.

Criminal law had a repressive purpose, by punishing and banishing those accused of fostering immorality, and a deterrent one, by making more difficult the movement of foreign prostitutes and their pimps.[5]

Second, women's moral protection was made dependent on increased coercive state intervention. Moving from the assumption that prostitution was 'a career of vice' that was not freely chosen (NVA 1899, 11), the 'social-purity' discourse portrayed the severe punishment of trafficking as a necessary condition for deterring procurers and, consequently, protecting 'the moral well-being of young womanhood' (Coote 1910, 19). Following this reasoning, the discourse pulled all the assistance for potential victims of trafficking into the criminal justice orbit. Connecting emigration controls to penality, Coote, for instance, suggested additional police supervision over English female emigrants to avoid their 'decoy' by foreign procurers (Royal Commission on Alien Immigration 1903, para. 12597). Beyond organising volunteers to patrol ports and railway stations to support travelling girls, purists did not make proposals for the assistance of those at risk of trafficking. Even the work with emigrants had somehow a repressive purpose, as the watching at points of embarkation also served to identify and then prosecute the procurers (Bullock 1907, 11). To be sure, the 'social-purity' discourse deployed an intense rhetoric of protection. However, unlike the 'repeal' discourse, the focus was not on the salvation of young girls and the preservation of their purity for their own good. Rather, to put it as Coote did (1910, 18), 'the sanctity of womanhood' had to be protected from corrupting sexual practices because of 'its value as a national asset'. The ultimate aim of the fight against 'white slavery' was 'to protect and keep pure the young, so that the offspring of the race may thrive and become strong' (Willis 1912, 161).

3. The 'social-hygiene' discourse

The Covenant of the League of Nations was approved at the Paris Peace Conference in 1919, following the First World War. Article 23(c) entrusted the League with supervision 'over the execution of agreements with regard to the traffic in women and children and the traffic in opium and other dangerous drugs'. The Great War had not undermined the interest in opposing the trade in prostitution. Yet the underlying discourse was evolving, influenced by the changed set of socio-political conditions and a growing debate over national health and efficiency. The interwar period saw the emergence of social-hygiene movements that, pulling together moralists, clerics, eugenists and some feminists, sought to regulate sex and morality from a preventive and medical perspective, rather than, as with the 'social-purity'

5 For some critical voices at the time, see Goldman (1911) (connecting the traffic in women to capitalism and arguing that it was an outgrowth of police persecution and attempted suppression of prostitution); Shaw (1912) (suggesting that 'white slavery' would not be eliminated by harsher penalisation but only by securing improved labour conditions for women); Billington-Greig (1913) (arguing that criminalisation and policing had no educative and little preventive power).

discourse, merely through the use of punishment (Mort 2000, 136–37). The discourse that stemmed from these movements neatly influenced the LoN's approach to trafficking.

Under the auspices of the LoN, two anti-trafficking treaties were adopted. The International Convention for the Suppression of the Traffic in Women and Children (1921) built on the 1904 Agreement and the 1910 Convention (art. 1). It extended criminal protection to minors of either sex (art. 2), punished attempts to commit the crime of trafficking (art. 3) and raised the age of consent to twenty-one (art. 4). The Convention also established an Advisory Committee on the Traffic in Women and Children (CTW) to which states had to report periodically. The CTW, comprising both government officials and representatives of voluntary organisations, became the main forum for debating issues around trafficking in the interwar period (Lammasniemi 2020, 74; Rodríguez García 2012; Pliley 2010; Metzger 2007).

In 1933, the International Convention for the Suppression of the Traffic in Women of Full Age was approved. It extended the provisions of the previous Conventions to cover any 'woman and girl of full age' who was procured, enticed or led away 'for immoral purposes to be carried out in another country', even if she was consenting (art. 1). The elimination of the age-limit reinforced the position of those who associated trafficking with regulated prostitution. In 1937 the LoN prepared a new draft convention, which in substance opposed state regulation of prostitution (Advisory Committee on Social Questions 1937). This draft convention was intended to be concluded at an international conference in 1940, but the Second World War got in the way. The 'social-hygiene' discourse, increasingly dominant in the interwar period, attacked both trafficking and state regulation of prostitution, while maintaining distinctive characteristics that—as this section shows—differentiated it from older discourses.

Table 8: The 'social-hygiene' discourse.

Objects	Subject positions	Themes
Trafficking = • socio-hygienic evil • transnational crime	**Victim** = • in need of protection • with moral and mental weaknesses **Criminal** • procurers • primary target of regulation	• Humanitarian language used to humanise penality • More crime control = more protection against socio-hygienic evil

Formations of objects

The 'social-hygiene' discourse viewed trafficking as a 'social evil' deriving from 'commercialised vice' (Special Body of Experts on Traffic in Women and Children 1927a, 6–9) and, as such, a danger 'to public health and morals' (Advisory Commission for the Protection and Welfare of Children and Young People 1934, 12). Depending on whether the discourse wished to emphasise the risk for the victim or the threat by the procurer, trafficking was considered as either a humanitarian issue or a transnational crime.

Approaching trafficking as a humanitarian issue, the 'social-hygiene' discourse moved away from the language of 'white slavery' of the 'social-purity' discourse. The LoN Covenant and following international legal instruments used the term 'traffic in women and children' with a view to provide protection also to 'women of brown and black and yellow races' (W. H. Harris 1928, 42). Relatedly, trafficking was described as 'open and shameless exploitation' from which everyone, from 'the honest girl' to 'the prostitute', had to be protected (Special Body of Experts on Traffic in Women and Children 1927a, 18–19). In line with the 'repeal' discourse, the 'social-hygiene' discourse portrayed the nature of the exploitation as primarily moral rather than physical. In the words of British author Henry Wilson Harris (1928, 53): 'the international traffic spells more certain and complete demoralisation for the victims themselves than ordinary prostitution'. On the other hand, the 'social-hygiene' discourse aligned with the 'social-purity' discourse by portraying trafficking as an 'organised' criminal activity (Special Body of Experts on Traffic in Women and Children 1927a, 9). As seen above, the LoN Covenant coupled the traffic in women and children with drug trafficking, thereby highlighting the similarities between the two criminal activities: both involving unlawful border crossing, supply and demand, illegal markets and involvement of criminal syndicates; both requiring a transnational crime-control approach (W. H. Harris 1928, 26).

The humanitarian and the transnational crime approaches were brought together by a moralistic language of health protection and racial survival. A report that a LoN special body of experts wrote on the extent and forms of trafficking in Europe and the Americas provides a striking example (Special Body of Experts on Traffic in Women and Children 1927a; 1927b).[6] In the report, trafficking was described as 'an evil which on all grounds of health and morals and in the interest of the future of the race must be uprooted' (1927a, 19). The experts endorsed a medical approach: trafficking, they declared, 'must be treated as an epidemic and must be continually fought in its endemic centres' (1927a, 45). These 'endemic centres' were found in contexts of assumed demoralisation, such as 'vice districts' that 'spread insidious corruption through the community, especially young men' (1927a, 14). Trafficking was also associated with other 'social evils, such as the abuse of alcohol and the traffic in obscene publications and drugs' (1927a, 9). Even when the report acknowledged the role of '[e]conomic depression, poverty, the danger of enforced migration, and low wages' on the trade in prostitution, it reconnected these factors to 'the influence of depraved homes and lack of family life' (1927a, 45; cf. Laite 2017, 48).

6 The experts, appointed by the CTW and funded by the American Social Hygiene Association, visited 112 cities and interviewed more than 6,500 people. Their inquiry confirmed the spread of trafficking, identified its geographical trends (from Europe to Central and South America as well as Northern Africa) and presented its causes and remedies. This study was followed by a report which looked at trafficking in East Asia (Commission of Enquiry into Traffic in Women and Children in the East 1932).

Formations of subject positions

The main subject positions of the 'social-hygiene' discourse were the women procured, victims of 'disgraceful exploitation', and the traffickers, the criminals who profited from the trade in prostitution (Special Body of Experts on Traffic in Women and Children 1927a).

The 1927 LoN report listed five kinds of trafficked victims (Special Body of Experts on Traffic in Women and Children 1927a, 18–23): i) 'the prostitute', who already sold sex in her own country; ii) 'the complacent girl'; who had other occupations but periodically earned money as a prostitute; iii) 'the artist', who having initially worked as an entertainer was induced to have 'immoral relations' with her clients; iv) 'the inexperienced girl', who came from 'poor surroundings of ignorant parents' and was 'easily deceived'; and v) 'the girl of minor age'. Unlike the 'social-purity' discourse, all these women had to 'be protected' from 'the international traffic', regardless of their previous involvement in prostitution (1927a, 44). In line with the 'repeal' discourse, the 'social-hygiene' discourse implied lack of agency on the part of women who migrated for prostitution. Yet, contrary to that older discourse, it was not merely the victim's deception or coercion that rendered cross-border prostitution an unwilling activity; the victim also lacked agency because of her mental and moral abnormality:

> The fact that a woman submits to [trafficking] … in a country where a complaint to the police would at once set her free and secure the punishment of her tyrant, implies on her extraordinary ignorance or submissiveness pointing to mental or moral weakness (H. M. Wilson 1916, 9–10).

In this way, while the 'social-hygiene' discourse rejected the 'social-purity' discourse's distinction between innocent victim and deviant prostitute, it still implied a disciplining of trafficked women: they had to be either treated when 'mentally defective' or otherwise assisted 'to regain their self-respect' (Advisory Commission for the Protection and Welfare of Children and Young People 1935, 37–39).

The 1927 LoN report also presented a typology of 'the traffickers and their associates' (Special Body of Experts on Traffic in Women and Children 1927a, 24–29): i) 'the principal', a 'prosperous business man' who owned brothels; ii) 'the madame', who managed 'a house of prostitution'; iii) 'the *souteneur*', who secured victims to the principal or lived on girls' earnings; and iv) 'the intermediary', who secured and transported the girl for the *souteneur* and madame. The 'social-hygiene' discourse determined that all these traffickers stimulated the 'demand for pervert practices' (Special Body of Experts on Traffic in Women and Children 1927a, 16) and thus identified them as the primary target of regulation. Harris (1928, 43) argued: 'If the "third party", who organises and fosters the traffic for his personal gain, could be eliminated, the traffic itself would wither up and disappear in a twelvemonth'.

Formations of themes

The 'social-hygiene' discourse appears as a precursor to both contemporary 'victims first' and 'law enforcement' discourses. It shares with the 'victims first' discourse both the assumption that penality is an element of a broader set of anti-trafficking tools and the attempt to 'humanise' penality. On the other hand, in its mobilisation of penality, the 'social-hygiene' discourse also anticipated certain themes of the 'law enforcement' discourse. Examples are the correlation between protection and extensive penal control, and the resort to a humanitarian language to justify crime-control agendas (Rodríguez García 2012, 100). However, the 'social-hygiene' discourse never resorted to the notion of human rights. The LoN campaign against trafficking was not a cause for upholding universal rights, but for opposing criminal practices of foreign people who created moral and hygienic threats to the race and the nation (Moyn 2010, 72).

Hygienists questioned the purists' 'pure' penal approach to immorality. For them, trafficking was not merely a job for penality, but one that required a wide spectrum of social interventions:

> An exact knowledge of the facts, active supervision and the application of suitable laws and measures of protection are all necessary elements in the campaign against traffic (Special Body of Experts on Traffic in Women and Children 1927a, 45).

The 'social-hygiene' described positive education, centred around chastity and continence, as a 'more scientific and more humane' approach to vice than state regulation of prostitution and mere prosecution of offenders (H. M. Wilson 1911, 23; 1926). For instance:

> [I]nfluences which lift the mind to higher planes, providing ideals of truth and beauty, have been urged as important factors in combating the traffic, because they engender a moral force which helps both men and women develop control of desires (Special Body of Experts on Traffic in Women and Children 1927a, 45).

Although socio-hygienic interventions sought to limit the use of legal means, the 'social-hygiene' discourse did not disregard penality, especially when the latter could be moulded as to appear benevolent. Hygienists, for example, were great supporters of the inclusion of women in the police, which was presented as a more humane (and *feminine*) way to 'decrease the evils of the traffic in women' without relinquishing a penal approach to the problem (Traffic in Women and Children Committee 1926, 3). While considering penality one tool among many, the 'social-hygiene' discourse still made women's (moral) protection dependent on strict enforcement of both criminal and immigration law:

> If [traffickers] could be eliminated, the battle would be largely won. Some countries realise this principle and punish severely *souteneurs*, *madames* and others who live on the proceeds of prostitution … Foreign *souteneurs*, procurers, *madames*, and other persons of the kind should be excluded or deported as a

> preventive measure (Special Body of Experts on Traffic in Women and Children 1927a, 47).

Finally, hygienists' support for the abolition of regulated prostitution was not only animated by humanitarian reasons, but also by a desire to punish pimps:

> [W]here a system of licensed or recognised brothels exists, [a] policy of punishing the third party who lives on the profits of the business cannot be effectively persuaded, because it is impossible to punish a person for doing what he is allowed to do by authority (Traffic in Women and Children Committee 1930, 31).

The discourse depicted punishment of pimps as 'an essential part of the work of moral protection' and as 'a safeguard for society' (Traffic in Women and Children Committee 1931, 4–7). The infliction of severe penalties was said to be instrumental to the 'regeneration' of the offenders, so they could 'acquire the habit of honest work' and free themselves 'from corrupting influences' (Traffic in Women and Children Committee 1931, 7).

4. The 'penal-welfare' discourse

In December 1949, the newly formed UN General Assembly (UNGA) approved the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1950). This Convention came out of the 1937 draft convention (Brand 2010, 12; Dolinsek and Hetherington 2019, 216–18). After the Second World War, the UN had taken over the LoN's anti-trafficking agenda (ECOSOC RES 43(IV) 1947) and the 1949 Convention was the first outcome of its work. Three elements underlay this instrument: an explicit anti-regulationist stance; the extension of criminalisation to all forms of procuring, pimping and brothel-keeping; and an attempt to counter trafficking through prevention and victims' rehabilitation (cf. Brand 2010, 13; Dolinsek 2022). First, article 6 urged states 'to take all the necessary measures to repeal or abolish' any form of state registration and special supervision of prostitutes. This provision seems to have limited the ratification of the Convention: only those few states whose existing legislation was compatible with the instrument joined it.[7] Second, contracting parties agreed 'to punish' both the procurement and the exploitation of prostitution, irrespective of the victim's age, sex or consent, the motive of the offender and any cross-border element (art. 1).[8] States were also required to punish owners, managers and financiers of brothels (art. 2). Penality was thus deployed 'to protect people' not merely against trafficking but against all types of prostitution

7 While the Convention currently has 82 parties (as of April 2022), until 1970 it had been ratified or acceded to by only 36 states (few European states, but many postcolonial and socialist states) ("United Nations Treaty Collection" n.d.).

8 The UK did not become a party of the 1949 Convention due to disagreement with the criminalisation of procuring and pimping regardless of the purpose of gain (Castle 1949, para. 35) and the deletion of the 'colonial clause' (Dolinsek 2022, 232).

(UN Secretary-General 1948, para. 22). Finally, article 16 urged states 'to take or to encourage, through their public and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims'.

In the following years, interest in anti-trafficking work began to wane. With governments reporting less and less cases of international trafficking (Limoncelli 2010, 89–90), domestic prostitution became the main concern.[9] The UN included the matter in its agenda of 'social defence', which promoted national policies focused on crime prevention and rehabilitation of offenders (Reanda 1991, 211; Dolinsek 2022, 228). The dominant discourse of the period assimilated the 'social-hygiene' discourse into the rubric of the emerging welfare state. It was a 'penal-welfare' discourse (Garland 1985), whose goal was to reintegrate prostitutes and procurers into society by addressing their deviance and by promoting their rehabilitation. Although the discourse explored in this section mainly focused on the domestic, rather than the international, trade in prostitution,[10] it has left an important legacy for contemporary anti-trafficking discourses.

Table 9: The 'penal-welfare' discourse.

Objects	Subject positions	Themes
Trafficking = • product of prostitution • moral threat to the welfare of society	**Victim** • freer prostitute but in need of rehabilitation • with moral and mental deficiencies **Criminal** • procurers • to be rehabilitated	• Rehabilitative ideals used to moderate penality • Rehabilitative ideals used to make penality more effective

Formations of objects

The 'penal-welfare' discourse understood trafficking as 'a product of prostitution' (UN Secretary-General 1947, 3). Accordingly, to combat trafficking, states had to address the individual and social factors that drove people to sell sex (UN Department of Economic and Social Affairs 1959, 6; Brand 2010, 13–16). The fight against trafficking rested on early detection of abnormalities, protection against premature sexual experience and contact with

9 According to Richard Willcox (1958, 70–71), 'any large-scale traffic in persons' was at the time 'virtually controlled' because prostitutes were 'recruited without difficulty among the nationals of the country concerned'. However, according to Sean O'Callaghan (1965), in the 1960s international trafficking continued affecting Continental Europe, the Middle East, South America and Africa.

10 In the UK, the issue of prostitution was discussed at length in the Wolfenden Report (Departmental Committee on Homosexual Offences and Prostitution 1957). In some of its parts, the report also touched the question of trafficking—presented as a problem of the past. The report (especially its focus on decriminalising homosexuality) triggered the Hart-Devlin debate, concerning the enforcement of morality by the criminal law. H. L. A. Hart (1963) took the position that immoral acts that were not harmful did not merit criminalisation; Patrick Devlin (1965) argued that criminal sanctions played an essential role in protecting common moral views.

other prostitutes, improvement of living standards and moral education, as well as social treatment and medical care for prostitutes (UN Secretary-General 1947, 4–9). Through this preventive and rehabilitative approach, the 'penal-welfare' discourse addressed the trade in prostitution as both a form of exploitation for the individual and a moral threat to the welfare of society. The Preamble of the 1949 Convention neatly encapsulated this assumption by declaring both trafficking and prostitution to be 'incompatible with the dignity and worth of the human person' and a danger to 'the welfare of the individual, the family and the community'.

By mentioning 'the dignity and worth of the human person', the 1949 Convention used the same wording of the Preamble of the UN Charter (1945). However, the Charter also named 'faith in fundamental human rights' and 'the equal rights of men and women', which are both absent from the text of the 1949 Convention. In fact, the 'penal-welfare' discourse did not consider trafficking as a human rights violation (Coomaraswamy 2000, para. 22). Yet the nexus between human rights and trafficking could have already emerged. In 1946, the Sub-Commission on the Status of Women of the Commission on Human Rights (1946, 17–18) connected the enjoyment of socio-economic rights with the adoption of 'strong measures to put down traffic in women and children'. In 1947, during the drafting of the Universal Declaration of Human Rights (UDHR), an article prohibiting slavery 'in all its forms' was initially adopted 'on the understanding that it covered traffic in women, involuntary servitude and forced labour' (Working Group on the Declaration of Human Rights 1947, 6). However, the article did not at that point include a list of slavery practices and, when the final version (art. 4 UDHR) was adopted, it did mention servitude but not trafficking or forced labour. The 1949 Convention did not take up this suggestion of framing trafficking as a human rights violation, nor the underlying 'penal-welfare' discourse. For the following fifteen years, the trade in prostitution was not associated with human rights. For instance, in the draft of the International Covenants on Human Rights (1966) the suggestion to include trafficking as a human rights violation was rejected, for it was thought that only slavery and the slave trade constituted human rights breaches (UN Secretary-General 1955a, para. 17). Academic articles on human rights written at this time did not discuss trafficking. In the rare cases where campaigns against 'traffic in women and children' were mentioned, they were not described as pursuing a human rights goal, but as successful examples of international cooperation that could inspire the human rights movement (Sandifer 1949, 60; Schwelb 1960, 659).

The 'penal-welfare' discourse also regarded trafficking as an activity which was 'universally recognised as criminal' (Nepote 1967, 7). It was a crime of international concern along with piracy, traffic in narcotics and obscene publications, damaging submarine cables and counterfeiting currency (Johnson 1955, 456; Moacanin 1951, 35; Pella 1950, 54). Albeit a serious offence, trafficking was deemed a crime of the past—one that had 'been considerably curbed by international action, first through voluntary societies and later through inter-

governmental channels' (Departmental Committee on Homosexual Offences and Prostitution 1957, 343).

Formations of subject positions

In the 'penal-welfare' discourse, rehabilitation was not just the desired outcome of social and legal interventions. It was the discourse's hegemonic and organising principle (Garland 2001, 35). Even the subjects of the discourse—the prostitute and the procurer—were ultimately individuals to be rehabilitated.

The 'penal-welfare' discourse described the prostitute as 'a freer person, less regimented and in general less subject to coercion' (UN Department of Economic and Social Affairs 1959, 7). The assumption was that, at the time, women generally did 'not need to be "procured"' because they spontaneously decided to become prostitutes (Departmental Committee on Homosexual Offences and Prostitution 1957, para. 344). In this way, the 'penal-welfare' discourse broke with both previous and contemporary discourses: there was no 'unwilling victim, coerced by a vile exploiter' but mainly 'willing girls and women' (Departmental Committee on Homosexual Offences and Prostitution 1957, para. 303). Yet, as it gave agency to prostitutes, the discourse also attributed the choice of sex work to a lack of 'moral and psychic freedom' (UN Department of Economic and Social Affairs 1959, 21). 'The number of prostitutes who are mentally, psychologically and emotionally normal appears to be very limited', a UN study asserted (UN Department of Economic and Social Affairs 1959, 20). As an individual with mental abnormalities and moral deficiencies, the prostitute needed protection and rehabilitation as well as control and disciplining. This approach was formalised in the 1949 Convention, which defined prostitution as 'incompatible with the dignity and worth of the human person' (preamble). The concept of dignity here differs from what human rights law usually associates with this term—the idea that every person should be valued for their own sake (Andorno 2014, 45). Rather, the 1949 Convention relied on the concept of *moral* dignity, that is the protection of honour from vice. In this sense, a person who engaged in prostitution was not deemed worthy of care and respect as other human beings but was in fact deemed lacking *moral* dignity and *honour* (Laite 2012, 197).

Not only prostitutes but also procurers and pimps had to be rehabilitated. The 'penal-welfare' discourse encouraged measures aimed at 'the training of vagabonds and other unstable persons with a view to their adaptation to regular work', as well as assistance 'to discharged prisoners' for 'their reintegration into society' (UN Department of Economic and Social Affairs 1959, 29).

Formations of themes

The 'penal-welfare' discourse expressed a clear will to protect and rehabilitate prostitutes and victims of trafficking, though this disguised an attempt to control and punish with more effectiveness, and not merely to repress but to re-educate. The discourse ingrained on anti-

trafficking discourses the theme that penality tackles trafficking and protects its victims more effectively when it is tamed by humanitarian ideals. To temper and correct penal measures, the 'penal-welfare' discourse relied on the rehabilitative ideal; in contrast, the contemporary 'victims first' discourse relies on human rights.

In 1959, the UN published a 'Study on Traffic in Persons and Prostitution' that illustrates these themes (UN Department of Economic and Social Affairs 1959). The study identified both the prostitute and her exploiter as the targets of its penal-welfare interventions. States could criminalise prostitution only when it constituted a 'serious nuisance' or caused 'public disturbance' (12). In the rest of the cases, the prostitute had to be subjected to 're-education', that is 'rehabilitation through education to discipline the mind and character and cultivate the personality both mentally and morally' (30). To achieve this, the study suggested that young and adult 'promiscuous persons':

> [C]ould be examined in order to obtain an insight into their personality structure and to investigate whether a better control of their tendency towards promiscuity could be attainable by means of psychiatric treatment (35).

This call for psychiatric measures was at once penal and humanitarian in nature. Through disciplining the mind and character, 'a liking for steady work' could be instilled into deviant individuals (35), thereby integrating them into the welfare state. Measures of social and medical control were part of a 'comprehensive programme of action' which also included improvement of economic living conditions, equal pay for men and women, adequate health care, protection for destitute mothers and pregnant women, foster homes and day-care facilities (33–34).

The study recommended more direct penal action against the trafficker. Yet the UN criticised the practice of suppressing procuring and pimping 'by increasing the already severe penalties provided by law' (36). 'The belief that the more severe the repression, the greater the deterrent effect', the study asserted, 'is not supported by facts' (36). Thus, the UN promoted a penality that punished with an attenuated severity, but in order to punish and control with more universality and necessity: not only to repress the immoral body, but also to cure the immoral soul (cf. Foucault 1991a, 82). It was also a penality to be inserted within a broader set of measures against prostitution and trafficking. Anticipating the contemporary 'three Ps' (prosecution, prevention and protection) approach, the UN study proposed a programme of action comprising 'the repression of the third party profiteers, the prevention of prostitution and the rehabilitation of its victims' (UN Department of Economic and Social Affairs 1959, 3).

5. The 'sexual slavery' discourse

In 1967, the UNGA adopted the Declaration on the Elimination of Discrimination Against Women. Having acknowledged that discrimination against women constituted a human

rights violation, the Declaration demanded that 'all appropriate measures' be taken 'to combat all forms of traffic in women and exploitation of prostitution of women' (art. 8). Two years later, the American Convention on Human Rights diverged from previous international and regional human rights treaties and mentioned 'traffic in women' as a breach of the right to be free from slavery (art. 6). Trafficking was becoming a human rights concern.

The turning point occurred in 1972, when the UN entrusted a human rights body with the issue of trafficking: the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the main subsidiary body of the UN Commission on Human Rights, was directed to consider the establishment of a 'permanent machinery to give advice on the elimination of slavery and on the suppression of the traffic in persons and exploitation of prostitution of others' (ECOSOC RES 1685(II) 1972, para. 12). In so doing, the UN moved the question of trafficking from its social defence agenda to the human rights framework (Reanda 1991, 210–13).[11] On this basis, the Sub-Commission established a Working Group on Contemporary Forms of Slavery[12] 'to review developments in the field of slavery and the slave trade in all their practices and manifestations, including the slavery-like practices of *apartheid* and colonialism, the traffic in persons and the exploitation of the prostitution of others' (ECOSOC DEC 16(LVI) 1974). The Working Group was composed of five human rights experts. Although it had a limited mandate and was generally unable to arouse much interest in the matter of trafficking (Reanda 1991, 213–15), its experience was significant as it rendered trafficking a salient human rights concern. Trafficking was soon brought into the UN human rights treaty regime. In 1979, CEDAW obliged states parties 'take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women' (art. 6). The establishment of the CEDAW Committee in 1981 also subjected states' anti-trafficking efforts to the scrutiny of a human rights monitoring body (Chuang 2012).[13]

Throughout the 1970s and 1980s, interest in trafficking grew steadily, while remaining limited to a few women's-rights organisations and UN bodies (Halley et al. 2006, 354–55). In this period, trafficking was termed 'sexual slavery' and was not only treated as a crime but also as a human rights violation. This section explores the dominant discourse of the period, the 'sexual slavery' discourse, and discusses how it contributed to the emergence of contemporary anti-trafficking discourses.

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11 The 1970s marks the rise of the contemporary human rights movement (Moyn 2010). It also marks, in many Western states, a departure from penal policies oriented at social welfare and a shift towards a more retributive penality (Garland 2001) as well as a growing sensibility about crime victims (chapter 2).

12 Originally named Working Group on Slavery.

13 For a recent general recommendation of the CEDAW Committee on trafficking in women and girls, see UN CEDAW (2020). This document essentially reproduces the 'victims first' discourse: it treats trafficking as 'a human rights violation' that 'can be a threat to international peace and security' (para. 14) and seeks to offers a 'gender analysis of the crime' of trafficking (para. 2).

Table 10: The 'sexual slavery' discourse.

Objects	Subject positions	Themes
Trafficking = • sexual slavery • human rights violation	**Victim** = • helpless woman/child • in need of rehabilitation and protection **Criminal** = • organised procurers • keen to corrupt public officials	• Penality used to protect the victim's human rights • Human rights used to reorient penality away from victims and towards procurers

Formations of objects

The 'sexual slavery' discourse recast trafficking as a form of slavery and 'a flagrant violation of human rights' (ECOSOC RES 1981/40 1981). As we have seen, through the idea of 'white slavery', the trade in prostitution had rhetorically been matched with the slave trade since the late nineteenth century. However, the 'sexual slavery' discourse did not merely see trafficking as *akin to* slavery; trafficking *was* in fact 'sexual slavery': a modern manifestation of the slave trade (Barlay 1968; Barry 1979; Barry, Bunch, and Castley 1984; Lassen 1988, 199; ECOSOC RES 1990/46 1990).[14] Since slavery had long been deemed a human rights violation, its direct association with trafficking naturally lured the trade in prostitution into the human rights field (Demleitner 1994, 176). Such an understanding enabled the extension of the notion of trafficking to situations that had until then been excluded, including exploitation of child labour, trafficking in pornography, sex-based tourism and trafficking in domestic workers or *au pair* girls (UN Secretary-General 1982; Bouhdiba 1982; Barry 1984, 40–41). Viewing trafficking as slavery also triggered a heated debate on the distinction between voluntary and involuntary prostitution (Halley et al. 2006, 347–56).[15] Some anti-trafficking advocates treated prostitution as 'a matter of personal moral choice' that had to be separated from forced prostitution, which was in fact 'sexual slavery' (Whitaker 1982, para. 44). Other activists rejected this approach. In their view, prostitution was always 'sexual slavery' because, even when it seemed 'to have been chosen freely', it was 'actually the result of coercion' (Fernand-Laurent 1983, para. 23).

Although the identification of trafficking as a human rights violation was a substantial innovation, the 'sexual slavery' discourse retained some of the moral substratum of older

14 In 1979, Kathleen Barry published an analysis of women's sexual abuses, *Female Sexual Slavery* (1979), which prompted international awareness of trafficking as a human rights violation and a form of slavery. Barry was also one of the organisers of an international network against female sexual slavery, hosting a global workshop on trafficking in Rotterdam in 1983 (Barry, Bunch, and Castley 1984), which has been described as 'the beginning' of the contemporary international anti-trafficking activism (Chew 2005). For a discussion of how feminist activism against 'sexual slavery' is also at the root of the woman's-human-rights movement and its turn to sexual violence, see Engle (2020, 40–42).

15 This debate was connected to the coeval 'sex war' between anti-porn and sex-positive feminists and their disagreement regarding pornography, sex work and other sexual issues (Ferguson 1984).

discourses. This tendency is plain to see in a report written by Jean Fernand-Laurent (1983), an ad hoc Special Rapporteur appointed by the UN to study the question of trafficking. Having recalled a number of human rights conventions, Fernand-Laurent, for instance, argued that their underlying ethic formed 'the positive and strict moral values' of the UN (para. 7). While this idea is uncontroversial, what follows denotes a repulsion for promiscuous sexual relations:

> When applied to the field with which we are concerned, [these values] lead to … the feeling that sexual relations should always be associated with affection and never debased by the desire for power or greed for profit (para. 7).

The rapporteur thus connected human rights values to the puritan conception of sexual vice. The rapporteur also revived the analogy between 'black' slavery and sex trafficking that the 'repeal' discourse had used a century before. In the case of prostitution, Fernand-Laurent contended that: 'the alienation of the person is … more far-reaching than in slavery in its usual sense, where what is alienated is working strength, not intimacy' (para. 18). He added:

> [T]he nineteenth century … abolished the traffic in blacks … Is not the twentieth century, which is better equipped in all respects, able to act as well as quickly with respect to the traffic in women and children? (para. 105).

We recognise in these two sentences the old comparison between the taking of black slaves for labour and the enslavement of white girls for sex—and with it the assumption that women's purer nature made the alleviation of their suffering more morally valuable (cf. Irwin 1996).

In line with previous and contemporary discourses, the 'sexual slavery' discourse also approached trafficking as a 'criminal' activity 'of major proportions' (Bunch and Castley 1984, 8). Anticipating the 'victims first' discourse, trafficking was described as 'a crime which produces victims' as opposed to an offence against the public/moral order (Fernand-Laurent 1983, para. 84). Moreover, trafficking was considered as a form of organised crime, directly connected to drug trafficking and money laundering (Barry 1981, 46; Maxim 1993, para. 37). It was argued that the gains from trafficking were often combined with the ones from 'traffic in narcotics and the illegal arms trade', not only to increase the profits on the part of the seller but also to finance 'terrorist' organisations (Fernand-Laurent 1983, para. 87). Similarly to the 'law enforcement' discourse, the 'sexual slavery' discourse suggested that the international community had to act against trafficking 'in the same way as [against] the problems of drug-trafficking and crime-related activities' (Ksentini 1991, para. 23).

Formations of subject positions

The 'sexual slavery' discourse identified the main agent of trafficking in the procurer, 'the organizer and exploiter of the market' who was involved 'in the world of crime' and keen to corrupt 'those in political circles, the police and other State officials' (Fernand-Laurent 1983,

paras. 19 and 27). 'Despise for women [sic], congenital sloth and a total lack of morals' were described as the characteristics that predisposed a man to become a trafficker (Fernand-Laurent 1983, para. 27). Although the 'sexual slavery' discourse deviated from the 'penal-welfare' discourse by renouncing any attempt to rehabilitate the offender, it still perpetuated the assumption that the person involved in trafficking had to be mentally or morally abnormal.

The figure of the procurer was contrasted to the victim of 'sexual slavery'. The relationship between the victim and her procurer was portrayed as 'one of dominator and dominated, exploiter and exploited, master and slave' (Fernand-Laurent 1983, para. 35). In this way, the 'sexual slavery' discourse revived the imaginary of the innocent and passive victim, reduced to a mere sex object and marketable commodity (UN 1985, para. 290). 'Rarely when a woman is approached by a procurer', it was argued, 'does she have any understanding of what is ahead of her' (Barry 1981, 46). The language of human rights played an important part in this regard: the 'sexual slavery' discourse described 'the struggle for respect and promotion of human rights' as a struggle for those who were 'least equipped to defend themselves', including trafficked women and children:

> [V]iolations of human rights … [that are] categorized as traffic in persons … attack the most fragile persons when they are in the most vulnerable situations: poverty, loneliness, depression. Confined in the bondage of prostitution, women and children await their liberation (Fernand-Laurent 1983, para. 104).

Thus, while women and children were provided with the human right to legal protection against trafficking (UN 1980, res 43), that same right was made contingent on their assumed incapacity of agency.

Formations of themes

The 'sexual slavery' discourse's main innovation was to recast trafficking as a human rights violation that required a 'human rights approach' (Fernand-Laurent 1983, para. 17). However, from its inception the discourse linked rights-based initiatives together with penal interventions. While the 1949 Convention and other anti-trafficking instruments were re-interpreted as human rights treaties (Nanda and Bassiouni 1972, 425), '[s]trict enforcement' of their penal provisions was deemed essential for protecting victims' human rights (UN 1985, para. 291). In this way, the 'sexual slavery' discourse laid the groundwork for later alignments of penality and human rights. It also indicates that human rights embraced penality from the very first moment they were associated with trafficking.

The 'sexual slavery' discourse entrusted the criminal justice system with both the punishment of the procurer and the rescue of the victim. Suppression of trafficking meant:

> [T]hreatening [procurers] under the law with sufficiently deterrent penalties …, and effectively prosecuting procurers … not only the pimp but all forms of

> procuring, including classified advertisements in the press (Fernand-Laurent 1983, para. 70).

The discourse also praised the use of police 'vice squads' in 'the detection and prevention of prostitution and related offences', prosecution of exploiters and removal of young persons to a 'place of safety' (UN Secretary-General 1982, para. 76). In much the same way as the 'law enforcement' discourse, victim-oriented measures were incorporated in a criminal law paradigm.

Even when the fight against trafficking was included in a fully fledged human rights treaty, as with CEDAW, penality was still relied upon to protect human rights. Although the language of article 6 CEDAW is not specific with respect to how states should suppress trafficking, the resort to criminal measures is implicitly contemplated in the reference to 'all appropriate measures'—especially since article 2, on the general measures that states should take against discrimination against women, explicitly mentions the adoption of 'sanctions where appropriate'.

In the 'sexual slavery' discourse, the fight against trafficking did not end at penalisation but also demanded 'social attitudinal changes' (Nanda and Bassiouni 1972, 440). Setting the stage for the 'victims first' discourse, the discourse emphasised that the suppression of trafficking required 'a three-fold concerted effort, involving prevention, punishment of all forms of procuring and solidarity in order to facilitate the social rehabilitation of the victims' (Prevention of Prostitution 1985). Relatedly, the discourse sought to incorporate human rights concerns in the deployment of penality. Echoing the 'repeal' discourse, rather than targeting women in prostitution (Bunch 1984, 50–51)—an approach that maintained victims' dependence on the world of crime (Fernand-Laurent 1983, para. 69)—penal measures had to be re-directed towards 'all forms of procuring' (ECOSOC RES 1983/30 1983).

6. The emergence of contemporary discourses

The global political turmoil at the end of the 1980s, with large-scale population movements caused by wars, economic deprivation and globalisation, brought the phenomenon of trafficking back into focus (Farmer 2019, 28; Milivojevic and Pickering 2013, 590–91). Driven by the rise of the women's-rights movement (A. M. Miller 2004), anti-trafficking initiatives initially remained centred on the sex trade involving women and children. However, other forms of exploitation were soon included. The Convention on the Rights of the Child, adopted in 1989, is the first treaty to prohibit traffic in children 'for any purpose or in any form' (art. 35). The year after, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) encouraged states to prevent and eliminate 'trafficking in migrant workers' (preamble). *Sex* trafficking was turning into *human* trafficking. Beyond the UN, other organisations also began showing a preoccupation with the phenomenon. Between 1987 and 1991, the Council of Europe adopted two

recommendations on trafficking in children and young adults (Recommendation 1065(1987) 1987; Recommendation R(91)11 1991). In 1989, the European Parliament declared that trafficking 'implies a whole series of limitations on the rights and freedoms of the human being' and 'is therefore one of the most degrading terms of slavery to which individuals can be subjected' (Resolution on the Exploitation of Prostitution and Traffic in Human Beings 1989, recital P). Trafficking was becoming the matter of national and international debate that it is today. With it, the contemporary anti-trafficking discourses that I explored in the previous chapter began to emerge. However, as this chapter has sought to demonstrate, their relations with human rights and penality did not originate from nothing. Their roots are to be found in what is now more-than-a-century of discursive engagement with the phenomenon of trafficking.

Trafficking became a human rights violation in the 1970s. Significantly, it was the same historical moment in which human rights became the dominant moral language of international politics (Moyn 2010). In the context of trafficking, human rights represented a secular and global morality that removed the vestiges of more nationalistic and religious conceptions of vice and virtue.[16] The *wrong* of trafficking, namely the reason which justified anti-trafficking activism and state intervention, has always remained a moral one. However, in the 1970s, it shifted from being a vice generated by promiscuous and extramarital sex to being a human rights violation. In this passage, the meaning of human rights in relation to trafficking conserved both the tendency towards penality and some of the moral substratum of older discourses. Despite their specific characteristics, all the historical discourses share an attempt to discipline and punish 'the criminal' who carried out evil practices against 'the victim'. The rationale for penality always remained the suppression of vice and the protection of value. It was the content and the source of morality that was redefined. In present-day discourses around trafficking, both the resort to penality and its moral rationale have been conserved. Yet the 'victims first' and the 'law enforcement' discourses are not identical because these two discourses, albeit rooted in the same past, have distinct genealogies.

Table 11: The 'law enforcement' discourse (from chapter 3).

Objects	Subject positions	Themes
Trafficking = • transnational organised crime • crime against the state's social-moral order	**Victim** = woman or child • helpless • unaware of her rights **Criminal** = • Organised trafficker • Victim who commits crimes	• More crime control = more human rights protection • Human rights provisions incorporated into the crime control framework

16 On the relationship between human rights and secularism, see Asad (2003, chap. 4) (arguing that the language of human rights 'can be taken as either sacred or profane' (155)); Moyn (2015) (stating that 'contemporary human rights are not too secular, but not secular enough' (167)).

Table 12: The 'victims first' discourse (from chapter 3).

Objects	Subject positions	Themes
Trafficking = • human rights violation • crime against the dignity of the victim	**Victim** = • blameless • in need of protection and assistance **Criminal** = • human rights violator • Corrupted public official	• Human rights used to humanise penality • Penality used to give force and recognition to human rights

The roots of the 'law enforcement' discourse

While commentators have highlighted the similarities between historical anti-trafficking discourses (especially about 'white slavery') and contemporary ones (e.g., Doezema 2010; Lammasniemi 2017), they have mainly done so in relation to the 'crime-control approach' that dominates present-day anti-trafficking interventions. What is rarely discussed is the role that human rights play in keeping alive the legacies of older endeavours (cf. Bernstein 2018, 9–11). At a first glance, it may appear that human rights are the main innovation of the current anti-trafficking framework. However, a careful analysis of how human rights are mobilised against trafficking shows that, at least for the 'law enforcement' discourse, they are an innovation in name only. In the 'law enforcement' discourse, the meaning of human rights does not differ significantly from older conceptions of vice and virtue. Of course, the context is different: reference to outdated religious and cultural values is today less explicit or substituted by modern concerns. However, as much as the fight against trafficking is to preserve the security of the state from foreign threats to its social-moral order (chapter 3), the 'law enforcement' discourse continues the century-long battle against the *vice* of the sex trade, now understood as a violation of human rights. In this context, human rights are deployed to give a justification to criminalisation policies aimed at satisfying anti-immigration or anti-prostitution sentiment (cf. Smith and Mac 2020, 165).

On the basis of these considerations, we can now consider the roots of the 'law enforcement' discourse. Its *objects* are to be found in the understanding of trafficking as a public moral wrong and a threat against the well-being of the nation ('social-purity' discourse) and society ('penal-welfare' discourse). From its inception, trafficking has also been approached as a serious crime, directly connected to immigration ('social-purity' discourse) and other organised crimes ('social-hygiene' and 'sexual slavery' discourses). Labelling trafficking as a human rights violation has not displaced previous framing but has actually reinforced it, by highlighting the moral repugnance of the offence. The 'law enforcement' discourse's *subject positions* have remained 'the victim' and 'the criminal'. Trafficked women are simultaneously victims and accomplices, helpless maidens and sexual threats ('social-purity' discourse). Interventions to protect the victim disguise attempts to discipline those who are believed morally and mentally weak ('social-hygiene' and 'penal-welfare' discourses). On the other hand, the trafficker is still cast as an organised and manipulative offender who stimulates the

demand for immoral practices ('social-purity' and 'social-hygiene' discourses). In terms of *themes*, ever-expanding penality has emerged as the tool to protect moral standards from the threat of trafficking—from the nation's purity to human rights as part of 'the wider culture of "Western norms"' (Asad 2003, 148). While a humanitarian language is deployed to justify crime-control agendas ('social-hygiene' discourse), victims' (moral) protection is incorporated into the criminal justice framework ('social-purity' and 'penal-welfare' discourses).

The roots of the 'victims first' discourse

Contrary to the 'law enforcement' discourse, the 'victims first' discourse does not use human rights as a new label for older conceptions of morality. In fact, human rights are often deployed to substitute nationalistic and religious values with cosmopolitan and secular ones (Asad 2003, 144). However, human rights remain a moral, rather than a political, tool to engage with trafficking. The ultimate aim is to prevent and vindicate a *wrong* that threatens proclaimed universal values, rather than to politically challenge the socio-economic conditions that cause abuses and vulnerabilities (see chapter 7; Marks 2008, 302; Bernstein 2017, 344–45).[17] In this regard, in the 'victims first' discourse, human rights play a role that is akin to the one of older moralities: to liberate the victim from abuse, they require penality to condemn the offence, communicate its gravity and apportion blame on the powerful perpetrators. The 'victims first' discourse justifies the penalisation of trafficking by reference to the physical and mental exploitation of the victim rather than to traditional notions of morality. Yet this resort to penality does not entail the abandonment of moral values but rather their re-engagement on new terms—human rights, rather than sexual morality.

In relation to its *objects*, the 'victims first' discourse reproduces the idea that people's domination is rendered grave or concerning only when labelled as 'crime', which in turn reinforces penal logics. This assumption has roots in the discursive history of anti-trafficking activism: while trafficking was seen as private moral harm ('repeal' discourse), a humanitarian issue ('social-hygiene' discourse) or a rights violation ('sexual slavery' discourse), it was also portrayed as a criminal offence to highlight its gravity. With regard to its *subject positions*, the 'victims first' discourse 'disciplines, regulates or constitutes subjects rather than emancipating them' (Kapur 2018, 19). This approach has a long discursive history of attempting to protect the victim, while controlling *her* body and speaking on *her* behalf ('repeal', 'social-hygiene', 'sexual slavery' discourses). This figure has been contrasted with the trafficker: a criminal villain whose punishment is necessary to bring justice to the victim ('repeal', 'social-hygiene', 'sexual slavery' discourses). In terms of *themes*, the 'victims first' discourse relies on human rights to mitigate and reorient penal policies; yet the discourse also facilitates the same penal

17 The 'victims first' discourse discusses poverty and inequality as causes of trafficking (chapter 3), 'but not in a way that suggests the possibility of actually doing anything about them' (Marks 2011, 73). The systemic context of abuses and vulnerabilities in which state policies have a major part is largely neglected.

policies as a way to give weight and substance to human rights protection. The use of morals to both tame and enable penality emerges from historical anti-trafficking discourses. Antecedents of the 'victims first' discourse pitted feminist moral ideas against the patriarchal moral order based on the 'double standard' for men and women. In so doing, they opposed a new victim-centred penality to a penal power that victimised female prostitutes and fostered impunity for their male exploiters ('repeal' and 'sexual slavery' discourses). This victim-centred approach did not de-escalate control and punishment but in fact made them more acceptable and compelling. Similarly, by complementing penality through moral education ('social-hygiene' discourse) or by humanising it through rehabilitative ideals ('penal-welfare' discourse), historical discourses presented the criminalisation of trafficking as pursuing the righteous goal of victim justice. Finally, both the 'victims first' discourses and some of its precursors ('social-hygiene', 'penal-welfare' and 'sexual slavery' discourses) have presented penality as an element of a broader set of anti-trafficking tools. In so doing, the discourses have moved attention away from crime-control measures, while rendering them necessary for the implementation of other anti-trafficking goals (moral education, prevention, rehabilitation and protection).

7. Conclusion

This chapter has traced a history of the dominant anti-trafficking discourses and their relationship with penality and human rights. Having conducted a discourse analysis of texts written between the late nineteenth and the late twentieth centuries, it has shed light on the roots of the 'law enforcement' and the 'victims first' discourses. A century-long attempt to prohibit and control the trade in prostitution is at the root of the way human trafficking is now understood and addressed. The discursive complexities of such a past have contributed to the alignment of human rights with the state's penal power that we experience today. Our present is shaped and moulded by the ongoing resonance of past discourses. The 'repeal' discourse brought in a tension between protecting and disciplining female prostitutes and a reorientation of penality from police control over prostitutes to prosecution of traffickers. The 'social-purity' discourse made trafficking a wrong against the well-being of the nation and identified in penality the key instrument of moral protection. The 'social-hygiene' discourse used a humanitarian language of moral and health protection to justify crime-control agendas. While promoting the re-education of the prostitute and attenuated punishment for the procurer, the 'penal-welfare' discourse contributed to making penality more 'humane' and, thus, more compelling. Finally, the 'sexual slavery' discourse anticipated current trends of using the penal system to protect victims' human rights. Overall, the analysis of anti-trafficking discourses from their emergence to the present is illustrative of how human rights have 'accelerated' towards penality. In the case of human trafficking, we can hardly observe what Karen Engle (2015) calls a 'turn to criminal law in human rights'.

Far from having a non-criminal past (somehow implicit in the idea of a 'turn'), human rights embraced penality from the very first moment they were associated with trafficking.

One should not conclude that there was a linear and necessary evolution from the past to the present. Rather, the current shape of anti-trafficking discourses is the result of historical contingencies: while certain discursive formations were taken up, others were lost along the way. Notwithstanding today's close linkage between trafficking and penal tools, the first anti-trafficking discourse arose out of a campaign that was in fact against the state's power to police female prostitutes. Yet this late nineteenth-century critique of penality was soon forgotten when the fight against 'white slavery' became a social-purity crusade to remove sexual vice from the UK. It was also not inevitable that the LoN's campaign against trafficking would combine humanitarian aims with penal ones. Having identified poverty and low wages as causes of prostitution, the League could have directed its mandate to improve prostitutes' socio-economic conditions. Yet, by choosing to address trafficking as a moral issue, it mainly aimed to prohibit the phenomenon by means of penality. Immediately after the Second World War, there were some attempts to make trafficking a human rights concern. However, the 1949 Convention did not go in this direction, preferring to uphold notions of morality based on condemnation of sexual vice. Twenty years later, when trafficking did become a human rights violation, the centrality of penality in anti-trafficking interventions could have been questioned, but was not.

It is clear, therefore, that the discursive alignment of rights and crime control that characterises today's anti-trafficking regime was not an inevitable historical outcome. Yet the assumption that trafficking was a matter of right and wrong, requiring protection for the former and punishment for the latter, eventually prevailed. There is discontinuity, but there is continuity too. The 'law enforcement' and the 'victims first' discourses are certainly different from their historical predecessors. They are concerned not merely with *sex* trafficking, but with *human* trafficking; not merely with sexual morals, but with violations of the fundamental rights of human beings. However, both contemporary and historical discourses are committed to penal intervention and place morality at the centre of what is at stake. Using discourse analysis, this chapter and the previous one have exposed the historical and contemporary assumptions that support, and lie behind, the relationship between human rights and penality in the context of human trafficking. The next two chapters do the same with regard to my second case study, that of torture.

5

Punishing torture through human rights

In March 2020, the British government introduced the Overseas Operations Bill (2020) in the House of Commons. The bill's stated aim was to end 'vexatious claims and prosecution of historical events' involving British soldiers, 'that occurred in the uniquely complex environment of armed conflict overseas' (UK Ministry of Defence 2020, para. 1). Central to this was a presumption against prosecution of soldiers after five years from the occurrence of certain offences allegedly committed during overseas operations. Sexual offences were excluded from the bill's time limit, but originally torture was not. The inclusion of torture in the presumption against prosecution sparked a heated debate on the role that criminal law should play to protect the right not to be tortured. The original bill enjoyed easy passage in the Commons. However, in the House of Lords a series of amendments led the government to accept that torture prosecutions should not be obstructed. The Overseas Operations (Service Personnel and Veterans) Act passed into law in April 2021. The presumption against prosecution was retained, but torture (together with sexual offences, crimes against humanity, genocide and war crimes) was excluded from the provision. An analysis of the parliamentary discussions and the related civil society responses show how competing discourses were advanced around the prohibition of torture (cf. Mallory 2022). All discourses engaged with rights claims and penality, albeit in very different ways.

The members of parliament, human rights groups (Amnesty International UK 2020) and legal scholars (Gearty 2020; Farrell 2021) who opposed the presumption against prosecution for torture argued that this provision would in effect lead to a 'decriminalisation of torture' (Baroness D'Souza 2021, col. 1214). The discourse they articulated—a discourse that I term ***the 'jus cogens' discourse***—regards torture as the quintessential human rights violation and one of 'the most serious of crimes' that 'has no moral justification in any circumstances' (Morgan 2020, col. 201). Torture, generally inflicted by powerful actors (e.g., British troops) on vulnerable victims (Baroness Jones of Moulsecoomb 2021, col. 1206), is considered as a dehumanising experience for both the victim and the perpetrator. The original bill was criticised because, by reducing the risk of torture prosecutions ever getting off the ground, it appeared to suggest that 'there are some circumstances in which torture is accepted' in the context of overseas operations (Carmichael 2020, col. 991). In effect, for the 'jus cogens'

discourse, any attempt to make criminal law harder to use against torture reads as 'legitimising' the practice and undermining its absolute prohibition under international law (Owen 2020, col. 237).

In response, the supporters of the original Bill articulated what I call ***the 'national security' discourses***. Although not always advanced as a single voice, this group of discourses resists, to a greater or lesser extent, the discursive formations of the 'jus cogens' discourse. The 'national security' discourses see torture as what 'differentiates the civilised from the uncivilised' (The Lord Bishop of Leeds 2021, col. 1563). For these discourses, torture is 'never, ever acceptable' (Baroness Buscombe 2021, col. 1193) but in certain (exceptional) instances it can be condoned.[1] Some 'rationalisations' are more explicit than others: the 'national security' discourses may deny the practice of torture ever taking place (Wallace 2020, col. 987); they may narrow down its definition and reduce the scope of its prohibition (Baroness Buscombe 2021, col. 1193); or they may tolerate violent activity, like torture, as necessary in the discharge of military duties (Mercer 2020, col. 233). These discourses 'condemn the use of torture' and 'remain committed' to the abstract prohibition under human rights law (Baroness Goldie 2021a, col. 1255), but they also restrict prosecution and punishment for torture. This position is also supported by highlighting the moral ambiguity of victims and perpetrators.[2] British soldiers are presented as a force for good; if they torture, they do it 'in good faith', believing that their action was 'legitimate and proportionate' (Baroness Goldie 2021b, col. 1575). Conversely, those subjected to abuses are either terrorists or false victims mobilised by 'ambulance-chasing lawyers' in search of financial enrichment (Wallace 2020, col. 992).

My analysis shows that the 'jus cogens' and the 'national security' discourses were not exclusive to the discussion of this bill. They are in fact the dominant ways in which we talk about torture, human rights and penality in the United Kingdom (UK), in Europe and at the international level. To some extent, the distinction between these discourses may bring to mind the public and intellectual debate between 'absolutists' (those who believe that the prohibition of torture can never be justifiably infringed or subjected to derogation) and 'conditionalists' (those who accept that torturous methods may be accommodated in exceptional circumstances) in the context of the post-9/11 'war on terror' (Gross 2004).[3] It

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1 I use the term 'to condone' with the meaning of tolerating or not condemning a wrongful behaviour. As a generic term it usefully avoids the legal connotations of terms such as 'to excuse' or 'to justify'.

2 My analysis does not focus on *all* discourses around torture, but only on those concerned with human rights and penality. On the narratives around British soldiers and victims, in the context of human rights abuses committed by the British Army in Northern Ireland and Iraq, see Hearty (2020).

3 Michelle Farrell (2013) distinguishes between three positions: the 'absolute torture prohibition', the 'qualified torture prohibition' and the 'pragmatic absolute torture prohibition'. While the 'absolute torture prohibition' corresponds to my 'jus cogens' discourse, I combine the other two positions into the 'national security' discourses because they both appear to accommodate—though to a different degree—some kind of torture.

also somehow reflects the distinction between the absolute ban on torture under international law and the actual practice of states (Levinson 2004). Yet the 'jus cogens' and the 'national security' discourses are more than simply the two main positions in the debate about the moral and legal nature of the torture ban. While addressing the subject-matter of torture, they also establish particular relationships between human rights and penality. These relationships are, in turn, framed through the assignment of certain *identities* to those who torture and to those who are tortured. Exploring these discourses reveals how the right to be free from torture is tied to penality. The 'jus cogens' discourse is the only proper *human rights* discourse, but the 'national security' discourses are also worth exploring because, by developing as oppositional stances towards the 'jus cogens' discourse, they drive its legitimacy and reify its formations. In addition, the 'jus cogens' and the 'national security' discourses, albeit very different, share a common assumption. Both believe that the prohibition of torture is meaningful only if translated into criminalising and punishing torturers. When the duty to punish appears as problematic (for either practical or moral reasons), the 'national security' discourses choose not to punish (or to punish less) and accept that torture could (or may appear to) be condoned. Conversely, the 'jus cogens' discourse upholds the duty to punish even in the most controversial situations.

The competition between these discourses is both product of and, in turn, produces certain knowledge around the social phenomenon of torture (what is torture?), its subjects (Who tortures? Who is tortured?) and the social techniques to control or outlaw it (how do we end/control torture?) (cf. Foucault 1991a, 27). While ordering and rendering legible the reality around the practice, this competition also tends to foreclose alternative views of the same reality (cf. Foucault 1970). In this chapter, I show that when torture is approached as a human rights violation, criminal accountability becomes so fundamental that any ambiguity with regard to it appears as a form of torture-apology. This derives from an investment in penality as the primary means of preventing torture and, especially, of hypostatising proclaimed universal moral beliefs of what constitutes an extreme wrong. Whilst punishment for acts of torture remains rare and sporadic, the relentless desire to see torture punished comes to occupy a predominant space in anti-torture practice. In this way, the same penal institutions (e.g., police and prison) with the most capacity for practising state torture are compelled to act to prevent and suppress torture as a human rights abuse. A question here arises on whether there is discursive space beyond the dominant discourses. In the chapter, I pit these discourses against certain critical voices that, whilst not forming a unitary discourse, challenge them in various ways. I look in particular at those voices that combine a firm condemnation of torture in all circumstances with a refusal to implicitly endorse penality and its enforcement mechanisms.

The chapter uses discourse analysis on torture texts. I explained in chapter 1 that torture, as the archetypal violation of human rights and one of the most heinous crimes, is particularly illustrative of human rights-driven penality. It is possibly the abuse where an entanglement

between human rights and penality emerged first and most clearly (see chapters 2 and 6), but also the abuse where this entanglement has been taken for granted the most. The discourse analysis in this chapter provides an analogous function as in chapter 3, but in the context of torture rather than human trafficking, and similarly contributes to the overarching arguments of the thesis. It illustrates how, in relation to the subject-matter of torture, human rights-driven penality is sustained by the competition between victim-centred and state-oriented discourses ('jus cogens' and 'national security' discourses) and correlated to the resort to state's penal powers to convey moral condemnation of abuses. Similarly to chapter 3, the scope of this chapter is limited to exploring present-day discourses, while their historical roots are analysed in the next chapter. Sections 1–3 retrace and examine the torture discourses (the 'jus cogens' discourse, the 'national security' discourses and critical discursive positions that challenge them) along the three analytical dimensions that we have seen in previous chapters: objects, subject positions and themes. Section 4 considers how the knowledge that is produced through the analysed discourses materialises in anti-torture practice.

1. Formations of objects

'What do we talk about when we talk about torture?'—asks Tobias Kelly (2013, 7; 2011). This question is important because, despite its legal definitions, torture remains a malleable concept. Article 1 of the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) (1984) provides an internationally agreed legal definition of torture.[4] Its elements are: i) the intentional infliction of severe mental or physical suffering; ii) by a public official, who is directly or indirectly involved; iii) for a specific purpose (obtaining information, punishment, intimidation/coercion or discrimination). In England and Wales, section 134 of the Criminal Justice Act (1988) defines the offence of torture along similar lines but without requiring any specific purpose. However, in Sanford Levinson's (2004, 27) words, '[t]orture as a term is a place holder—an abstract word made concrete by the imagination of the reader'. Not just the reader, but also the speaking subject in practice broadens, narrows or fills with varying content the concept of torture depending on their moral and strategic positions, the situations covered and the responses demanded.[5] This section explores how knowledge of what is and what is not torture is discursively produced, looking in particular at the extent to which torture is regarded as a 'crime' and a 'human rights violation'.

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4 This definition is without prejudice to any wider definition in international or domestic law (Torture Convention 1984, art. 1(2); Rodley 2002).

5 This occurs because labelling a violent act as torture has legal, moral and political consequences. See, e.g., *Ireland v United Kingdom* (2018), where the Irish government unsuccessfully tried to persuade the European Court of Human Rights (ECtHR) to revise its 1978 judgment regarding whether British security forces' use of the 'five techniques' of interrogation in Northern Ireland amounted to torture (chapter 6).

Table 13: Contemporary torture discourses. Formations of objects.

'Jus cogens' discourse	'National security' discourses	Critical discursive positions
Torture =	**Torture** =	**Torture** =
• archetypal human rights violation • exceptional wrong and crime	• measure of civilisation • moral wrong that can be condoned in exceptional circumstances	• exercise of sovereign power connected to penality • not exceptional

The 'jus cogens' discourse

The 'jus cogens' discourse views torture as 'one of the most brutal human rights violations and a direct attack on the core of human dignity' (Nowak 2010, para. 87). Torture violates human rights materially, by breaching a person's physical and mental integrity, and spiritually, by constituting 'an outrage upon personal dignity' (*Prosecutor v Kunarac et al* 2002, para. 190). In the 'jus cogens' discourse, torture is also one of 'the world's most heinous crimes' (JCHR 2009b, 3). The crime of torture is not simply viewed as an aggravated assault, but as 'an exercise of power over a victim that does not correspond to any other criminal offence' (Bernath 2010, 19). For this reason, calling torture 'crime' serves to signal 'the specific nature and the gravity of the offence' (Bernath 2010, 19). While the definition contained in the Torture Convention mainly serves penal purposes (Gaeta 2008, 189), acts of torture can also constitute crimes against humanity and, when committed in situations of armed conflict, war crimes (Rome Statute of the International Criminal Court 1998, arts. 7(1)(f) and 8(2)(a)(ii)). Torture is, finally, a crime with universal character: it is such 'an attack on the fundamental values of the international community' that it should be prosecuted without regard to any territorial ties (Amnesty International 2001b, 33).[6]

The 'jus cogens' discourse attaches great importance to the absolute and non-derogable prohibition of the practice.[7] The ban on torture is a peremptory norm or *jus cogens* (*A v Home Secretary (No 2)* 2005, para. 33; UNCAT 2008, para. 1; *Belgium v Senegal* 2012, para. 99), which rejects all exceptions or qualifications and proscribes any measure that weakens the force of the prohibition. As the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia stated in *Furundžija* (1998, para. 150):

> The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about its effects.

The 'jus cogens' discourse's support for this blanket ban accepts no compromise. The prohibition of torture stands 'even in the event of a public emergency threatening the life

6 The Torture Convention provides for the obligation for states parties to establish universal jurisdiction to try cases of torture where an alleged perpetrator cannot be extradited (art. 5; see chapter 2).

7 In international human rights law, torture is prohibited in absolute terms. See, e.g., Universal Declaration of Human Rights (1948, art. 5); European Convention on Human Rights (1950, art. 3); International Covenant on Civil and Political Rights (1966, art. 7); Torture Convention (1984, art. 2(2)).

of the nation' and 'irrespective of the conduct of the victim or the motivation of the authorities' (*Gäfgen v Germany* 2010, para. 107). For the discourse, condoning or benefiting from even a single instance of torture is 'immoral', 'illegal' and 'counter-productive to law-enforcement efforts' (Méndez 2011, para. 50). The prohibition of torture is not even debatable: discussing moral dilemmas around torture (e.g., 'ticking bomb' arguments) is deemed wrong, as it would cast doubts on the absolute ban (JCHR 2009a, para. 63).

Taking the definition in the Torture Convention as a benchmark, the 'jus cogens' discourse tends to expand what counts as torture, to include new situations and provide broader protection (Méndez 2011, para. 37). For the discourse, to amount to torture the severe mental or physical suffering 'does not have to be long lasting, damage health, or produce any identifiable bodily injury' (Paust 2009, 1552). The discourse also underlines the contingency of the 'public official requirement' (Amnesty International 2001b, 4), envisaging a full protection against torturous practices perpetrated by private individuals (*A v United Kingdom* 1998, para. 22).[8] Rape and other gender-based violence (domestic violence, female genital mutilation, trafficking), mob justice, lynching and corporal punishment are often connected with torture or qualified as such (UNCAT 2014, paras. 53–70).[9] Given the 'special stigma' attached to the finding of torture (chapter 7), labelling other violent behaviours as torture is used to inscribe 'the gravity of the violence' and emphasise 'the urgency for the response' (OMCT, WLW, Amnesty International and GJC 2018, 6).[10] Nonetheless, the 'jus cogens' discourse never stretches the definition of torture to include mental anguish resulting from incarceration.[11] Despite its potential severity, the discourse considers this form of suffering as a 'natural' consequence of the use of imprisonment as a legitimate punishment for crimes (Rodley and Pollard 2006, 121).

Overall, the 'jus cogens' discourse provides a moral reading of the concept of torture. Torture is a human rights violation and a crime because it is 'inherently repugnant and evil' (Ambos 2008, 269). It represents a total disrespect for human dignity and its practice is contrary to the beliefs, values and interests that make us human (Redress 2000, 201; Bachelet 2017). In the words of Lord Hoffmann in *A v Home Secretary (No 2)* (2005, para. 82), '[t]he use of torture is dishonourable' because it 'corrupts and degrades the state which uses it and the legal system which accepts it'. Accordingly, torture emerges as an exceptional wrong

8 Under the ICC Elements of Crimes (2000), the definition of torture as a war crime or as a crime against humanity does not require the involvement of a state official in the commission of the crime (Gaeta 2008).

9 See the discussions of rape as torture in McGlynn (2009) and domestic violence as torture in Davidson (2019).

10 The 'jus cogens' discourse fosters a 'progressive' interpretation of the prohibition of torture not only as a norm of human rights law but also of criminal law. While this construction aims to maximise victim protection, it may run counter to the general principles of criminal law which would require a strict construction (Robinson 2008, 929; Stoyanova 2017, 336).

11 The Torture Convention explicitly excludes pain or suffering arising from 'lawful' application of criminal sanctions (in terms of domestic and international law) (art. 1).

(Baroness Warsi 2021, col. 1210), fundamentally different from everyday violence (cf. Jensen et al. 2017, 402–5). Even when torture is practised systematically, it is regarded as a departure from normal practice (Lord Browne of Ladyton 2021, col. 1565) and a 'betrayal' by the authorities who are ordinarily responsible for protecting people from harm (Amnesty International 2001c; cf. Marks 2004, 376).

The 'national security' discourses

The 'national security' discourses do not always frame torture in the same manner. Torture is sometimes approached from a consequentialist perspective; at other times, utilitarian arguments are rejected and torture is discussed in deontological terms. However, the 'national security' discourses are worth considering together insofar as they question the discursive formations of the 'jus cogens' discourse. The 'national security' discourses do not support torture: they are in fact normatively against torture (Dershowitz 2004, 266) and see it as 'a barbarous and abhorrent crime' (UK Ministry of Justice 2009, 12). They also position the prohibition of torture as a necessity of progress; yet they think of progress in more national rather than universal terms. While torture was widespread in the past and still is under dictatorships (Resolution on the Eradication of Torture in the World 2014), according to the 'national security' discourses, 'civilised nations' have eradicated the practice and made it a crime, as it is contrary to their fundamental values, including the protection of human rights (Lord Carswell, *A v Home Secretary (No 2)* 2005, para. 146; Lord Goff, *R v Bow Street Magistrate, ex p. Pinochet (No. 3)* 1999, 217).[12] In the UK, the rallying cry is that the British government has never 'been found by a court to be responsible for the torture or ill-treatment of any individual' (UK Government 2017, para. 243). Torture, in other words, is regarded as fundamentally 'un-British' and 'a crime committed by other people in other places' (Kelly 2013, 24).[13]

As noted, the 'national security' discourses agree that torture cannot be justified as a general practice (Ignatieff 2004, 140–41). Yet they employ moral and practical arguments to condone some instances of torture in 'exceptional' circumstances (cf. Farrell 2013). 'Torture is uncivilised'—argues Richard Posner (2004, 294–95)—'but civilised nations are able to employ uncivilised means … without becoming uncivilised in the process'. Stanley Cohen (2001, 101–16) explains that the spiral of denial that leads the 'national security' discourses to condone torture consists of three variants: literal (nothing happened), interpretative (what

12 Although the ratio decidendi of *A v Home Secretary (No 2)* (2005) (evidence likely obtained by torture committed abroad by a foreign state's agents is inadmissible in UK proceedings) and *R v Bow Street Magistrate, ex p. Pinochet (No. 3)* (1999) (Pinochet does not enjoy immunity from prosecution for torture after 1988) may appear to be along the lines of the 'jus cogens' discourse, some of the judges' obiter dicta reproduce the 'national security' discourses.

13 In *A v Home Secretary (No 2)* (2005), Lord Bingham held: it is 'clear that from its very earliest days the common law of England set its face firmly against the use of torture' (para. 11). He contrasted the common law's rejection of torture with the use of torture in early modern continental Europe to describe the practice as fundamentally alien to British legal culture (Farrell 2022, 19).

happened is really something else) and implicatory (what happened is justified).[14] First, the 'national security' discourses deny that liberal democracies have inflicted torture or that their actions count as such (Tugendhat and Croft 2013, 42). Second, through interpretation, the discourses limit torture to a very high degree of physical (rather than also mental) cruelty (Malcolm 2017, 84–89).[15] Thus, the 'national security' discourses do not explicitly admit that torture is permissible but accept that certain coercive methods—in practice comparable to torture or other illegal ill-treatments—may be justified in certain circumstances (Ignatieff 2004, 136–38). Similarly, the 'national security' discourses arrogate to themselves the power to define what is torture and what is not (Pinto-Duschinsky 2011, 36). For the UK government, for instance, British soldiers' 'intrinsically violent' activities should not be regarded as torture (Baroness Goldie 2021b, col. 1575), even when in effect they appear to many as indistinguishable from it. Third, the 'national security' discourses discursively create abstract scenarios (e.g., the 'ticking bomb' example) where torture appears as morally permissible or even required (*Public Committee v Government of Israel* 1999; Parry and White 2002, 761).[16] Various collateral arguments sustain this approach: the claims that moral debates around the scope of the torture ban are warranted and necessary (Levinson 2004, 28); the argument that torture might work (Levinson 2004, 33); and the assumption that we can quantify the costs and benefits of torturing and not torturing (Bagaric and Clarke 2007). Additionally, on rare occasions, the 'national security' discourses accept that (some) torture should be regulated rather than legally prohibited (see, e.g., Dershowitz's (2004) 'torture warrant').

Critical discursive positions

The 'jus cogens' and the 'national security' discourses do not cover all the possible discursive space around torture. Limiting the focus on critical utterances connecting torture and penality, we have a position that approaches torture as a technique of punishment deeply connected with the exercise of sovereign power. Angela Davis (2005, 62) writes:

> Torture is extraordinary and can be clearly distinguished from other regimes of punishment. But if we consider the various forms of violence linked to the practice of imprisonment … then we begin to see that the extraordinary has some connection to the ordinary.

14 See also Melzer (2020b) (arguing that the 'national security' discourses' responses to allegations of torture are often characterised by three patterns of denial: denial of fact, denial of responsibility or denial of wrongfulness).

15 On the limits of advocating minimalism as an approach to interpreting torture (often for 'minimalism's sake'), see Mavronicola (2021, 33–34).

16 For a collection of various 'ticking bomb' examples, see Ginbar (2008, 379–86). For the argument that 'ticking bomb' examples are misleading because they both idealise and abstract, see Luban (2005); Shue (2006).

This position upholds the claim that acts of torture are unjustifiable but also rejects the idea that these abusive practices can be dismissed as 'anomalies' (Davis 2005, 49). Susan Marks (2004, 378–80) illustrates three arguments that have been advanced against this language of 'exceptionalism': thinking torture as an aberrant event 'obscures the normality of abuses'; it conceals 'the conditions that lie behind' acts of torture; and it prevents us from asking 'a range of pertinent questions' about the context, social processes and conditions whereby torture is practised.

In this refusal to see acts of torture as 'freakish irregularities' (Davis 2005, 50), critical voices take a political shape rather than ethical and juridical ones.[17] Moral and legal debates about torture are criticised for implicitly legitimising those forms of violence that do not appear as *prima facie* immoral or that are perpetrated under the cover of law (Kelly 2011, 341; Davis 2005, 77–78). Direct engagement with the political context that enables torture becomes more important than discussion about the evilness of torture and the boundaries of its legal prohibition. Torture is expressly considered in relation to other violent manifestations of sovereign power, including incarceration, policing, military interventionism and other instances when violence is inflicted legally and non-arbitrarily (Sexton and Lee 2006). Prison abolitionists, for example, have long questioned the state's power to incarcerate people by qualifying the pain of prisons, as currently constituted, as a form of torture (Dubler and Lloyd 2020, 37).[18] The language of torture is also used to mark opposition to police violence (P. Butler 2011; We Charge Genocide 2014) and fight for reparations without necessarily relying on penal institutions (CTJM n.d.; McLeod 2019; Akbar 2020, 1831).

2. Formations of subject positions

Torture discourses produce contradictory knowledge not only about torture but also about the individuals who experience it as either victims or perpetrators. The nature of torture as a legal violation already demands the identification of individuals or groups to be held accountable or given redress. A process of identification also occurs at the discursive level: people who are said to be involved in torture are given certain identities that enable certain understandings of torture and certain strategies against it. For instance, ambiguity regarding the torturer's moral culpability leads to a very different appreciation of, and response to, torture than, say, presenting the torturer as a moral monster. This section explores how the discourses under analysis frame the 'victim' and the 'perpetrator' of torture. It does so to determine how, by constituting certain moral and legal subjects, the discourses order the reality around torture, thereby sustaining certain interventions while precluding others.

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17 Paul Kahn (2008) describes torture as an inherently political phenomenon that offends our vision of what sovereignty should be: it appears as the practice of power of the sacral monarch rather than of popular sovereignty.

18 For a theoretical discussion on the relationship between punishment, imprisonment and torture, see Bronsther (2019; 2020) (arguing that long-term incarceration is qualitatively comparable to torture).

Table 14: Contemporary torture discourses. Formations of subject positions.

'Jus cogens' discourse	'National security' discourses	Critical discursive positions
Victim = • blameless • suffering body **Perpetrator** = • morally corrupted • powerful	**Victim** = • ambiguous victim • distant victim • victim of the victim • 'fake' victim **Perpetrator** = • heroic perpetrator • distant perpetrator • 'rotten-apple' perpetrator • 'fake' perpetrator	• Focus on system more than on individuals • Torturer and tortured as political actors

The 'jus cogens' discourse

The Victim

The victims of torture[19] (along with their protection, redress and rehabilitation) constitute the 'jus cogens' discourse's focus of concern, but their representation is what gives purpose to the discourse: the 'jus cogens' discourse is justified because it speaks in the name of torture victims.[20] Beyond the rhetoric, the discourse shows genuine support for actual people who have faced torture, for their suffering and for their violated bodies. Sometimes, victims are directly asked to tell their stories 'to promote awareness' (IRCT 2014, 4) or to help 'track' their torturers (IRCT 2017, 7). Other times, the 'voices of victims' are 'taken into account' to orient anti-torture policies towards certain goals (Redress n.d.). In the 'jus cogens' discourse, anyone can become a victim of torture. Not only because anyone can potentially face unwanted severe pain and suffering, 'regardless of their demographic or group affiliations' (Bergman-Sapir 2016, 45), but also because each act of torture is said to concern 'all members of the human family because it impugns the very meaning of our existence' (OHCHR 2004, 1). However, the discourse narrows down this macro-category when it focuses on those who face a higher risk of torture. Here, the vulnerability of the victim plays a key role: torture is said to arise from situations where there is 'an imbalance of power, in which one person is totally dependent on another' (Bernath 2010, 4). For the 'jus cogens' discourse, many of those who suffer torture come from disadvantaged groups within society: prisoners, minority groups, women, minors, migrants, disabled people, the homeless and the poor (UNCAT 2008; 2012).

The 'jus cogens' discourse portrays torture as destructive, as it physically or psychologically affects most victims for the rest of their life (Nowak 2010, para. 63). Torture violates the physical or mental integrity of the people subjected to it and their family members (OHCHR 2002a, 28); it negates their autonomy and humanity (Bergman-Sapir 2016, 42); and it deprives

19 Sometimes the term 'torture survivor' is also used (UNCAT 2012, para. 3).

20 See, in the context of international criminal law, Kendall and Nouwen (2013).

them of human dignity (Amnesty International 2001a, 113). By highlighting victims' suffering, the 'jus cogens' discourse operates a 'strategy of dis-identification' (cf. Aradau 2004, 262). On the one hand, there is an insistence that torture is often inflicted on the 'innocent', while 'the true, guilty perpetrator of the crime' remains free (Boyle and Vullierme 2018, 13). On the other, once people have been tortured, their torments make them extraordinary. They are no longer identified as harmful subjects (terrorists or criminals) nor merely as political dissidents: they all become suffering bodies with 'an equal moral entitlement' to redress and rehabilitation (OHCHR 2004, 13).

The Perpetrator

As we have seen, in the 'jus cogens' discourse torture involves a substantial power asymmetry between perpetrator and victim (Mavronicola 2021, 44). If the victim is 'the vulnerable', the perpetrator is 'the powerful' (Chakrabarti 2010, 3). In this discourse, the exercise of power over a victim is what fundamentally makes a person a torturer, regardless of whether they are state or non-state actors (OMCT, WLW, Amnesty International and GJC 2018, 11). On the one hand, the act of torture manifests 'the torturer's limitless power' over 'the victim's absolute helplessness' (Luban 2014, 128). On the other, the 'jus cogens' discourse portrays torturers as agents holding full authority and control even before and after the infliction of suffering. Many are presented as having acted under the aegis of high state officials, such as 'ministers', 'senior officers' or 'military leaders' (OHCHR 2004, 18). After their actions, most torturers are also deemed capable of continuing their lives as usual, without fear of legal consequences (Pillay 2011). By emphasising this unequal and profoundly unjust power relation between victims and perpetrators, the 'jus cogens' discourse identifies first shame and then punishment as the instruments to shift the distribution of power and bring about justice.

Ariel Dorfman (2004, 8) has argued that torture presupposes 'the abrogation of our capacity to imagine others' suffering, dehumanizing them so much that their pain is not our pain'. By demanding this of the perpetrators, torture appears to degrade all those who lend themselves to the practice (Lord Bingham in *A v Home Secretary (No 2)* 2005, para. 11). In the 'jus cogens' discourse, the torturers, incapable of compassion for their fellow human beings, are dehumanised. No longer fully fledged 'human beings', they are regarded as 'the world's worst criminals' (JCHR 2009b, para. 4) and 'enem[ies] of all mankind' (Redress 2000, 13).[21] By portraying the torturers as individuals who deliberately choose evil, the discourse has the effect of presenting torture as a problem of individual moral monsters, thereby reproducing the assumption that it is an anomaly in an ultimately just system. In this context, legal punishment and rehabilitation become crucial steps in the process of moralising, or even 're-humanising', the perpetrators.

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21 The idea of the torturer as 'hostis humani generis, an enemy of all mankind' comes from *Filartiga v Pena-Irala* (1980).

The 'national security' discourses

The Victim(s)

The 'national security' discourses' subject positions are loaded with moral ambiguity. The victims of torture (sometimes real, more often imaginary) are not 'defenseless' but serious threats themselves (Gur-Arye 2004, 192). Generally male, foreign and racialised, the victim is primarily an evil person (a terrorist or a ruthless criminal) whose actions 'may pose a mortal danger' to the values and beliefs of liberal democracies (Ignatieff 2004, 137–38).[22] For instance, the Israeli High Court of Justice has not hesitated to recall that terrorists, even when allegedly subjected to torture, act 'out of cruelty and without mercy' and aim at the 'disruption of order' (*Public Committee v Government of Israel* 1999, para. 1). At times, the victims are made responsible for their own torture, because they do not reveal the information in their possession or because they have posed a threat in the first place (Gur-Arye 2004, 192; S. Greer 2011, 84). Finally, the 'national security' discourses may contend that victims of ill-treatment, given their moral connotations, do not deserve rights otherwise enjoyed by ordinary citizens (Tugendhat and Croft 2013, 39).

The 'national security' discourses contrast this 'ambiguous victim' with three other 'victims'. One is the 'distant victim': the abstract, vulnerable and generally female prey of oppressive regimes (Resolution on the Eradication of Torture in the World 2014, paras. 19 and 40). To prove their moral standing, the 'national security' discourses may express sympathy with *her*, provided that *she* does not become a burden (UK Government 2017, para. 243). Another category comprises the innocent 'victims of the victim', namely yet-to-be victims that are discursively created to be opposed to the evilness of the 'ambiguous victim' of torture (e.g., in 'ticking bomb' examples) (Bagaric and Clarke 2007, xi). They are the 'lives, perhaps many lives' that information coming from torture is supposed to save (Lord Brown in *A v Home Secretary (No 2)* 2005, para. 171). Finally, there are the 'fake victims', who 'pretend that they have fled from torture' to demand asylum or other protection (Pinto-Duschinsky 2011, 36). The 'national security' discourses despise them, as their 'unfounded or abusive' claims (UK Government 2017, para. 196) risk lowering the thresholds of the torture prohibition, thereby diluting its moral force (Malcolm 2017, 89).

The Perpetrator(s)

In the 'national security' discourses, the representation of the perpetrators already provides an excuse for their actions. While torture remains always wrong, the perpetrators are *not so* wrong when they act to save 'a large number of lives' (Parry and White 2002, 765), protect 'us' from evil (Ignatieff 2004, 8) or serve their nation in a just war (Larkin 2020, 5). Sometimes, in the 'national security' discourses, the perpetrator is imagined as a heroic figure that acts beyond (and despite) the law to save the law itself from ruin—while courageously

22 For a critique of the use of language of good and evil in this respect, see Gearty (2005).

accepting the consequences (Gross 2004). However, once this moral ambiguity is introduced regarding the subjects of torture, moral ambiguity inevitably pervades torture as the object of discourse—no longer solely wrong but somehow also allowed.

The 'national security' discourses discursively construct three other classes of perpetrators to prevent the damage that allegations of torture might do to the reputation of the nation and its institutions (cf. Kelly 2013, 22).[23]. One is the 'distant perpetrator', namely the uncivilised torturer of dictatorial regimes who is pitted against the 'distant victim' (UK Ministry of Justice 2009, 9). This figure serves to outweigh the violence of liberal democracies, which appears as less barbaric than the one perpetrated elsewhere (Lord Rodger in *A v Home Secretary (No 2)* 2005, paras. 130–136). The police officers or the soldiers who, having acted violently, are accused of torture are represented as either the 'rotten-apple' or the 'fake perpetrators'. The former are singled out as 'occasional lapses' from the values of 'decency and honour' that the military or the police normally embody, thereby re-legitimising those very same institutions (UK Government 2012, para. 565). The latter are not regarded as torturers, but in fact as the real 'victims' (Wallace 2020, 992). The 'national security' discourses downplay these individuals' violence and describe the charges against them as 'vexatious claims' (UK Ministry of Defence 2020, para. 1) or even actual 'mental torture' (Jones 2020, col. 166).

Critical discursive positions

In the production of knowledge around the subjects of torture, not all utterances can be ascribed to either the 'jus cogens' or the 'national security' discourses. Critical voices have in various ways questioned the dominant representations presented above. I focus here on three general objections.

A first objection is that dominant discourses shape the identities of people who experience torture in a patronising way. Rather than letting the 'victims' and 'perpetrators' define themselves, dominant discourses impose upon them characteristics that oversimplify the complexity of their experience (cf. Kelly 2013, 170–71). The 'jus cogens' discourse, in particular, risks fixating the identity of the victim as helpless, as well as precluding a more holistic appreciation of the position of the victim, who may well be in a 'devastating sense of powerlessness' (OHCHR 2004, 19) but who can also exercise active resistance against the violence (cf. Ticktin 2006, 44). A better approach would be to pay more attention to the role of discourse in constituting subject positions (Kennedy 1985, 1379). It would also entail creating more room for the people involved in torture to speak for themselves about their experience—outside and beyond the confined spaces provided by the judicial process (IRCT

23 This was also visible in some of the opposition to the Overseas Operations Bill (2020), which was criticised for compromising Britain's international reputation and for the risk of triggering ICC prosecutions (e.g., Robertson 2021).

2014).[24] A second objection relates to the failure to see torture as a complex phenomenon, which cannot be reduced to the wrongdoing that one individual does to another (Celermajer 2018). Implicating specific individuals as the perpetrators risks overlooking the context that enables the torturers to act (Davis 2005, 52). In fact, torture is rarely the product of a few 'bad apples' within an otherwise functioning institution (Mavronicola 2021, 156–57; Celermajer 2018, 9). Moreover, by fixating on torture as the work of aberrant individuals, we may overlook the continuities between everyday violence and torture (McLeod 2019, 1639–40). In Davis's (2005, 63) words:

> What is routinely accepted as necessary conduct by prison guards can easily turn into the kind of torture that violates international standards, especially under the impact of racism.

This leads to a third objection: dominant discourses see the people involved in torture as primarily moral subjects rather than as political actors (Davis 2005, 78–79; Ticktin 2006). Focusing on morality tells us little about the politics that is inherent in the process of torturing—the initiative and interests of those who are tortured; the political drivers of those who torture; and how torture aims to break political agency.[25] Moralisation does not, of course, necessarily result in the absolute depoliticisation of torture subjects. However, by talking in terms of morality, the ground has already been ceded in terms of what type of victims and perpetrators we can have.[26]

3. Formations of themes

By producing knowledge about torture and its subjects, torture discourses also frame the solutions that they deem necessary to outlaw or govern the practice. Since torture is regarded as a human rights violation and a crime, it is unsurprising that rights-based interventions and penal measures assume a central role among the social techniques aimed at dealing with instances of torture. This section considers how, within torture discourses, the relationship between human rights and penality is constructed and imagined. Attention is given to the role that the right to be free from torture plays in both enabling and limiting penality.

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24 See Kelly (2013, 171): 'When courts or tribunals make judgments about torture, the survivor is rarely, if ever, allowed to speak. The survivor's testimony is seldom accepted at face value. Concern for suffering is instead filtered through technical forms of expertise'.

25 The tortured is treated, in Giorgio Agamben's (1998) terms, as 'bare life', namely life excluded from the political. At the same time, if the power to define 'bare life'—that is, the power to decide who is excluded from the political—is what constitutes sovereignty, then torture is nothing less than a brutal exercise of sovereign power.

26 For the argument that the focus on 'good victimhood' risks ignoring the seemingly less virtuous survivors, see Jensen et al. (2017).

Table 15: Contemporary torture discourses. Formations of themes.

'Jus cogens' discourse	'National security' discourse	Critical discursive positions
• Right to be free from torture used to humanise penality • Penality used to give force and recognition to the absolute right to be free from torture	• Demanding penality against the torture of the 'enemies' • Limiting penality for the torture of the 'friends'	• Punishing torture is not sufficient and often not necessary for human rights protection (*penal minimalism*) • To end state torture, penality should be abolished (*penal abolitionism*)

The 'jus cogens' discourse

The 'jus cogens' discourse assigns two functions to the human right to be free from torture in relation to penality. Freedom from torture has both a 'shield' and a 'sword' function (van den Wyngaert 2006): while it limits the modes of penality, it also enables the intervention of criminal law to respond to, and redress, its violations (cf. Tulkens 2011; 2012).

The 'shield' function goes well beyond the 'jus cogens' discourse. The prohibition of torture is historically connected to a 'humanisation' of the state's penal power. As the next chapter shows, while in medieval and early modern Europe torture was part of the ordinary criminal process, contemporary consciousness rejects the infliction of unwanted pain as a morally shocking penal means. Specifically, the 'jus cogens' discourse regards freedom from torture as the embodiment in law of just such an ethical sensibility. The absolute prohibition of torture places moral and legal limits on what penal institutions can do to repress criminal conduct, thereby preventing an uncontrolled and arbitrary deployment of penality. The 'shield' function emerges in three areas of the criminal process: law enforcement, criminal procedure and deprivation of liberty. In all these areas, the 'jus cogens' discourse advocates the establishment of a 'human-rights-based' penal system, which would ensure rights and provide attention to the most vulnerable and marginalised (UNCAT 2014, paras. 53–70).

Regarding law enforcement, for the 'jus cogens' discourse, the torture ban precludes not only coercive techniques for interrogating suspects but also intelligence and executive decisions that are based on information obtained through torture (Méndez 2011, para. 56). The discourse also condemns over-policing, extensive anti-terrorism powers and 'tough-on-crime' policies, which seem to create conditions conducive to ill-treatment (Bernath 2010, 3; Nowak 2010, para. 89). In the area of criminal procedure, the 'jus cogens' discourse uncompromisingly rejects the use of incriminating evidence derived from torture, as it would render the proceedings as a whole 'unfair' (*Gäfgen v Germany* 2010, para. 166).[27] The discourse also demands that all judicial proceedings abide by international standards of due process, fairness and impartiality, respecting the dignity of each victim and the rights of the defendants (UNCAT 2012, para. 18). Finally, the 'jus cogens' discourse commonly identifies

27 Torture Convention, art. 15. This position is not so categorical when evidence is secured by means of ill-treatment: the failure to exclude such evidence does not always render the whole trial unfair (*Gäfgen v Germany* 2010, para. 187).

freedom from torture in relation to the treatment of persons deprived of their liberty—especially in prisons and police custody. It demands that detention conditions respect human rights and denounces modes of imprisonment amounting to torture or ill-treatment, including incommunicado detention (Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Mandate of the Special Rapporteur 2011, paras. 7–8) and irreducible life sentences (*Vinter and Others v United Kingdom* 2013). The discourse also supports reforms intended to 'humanize the prison system' and reduce overcrowding in places of detention (Méndez 2011, para. 32).[28]

The second, 'sword', function that the right to be free from torture plays in relation to penality concerns the reliance on criminal law and its enforcement mechanisms to uphold the torture prohibition. From the absolute right not to be tortured, the 'jus cogens' discourse derives an absolute duty to criminalise, prosecute and punish torturous practices (UNCAT 2014, paras. 68–70). The discourse traces back the origins of this duty to either the provisions of the Torture Convention (arts. 4–7) (*R v Bow Street Magistrate, ex p. Pinochet (No. 3)* 1999) or the peremptory ban on torture under customary international law (*Prosecutor v Furundžija* 1998, para. 156).[29] Yet the discourse's commitment to use criminal law transcends its legal boundaries and becomes an 'ethical' obligation (OHCHR 2004, 11) to safeguard 'the international community and its fundamental values' (Amnesty International 2009, 29–30).

The 'jus cogens' discourse resolutely believes that *all* acts of torture should be prosecuted and punished with significant severity (*Cestaro v Italy* 2014, paras. 206–209).[30] It regards any deviation from this commitment as legitimising at least some torture (Melzer 2020a; Redress 2021, paras. 3–8). As stated in relevant international jurisprudence:

> [A]mnesties or other impediments [immunities, statutes of limitations and defences] which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability (UNCAT 2008, para. 5).

The 'jus cogens' discourse does not merely say that those suspected of torture must be prosecuted (or extradited) and, if found guilty, punished—as stated in article 7 of the Torture Convention. The discourse also considers impunity as 'the single most important factor in the proliferation and continuation of torture' (Rodley 2001, para. 26) and the absence of, or limits to, criminal accountability as in themselves violations of the absolute right not to be tortured (Rodley 2001, para. 31, mentioning *Barrios Altos v Peru* 2001). There is, in other words, an inextricable link between the norm that outlaws torture in all circumstances and

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28 The 'shield' function that freedom of torture plays in the context of detention is also implemented through detention monitoring mechanisms (see section 4).

29 But, as we see in the next chapter, the roots of the duty to punish torture are older.

30 The UN Committee Against Torture (UNCAT) generally considers a sentencing range of six to twenty years' imprisonment to be suitable (Rodley and Pollard 2006, 128).

the use of penal means to redress it. Criminal law is more than an instrument to uphold the sacrality of the prohibition: it is an 'imperative' (IRCT 2017, 7).[31]

In the 'jus cogens' discourse, punishing torture is thus obligatory in deontological terms. Additionally, the discourse assigns two tasks to penality as an instrument to redress human rights: a 'symbolic' and a more 'practical' role. First, penality plays an expressive function in upholding the symbolism of human dignity and the inviolability of human rights (chapter 7). Defining torture as a crime promotes the values that underpin freedom from torture, by 'alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture' (UNCAT 2008, para. 11). Prosecutions also send 'a clear message' that the state does not tolerate torture and considers it unacceptable (Amnesty International 2001b, 15). The 'jus cogens' discourse is aware that criminal accountability for acts of torture will not be frequent and that prosecution alone will not achieve the goal of protection. Nonetheless, the discourse considers criminal law as the main (if not the only) means of hypostatising proclaimed universal moral beliefs of what constitutes an extreme evil (cf. Burchard 2021a). The wrong of torture becomes real insofar as it is treated as a serious crime (see chapter 7). In Dorfman's (2004, 9) words:

> [T]he punishment of the perpetrator, however symbolic it may be, can help to heal the world, overcome that paralysis, and challenge apathy and silence.

By contrast, any failure to take penal action comes across as contributing to 'the corrosion of the values' at the basis of the torture ban (CPT 2004, 14). As the European Committee for the Prevention of Torture (CPT) (2004, 14) puts it:

> The credibility of the prohibition of torture and other forms of ill-treatment is undermined each time officials responsible for such offences are not held to account for their actions.

The second, more practical, task that the 'jus cogens' discourse assigns to penality is that of backing up the prohibition of torture with legal mechanisms to ensure its protection and expose the truth of what happened. Freedom from torture appears as 'theoretical and illusory' without methods of enforcement: only through the involvement of the police, courts and prisons is it rendered 'practical and effective' (*Gäfgen v Germany* 2010, para. 123). The reason why the discourse gives such a prominence to penality is based on the assumption that penality is 'indispensable' if torture is to be successfully deterred (UNCAT 2013, para. 17) and victims delivered justice (Rodley 2001, para. 28). On the one hand, the 'jus cogens' discourse assumes that the threat of prosecution and punishment serves 'a very effective

31 This does not mean that, to ensure that torture does not go unpunished, public authorities can violate other human rights. As recently observed by the ECtHR in *Advisory Opinion: Armenia* (2022, para. 65): 'it would be unacceptable for national authorities to compensate for the failure to discharge their positive obligations under Article 3 of the Convention at the expense of the guarantees of Article 7 of the Convention, one of which is that the criminal law must not be construed extensively to an accused's detriment.'

preventive purpose' (Méndez 2011, para. 45). On the other, it considers that holding torturers criminally accountable gives 'survivors a sense of justice' and facilitates 'both a coming to terms with their past suffering and a comprehensive process of healing' (Nowak 2010, para. 66).

The 'shield' and the 'sword' functions just presented, whilst apparently contrasting, are in fact capable of being reconciled. For the 'jus cogens' discourse, opposing torture does not imply a reduction of the space of penal techniques and institutions in society. The discourse locates the problem with penality as an issue for governance (cf. Lippert and Hamilton 2020). It questions the modes of penality—how and (to some extent) how much we punish—rather than penality itself. The assumption is that a well organised and functioning penal system is free from torture and other morally shocking practices (Bernath 2010, 3). The 'jus cogens' discourse regards the police, the prison and other penal institutions as necessary social goods, provided that they operate with impartiality and publicity—institutions whose 'essential core objective' is the protection of human rights (Boyle and Vullierme 2018, 7). The discourse maintains that the most brutal aspects of penality will be eliminated if penal institutions are monitored, their agents well trained (OHCHR 2004) and adequate funds allocated to them (Rodley 2001, para. 32). Based on human rights principles and devoid of corruption (Decision No 7/20: Prevention and Eradication of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment 2020), penality appears not as inherently problematic but as an effective tool to ensure public safety (Boyle and Vullierme 2018, 7). In this way, the discourse leaves in place assumptions about the purpose and function of penality in society. It also invites investments in the state's punitive power (CTI 2019, 9; Webbe 2020, col. 1025) and, therefore, builds the power and legitimacy of its institutions. The 'shield' function ultimately converges with, and flows into, the 'sword' function.

The 'national security' discourses

Whereas in the 'jus cogens' discourse the penalisation of torture is a legal and (especially) a moral obligation, in the 'national security' discourses the resort to criminal law is politically motivated. The 'national security' discourses in fact share a tendency to demand penality against acts of torture practised by their 'enemies', while providing limitations to it when allegations of torture involve their 'friends' (cf. Schmitt 2007).

The 'national security' discourses are 'crime control' discourses. Domestically, they support an expansion of penal institutions and techniques. They advocate for investments in police and prisons, more severe responses to crime and far-reaching counter-terrorism strategies (e.g., UK Government 2012, para. 561). Internationally, the discourses endorse initiatives to tackle transnational organised crime and military responses against terrorism and other global threats (Tugendhat and Croft 2013). They integrate initiatives for '[p]reventing torture and tackling impunity' in crime-control strategies and treat them as 'essential components of safeguarding [national] security' (UK Foreign & Commonwealth Office 2011, 3).

Additionally, human rights and freedom from torture are used as instruments of foreign policy to enhance the reputation of the state and justify penal interventions abroad (Resolution on the Eradication of Torture in the World 2014; UK Foreign & Commonwealth Office 2011). By presenting torture as a problem only for non-Western states, the 'national security' discourses promote 'capacity-building efforts' in the global South and invite investments in penal projects with a view to tackling torture around the world (UK Ministry of Justice 2009, 8–11). The discourses use freedom from torture almost exclusively to expand national and international penality against foreign torturers. Far less attention is paid to the role of human rights in limiting the application of penality (cf. Delmas-Marty 2007). For instance, the 'national security' discourses allow executive and policing decisions based on information derived from the use of torture, on the assumption that individual rights should be balanced with the public interest in preventing crime (*A v Home Secretary (No 2)* 2005, paras. 68–70, 149, 161). The discourses are also cautious of other, non-penal, measures—such as expanding victim compensation programmes—which are accused of 'bringing international efforts to punish torture into disrepute' (UK Ministry of Justice 2009, 10).

While affirming the necessity of severe punishment for foreign torture, the discourses carve out some exceptions when allegations of torture involve liberal democracies. Limits on criminal accountability are generally justified by stressing the identity of the (alleged) perpetrators or their (moral) motives. The argument goes like this: torture should be punished, but in particular circumstances the infliction of unwanted suffering is 'morally permissible' and the authors can be shielded from prosecution (Baroness Goldie 2021a, cols. 1255–1256); alternatively, they can successfully raise the defence of necessity (*Public Committee v Government of Israel* 1999) or self-defence (Gur-Arye 2004); or they can receive a lenient sanction (S. Greer 2011). Generally, in the 'national security' discourses, the lifting of criminal responsibility does not imply authorisation to commit torture (*Public Committee v Government of Israel* 1999, para. 36). Yet, as Levinson (2004, 36) admits:

> [T]his scarcely avoids legitimizing at least some acts of torture. What else, after all, is conveyed by accepting the possibility of acquittal, suspension of sentence, or … pardons of what would be perceived as 'morally permissible' torture? State officials would then be giving their formal imprimatur to actions that the various conventions condemn without exception.

The 'national security' discourses also seek to obstruct criminal liability for torturous practices when this is not in the national interest.[32] For instance, in *R v Bow Street Magistrate, ex p. Pinochet (No. 3)* (1999), Lord Goff adduced policy considerations to support the argument that state immunity could hinder torture prosecutions, including the fear of

32 See also Barack Obama's decision not to authorise an inquiry into those responsible for the CIA's torture programme during George W. Bush's presidency. Obama's decision to 'look forward as opposed to looking backwards' was arguably motivated by the idea that torture prosecutions were not in the best interest of his administration and the US more generally (Johnston and Savage 2009).

malicious allegations against state officials.[33] In the recent debate on the Overseas Operation Bill (2020), most of the arguments in favour of a presumption against prosecution for torture were based on the importance of allowing soldiers to 'take the risks' that were deemed necessary 'to keep [the] country safe' (Tugendhat 2020, col. 1008). Relatedly, the discourses, albeit generally agnostic or even critical regarding the 'shield' function of human rights, strongly support penal guarantees and defendants' rights for state agents accused of serious ill-treatment (Larkin 2020, 4).

In sum, when penality appears as problematic (for either moral or practical reasons), the 'national security' discourses tend to condone torture rather than demand its punishment. Some (minority) voices even go as far as to say that, along with punishment, torture should also be governed (Dershowitz 2004). Interestingly, this argument is generally formulated in the language of rights: torture becomes something that protects human rights (especially the right to life) insofar as it elicits crucial information that terrorists are purported to withhold (Bagaric and Clarke 2007, 4).

Critical discursive positions

Dominant discourses connect the protection of freedom from torture with recourse to criminal law: while the 'jus cogens' discourse upholds the duty to punish every act of torture, the 'national security' discourses accept that some torture may appear to be condoned for the sake of reducing criminal accountability in some circumstances. However little, some space is left for discursive positions that assert the absolute duty to end torture without necessarily relying on penality. We can distinguish between a 'penal minimalist' and a 'penal abolitionist' position.

Penal minimalists do not reject the use of criminal law for torture but seek to restrain it within the limits of what they deem strictly necessary. This stance is generally grounded on human rights principles and based on the idea that human rights obligations should be 'protective, not coercive' (Mavronicola 2021, 200). Penal minimalists do not consider penality to be 'the first port of call when responding to harm' but rather 'a last resort' (Cryer 2020, 313). As stated in the concurring opinion of Judges Tulkens, Ziemele and Bianku in *Gäfgen v Germany* (2010):

> [E]ven … where criminal punishment serves the purpose of protecting rights and freedoms, at the risk of obscuring the fact that it is also a threat to rights and freedoms, we should not lose sight of the subsidiarity principle …: use of the weapon of punishment is acceptable only if there are no other means of protecting the values or interests at stake.

33 Lord Goff mentioned the possibility that a British official could be sued abroad on allegations of torture in Northern Ireland.

Penal minimalists generally agree that torture must not go unpunished. Yet they also believe that 'not every duty grounded in an absolute right is itself absolute' (M. Jackson 2018, 453) or 'limitless' (Mavronicola 2021, 128). In particular, restraints on the duty to punish torture are possible if they are meant to ensure the effectiveness of human rights protection, such as in case of amnesties aimed at facilitating national reconciliation, peace negotiations or the end of oppressive regimes (Concurring Opinion of Judges Šikuta, Wojtyczek, and Vehabović in *Marguš v Croatia* 2014). Penalisation, writes Natasa Mavronicola (2021, 157), 'may in some circumstances not be necessary, and will in most if not all circumstances not be *sufficient* for preventing ill-treatment'.

The penal abolitionist position is more radical and not always formulated in the language of human rights.[34] For penal abolitionists, torture and other abusive practices emanate from techniques of punishment embedded in the history of penality. Acts of brutality similar to the ones that US soldiers employed in Abu Ghraib and Guantánamo, states Davis (2005, 49), 'can be discovered inside US domestic prisons'. Although penal abolitionists acknowledge the difference between everyday penal violence and torture, they are convinced that the two are strictly connected (Davis 2005, 62). In particular, they consider the normalisation of the violence that over-policed communities and people in prisons constantly face due to penalisation as a major factor behind the commission of acts of torture contrary to international conventions (Davis 2005, 114; Sexton and Lee 2006; Daulatzai 2007). In this context, penal abolitionists seek justice for torture not through the criminal process, but by means of efforts to end imprisonment and policing (McLeod 2019, 1613–14). Ezzat Fattah (2007, 9) writes:

> Is punishment the appropriate answer to torture? Definitely not, because it never reaches those who are responsible, those untouchables at the top. … And [even if it does] what exactly is being achieved by incarcerating those individuals for varying terms of imprisonment?

For penal abolitionists, to really end (and not merely outlaw) state torture, it is necessary to move 'past (while retaining in some form) the *habeas corpus* preoccupations of … Amnesty International or Human Rights Watch' and press 'forward with the campaign for abolition' of penal institutions (Sexton and Lee 2006, 1008; see also P. Butler 2011, 171; McLeod 2019).

4. Anti-torture practice

The 'jus cogens' and the 'national security' discourses generate tangible effects and influence how anti-torture interventions are implemented. What is said about torture, its subject positions and responses shapes how anti-torture practice is carried out, which anti-torture laws are adopted and which institutions or actors are empowered. This section explores how the relationship between human rights and penality, constructed by torture discourses,

34 On the relationship between prison abolition and human rights, see Renzulli (2022); Engle (2021).

materialises into anti-torture practice. It also considers what the alternatives could be, by relying on the discursive space that already exists beyond dominant torture discourses.

Dominant anti-torture practice

Anti-torture practice that directly concerns human rights and penality is generally implemented under the aegis of the 'jus cogens' discourse.[35] As noted in the introduction, this discourse is the only proper human rights discourse, as it is the only one that unequivocally upholds the prohibition of torture as enshrined in human rights instruments. However, this does not mean that the 'national security' discourses are not translated into practice. As discourses generally advanced by governments, national courts and organisations interested in national security, they cannot but affect how measures against torture, including rights-oriented solutions and penal interventions, are in effect implemented.[36] In other words, their apologetic posture acts as a constraint upon the utopian aspirations of the 'jus cogens' discourse (cf. Koskenniemi 2006).[37] Additionally, the 'national security' discourses form the oppositional stance against which the 'jus cogens' discourse mobilises. Contesting the 'national security' discourses' perceived torture-apology helps organise the 'jus cogens' discourse and forms a basis of what in effect should be done to oppose torture. In other words, anti-torture practice arises as a response not only to actual torture occurring but also to the 'national security' discourses' efforts that appear to condone torture. Take, for instance, the debate around the Overseas Operation Bill (2020) presented in the introduction of this chapter. The British government sought to make it harder to prosecute acts of torture committed by British soldiers. As a response, several human rights nongovernmental organisations (NGOs), lawyers and activists mobilised through reports and publications (Cormacain 2021), by giving oral evidence in Parliament (Redress 2021) and by organising petitions (Amnesty International UK 2021) to have torture excluded from the presumption against prosecution. These efforts were successful, as the Overseas Operations Act (2021) now excludes torture from this provision.

Danielle Celermajer (2018, 12–13) identifies three dominant strands of anti-torture practice. A central—if not the principal—form of action has been the criminalisation of torture and

35 Anti-torture practice is not limited to human rights and penality but concerns many other fields (the medical context, international relations, etc.) and areas of law (e.g., constitutional, refugee, tort and military law). For example, Jensen et al. (2017) argue that anti-torture practice should focus more on the experiences of people living in poverty and prioritise protection above legal accountability; for Oette (2021) this shift is already occurring, with human rights organisations and bodies increasingly cognisant of the heightened vulnerability to torture resulting from economic marginalisation and discrimination.

36 For example, the 'national security' discourses nearly achieved a significant change in UK law with the original Overseas Operations Bill (2020) and, albeit eventually not successful, acted as a trigger of the 'jus cogens' discourse.

37 The 'jus cogens' discourse promotes a recognizably utopian project, which draws on the image of a world where torture is not just abolished formally but its actual practice has ceased to exist (cf. Moyn 2010).

the subsequent attempt to punish perpetrators (Celermajer 2018, 12).[38] Anti-torture institutions and NGOs dedicate considerable time and resources to advocate for states to ratify the Torture Convention and to push for the enactment of domestic laws criminalising torture as a distinct offence (Jensen et al. 2017, 409). They are also highly involved in exposing instances of torture, shaming torturers and promoting prosecutions. By way of example, following the UK military campaigns in Iraq and Afghanistan, the work of several human rights organisations has focused on reporting allegations of mistreatment by members of the British armed forces (Gearty 2021). Anti-torture practice has consisted in collecting evidence, writing reports and doing advocacy to support criminal investigations and prosecutions of UK personnel allegedly involved in war crimes. Despite the very high volume of allegations submitted to the authorities (over 3,000 claims), no British soldier has been prosecuted, let alone convicted, for torture at the domestic level, nor has the International Criminal Court (ICC) so far accepted the need to become involved (ICC OTP 2020).[39] Thus the tremendous efforts that are put into torture prosecutions collide with opposite endeavours, to which the 'national security' discourses contribute, that obstruct the use of criminal law against state torture—by providing statues of limitations, amnesties, immunities or other jurisdictional impediments to such prosecutions, for example (Melzer 2021, para. 26).[40] Even when the state is forced to acknowledge acts of torture committed by its agents, the result is often a process of transitional justice without many torture prosecutions (Payne 2015).[41]

Secondly, beyond criminalisation and punishment, anti-torture practice has focused on monitoring places of detention and developing rules to improve the material conditions and treatment of detainees (Celermajer 2018, 12).[42] Within the Council of Europe, the CPT has organised visits to places of detention since 1990. In 2002, the European model was adapted and generalised by the UN through the Optional Protocol to the Torture Convention, which established the Subcommittee on Prevention of Torture (SPT) and required state parties to

38 Lutz Oette (2022) has criticised the argument that criminalisation and punishment constitute the *principal* form of anti-torture practice, arguing that in recent years there has been a renewed focus on torture prevention that is cognisant of structural factors. See also Oette (2021).

39 In December 2020, the Office of the Prosecutor (OTP) of the ICC announced its decision to close the preliminary examination into alleged war crimes by British troops in Iraq between 2003 and 2009 (ICC OTP 2020). The OTP determined that there was 'a reasonable basis to believe that various forms of abuse were committed by members of British forces against Iraqi civilians in detention' (para. 2) but could not conclude that that 'the UK authorities have been unwilling genuinely to carry out relevant investigative inquiries and/or prosecutions' (para. 12).

40 On the various methods used by the British state to obstruct investigation of UK officials for their complicity in torture during the 'war on terror', see Blakeley and Raphael (2020).

41 By constructing torture as one of the worst crimes that anyone can commit, the 'jus cogens' discourse arguably raises the stakes in any prosecution and indirectly makes torture prosecutions more difficult. In Kelly's (2013, 145) words: 'The particular status given to torture as a "heinous" crime means that it is only reluctantly used as a specific charge by states against their own citizens.'

42 According to Richard Carver and Lisa Handley (2016b, 67–68), among all the strategies to prevent torture, measures that seek to alter the situation of detention have the most impact on reducing torture.

set up National Preventive Mechanisms (NPMs). In the last ten years, the UK NPM has undertaken regular inspections across detention settings, drafted guidance on monitoring solitary confinement and pushed for reforms in the legislation that governs detention (NPM 2020). During the COVID-19 pandemic, this NPM worked to ensure that the British government protected the well-being of people deprived of their liberty—for example by expanding early-release schemes and alternatives to custody, by ensuring detainees' access to health and social care services, and by putting in place measures to facilitate contact between detainees and their families (Wadham 2020; NPM 2021, 12). A third strand of anti-torture practice has involved human rights training and education for law-enforcement and security personnel (Celermajer 2018, 13). Over the past two decades, we have seen the proliferation of declarations specifying the need for human rights training for the military and police (Declaration on Human Rights Education and Training 2011, art. 11); a growing number of government-led programmes of human rights awareness-raising for law-enforcement officers; and numerous NGOs working on developing resources for the expansion of educational efforts (Celermajer 2018, 63–65). The goal here is to alter the values of individuals who work in the penal context with a view to strengthening their commitment to human rights and their ability to carry out their coercive function in a manner that is human rights-compliant (Celermajer 2018, 13).

These three trends of anti-torture practice, whether as part of efforts to promote penality or to monitor and 'humanise' it, are perceived as complementary. Both the 'jus cogens' and the 'national security' discourses regard the penal system as *prima facie* a necessary social good. Accordingly, anti-torture practice unfolds as if criminalisation and punishment of torture were a logical and necessary part of a system that may cause more harm than it should but that—when it is monitored and its agent educated—can ultimately be made to work. Through this lens, punishment for acts of torture, especially when they occurred in the penal context, represents the system correcting itself by holding public authorities accountable, protecting victims' rights and condemning those who abuse their position (cf. Levine 2021, 1004). However, once we move away from ideal principles and we look at what concretely occurs in society, it is hard not to notice that anti-torture practice often fails to meet its stated purposes.[43] Torture is still routine practice in many places of detention across the globe; the state's penal power continues contributing to inequality, prejudice and discrimination despite all the efforts to humanise it; and very few people are ever prosecuted, let alone punished, for torture (Kelly 2013, 144; Melzer 2021). Additionally, in the few cases where punishment does occur, it rarely plays out in accordance with the will of anti-torture advocates. Ironically,

43 In their multi-country study on the effectiveness of torture prevention, Carver and Handley (2016a) argues that prevention measures do work, but they also note that some measures (proper detention safeguards) are much more effective than others (treaty ratification, criminalisation of torture, monitoring and training). To explain the persistence of torture despite the enormous efforts of anti-torture advocates, Celermajer (2018, 198) argues that preventive strategies 'have placed too great a focus on individual agents' and 'have paid insufficient attention to the full range of situational factors' that sustain and produce torture.

by invoking penality, the 'jus cogens' discourse risks laying the groundwork for the 'national security' discourses' crime-control agenda. Once enabled, the penal system is in fact likely to express its inherent cruelty or to reflect its racist biases. It is surely no coincidence that the three prosecutions for the offence of torture that have occurred in the UK were all against non-British, non-white defendants (see *R v Reeves Taylor* 2019, para. 62).

Not only are the goals of anti-torture practice often unachieved but the very effort to make the penal apparatus work risks having a series of 'unintended' consequences. Those institutions with the most capacity for practising state torture, such as the military, the police and the prison, are not merely monitored and their agents trained, but they are in fact compelled to act to prevent and repress torture. Even when members of these institutions are implicated in acts of torture, a single-minded focus on prosecution and punishment may have the effect of reinforcing the very same dynamics that sustain institutional systems and cultures conducive to torture (Levine 2021). First, the criminal process tends to focus on individual culpability of particular perpetrators, leaving unimplicated the larger institutional and cultural dynamics that underpin the infliction of violence (McLeod 2019, 1639). Second, calling for punishment as the main response to torture risks making us complacent about the institution of punishment in general, and its manifestation as imprisonment in particular, despite being themselves significant sources of violence and suffering (Fassin 2018; Christie 1982). Third, when criminal law prohibits abuse, it risks authorising whatever does not constitute abuse (Marks 2012, 320). Admission of a legal breach on one unique malevolent act may serve to immunise the institution with regard to everything else (Marks 2004, 384). As a result, not only are non-abusive or non-identifiable types of violence in the institutions legitimised, but the ordinary functioning of the institutions is also re-inscribed (Levine 2021), including, for example, the deployment of soldiers abroad, over-policing, mass incarceration and the infliction of harsh punishment.[44]

In sum, anti-torture practice does not directly and wilfully assist state violence. Its goals are the opposite. Yet, by making punishment the outright solution to torture, it risks sustaining the necessary conditions for the deployment of the state's power to cause injury through penality. This risk is, however, overlooked by the 'jus cogens' discourse's moral approach to torture as a horrifying violation committed by evil perpetrators. This discourse in fact impedes any practice that 'would even seem to imply a laxity toward the responsibility of perpetrators, and thereby convey the message that torture is less than an absolute moral wrong' (Celermajer 2018, 13). The 'jus cogens' appears to be unable to separate moral opposition to torture from its condemnation by means of penality. The fact that the 'national security' discourses—the discourses that appear to condone torture—materialise into practice by obstructing torture prosecutions does nothing but give validation to this

44 In the UK, the offence of torture is punished with a maximum sentence of life imprisonment (Criminal Justice Act 1988, sec. 134(6)).

approach. Ultimately, both discursively and in practice, the protection and the worth of the right to be free from torture are inescapably tied to penality.

Critical voices

The discursive space that exists beyond dominant discourses is a demonstration that anti-torture practice could potentially be different. Alternative anti-torture voices do not currently inform national and international anti-torture practice. They are marginalised and, in relation to human rights and penality, do not even form a unitary discourse. Additionally, given their critical stance, they often seem concerned less with actively preventing torture and more with aligning themselves with movements that advocate radical macroeconomic and political transformations (Celermajer 2018, 5–6). Nonetheless, these critical voices may offer some insights on how to imagine anti-torture practice without or beyond penality, and to break the 'natural' association between torture condemnation and torture punishment. The competition between dominant torture discourses leads us to think that we cannot restrict criminal accountability without undermining the absolute duty to prevent and end the practice. Yet the critical utterances that I exposed in this chapter show that it is not necessarily the same if opposition to torture is mobilised from a more political—and less moral and juridical—perspective. By avoiding collapsing questions of criminal responsibility and punishment into questions of torture condemnation, critical voices manage to accommodate an unconditional opposition to torture with a refusal to endorse penality.

Albeit limited to local contexts, there have been some efforts to abandon punishment in favour of other forms of accountability and repair, as well as to prevent torture by addressing the social, economic and political landscape that makes it possible in the first place (McLeod 2019, 1616). The American abolitionist Allegra McLeod (2019) gives the example of the Chicago reparations initiative, which has confronted decades of police torture not through recourse to the criminal courts or civil litigation,[45] but by thinking innovatively about justice and redress.[46] This initiative adopted a strategic approach to international human rights law and institutions to raise awareness abroad and put pressure on US officials for their failure to adhere to international law (Losier 2018; We Charge Genocide 2014).[47] These efforts eventually succeeded in pushing Chicago to launch a torture memorial project; to devolve more than five million dollars in reparations; to create a support services centre for those who experienced police violence; and to change the public-school curriculum to include the

45 Yet McLeod (2019, 1624) acknowledges that Jon Burge, 'the most notorious Chicago officer guilty of torture', was tried and convicted for perjury and obstruction of justice for lying about his wrongdoing.

46 On the history of torture in Chicago and the burgeoning activist movement against it, see Ralph (2020). On the relationship between the Chicago anti-torture movement and abolition, see also Rodríguez (2019, 1602–4); Davis et al. (2022, 141–42); Epstein (2022).

47 This included submissions to the Inter-American Commission for Human Rights, the UNCAT and the UN Committee on the Elimination of Racial Discrimination.

history of police violence (McLeod 2019, 1627; Akbar 2020, 1832).[48] In McLoad's (2019, 1628) words:

> Instead of the typical calls for punitive responses to harm, participants engaged in a broad and deep democratic process to contemplate how to make amends. They then sought redress and repair in a form that would begin to make the survivors whole, prevent future harm, and educate young people so that they have an understanding of some of the root causes and persistent legacies of racial inequality and violence.

5. Conclusion

Drawing on the findings of discourse analysis, this chapter has explored how contemporary torture discourses sustain penality as an indispensable instrument for safeguarding human rights. Two basic sets of discourses have been identified along the analytical dimensions of objects, subject positions and themes.

In the 'jus cogens' discourse, torture is an exceptional moral wrong. As the archetypal human rights violation and a heinous crime, it can never be justified or excused. In this discourse, the victim of torture, violated in their human dignity and subjected to unbearable suffering, is rendered, for this reason, extraordinary and worthy of unconditioned protection. Conversely, the perpetrator, corrupted by the infliction of unwanted pain, appears as both powerful and evil. These constructions make human rights and penality central remedies for torture. On the one hand, the discourse attempts to humanise the state's penal power to prevent torture from occurring; on the other, it sees penality as an essential means for upholding the right not to be tortured and signalling acts of torture as absolute wrongs. The 'jus cogens' discourse mobilises and gains its legitimacy by opposing the 'national security' discourses. While the 'national security' discourses view torture as an 'uncivilised' crime generally committed by other people in other places, they also advance moral and practical arguments to condone the torture of their 'friends' in exceptional circumstances. This position is supported by highlighting the moral ambiguity of victims (not always defenceless but often a threat themselves) and perpetrators (not always foreign monsters, but rather individuals who get their hands dirty for the security of their nation). By demanding penality against torture practised by their 'enemies' but penal limitations when torture is employed by their 'friends', the 'national security' discourses accept that some torture may go unpunished and appear to be condoned.

When these discourses are translated into practice, the 'national security' discourses act as a constraint upon the 'jus cogens' discourse's enormous efforts to prosecute all torturers. Although perpetrators are rarely punished, anti-torture practice predominantly relies on

48 See also Russo (2016), describing the alliance between Witness Against Torture (a group of US citizens enacting solidarity with Guantánamo's detainees) and the Black Lives Matter movement in order to link torture to the policing and incarceration of black and brown communities in the US.

penality. In this way, it depends on mechanisms which belong to the same order of hard treatment, including punishment and incarceration. It also resorts to the same penal institutions that are often responsible for infringing on the values that punishing torturers is supposed to vindicate. While dominant discourses occupy most discursive space around torture and shape most practice, they do not cover all there is to say about freedom from torture and penality. I have in fact identified some critical utterances that try to accommodate the condemnation of torture in all circumstances with a refusal to endorse the state's penal power. By mobilising politically against torture, they regard penality as an obstacle to, not a tool for, achieving a non-tortuous society. Although these critical voices have currently little practical import, they can offer insights on how to re-imagine anti-torture practice beyond penality. The scope of this chapter has been limited to exploring contemporary discourses around torture as a human rights violation and a crime. The following chapter considers how the present-day discursive terrain has come about and how penality has become so indispensable for ensuring the unqualified protection of the right not to be tortured.

6

Making anti-torture a penal imperative

Six years after being elected as Emperor of the French, Napoleon Bonaparte promulgated the French Code Pénal (1810). The new criminal code was intended to safeguard the security of French society from growing social unrest. It had an authoritarian character: it reinstated life imprisonment and branding, while conserving the death penalty, hard labour, reclusion, forfeiture of estate, lifelong transportation and banishment. Almost half of the articles related to offences against public security (Padoa Schioppa 2007, 468). Among these, article 186 laid down:

> When an official … uses, or causes to be used, violence, without legitimate cause, against persons in the exercise of, or in connection with, his functions, he shall be punished according to the nature and gravity of his violence.[1]

It was one of the first provisions criminalising judicial torture—*la question*. In France, torture had long been part of criminal procedure until King Louis XVI had abolished it between 1780 and 1788. During the French Revolution, the abolition was confirmed by a Decree of the Constituent Assembly (1789), which declared torture to be contrary to one of the 'main rights of Man', namely to 'enjoy, during a criminal prosecution, the full extent of liberty and security for one's defence compatible with the interest of society in punishing offences'. A couple of decades passed and torture was not merely abolished but also criminalised.

No subsequent regime reversed this development. It may be thought that the spirt of article 186 and the Decree of the Constituent Assembly is now characteristic of every judicial system at the domestic and international level (Coursier 1971, 484). Yet, despite the similarities, it would be a mistake to assume that today's criminalisation of torture rests on the same premises as Napoleon's article 186; or that torture is a human rights violation in the same way as the French Constituent Assembly considered it to be. Today's criminalisation of torture is generally driven by moral revulsion to what is regarded as the archetypal human rights abuse. In contrast, in the early nineteenth century, torture criminalisation was essentially political, notably aimed to legitimise the sovereign's exercise of penal power. Also,

1 Unless otherwise indicated translations are my own.

in the eighteenth and early nineteenth centuries there was no serious concern for the victim of torture; rather, the focus was on the way torture endangered public security. There are discontinuities as much as there are continuities between today's torture discourses and the ones of two centuries ago.

This chapter scrutinises these continuities and discontinuities to understand how contemporary torture discourses (the 'jus cogens' and the 'national security' discourses), exposed in chapter 5, have emerged. It does so by considering the discursive history of the prohibition of torture in relation to its penalisation and moral condemnation. This history starts in the eighteenth century in continental Europe and probably earlier in England, where torture was never regularised as an instrument of criminal procedure (Langbein 2006). There are good reasons to start the analysis at the eighteenth century, nonetheless: only by then had political and legal debates around the prohibition of torture assumed a crucial space in the intellectual life of Western nations, including England (Farrell 2013, 207). Between this period and the contemporary discussion on torture, human rights and penality, I have identified four torture discourses that, emerging around legal events, contributed to the formations of a fifth stage, that are our present-day discourses. ***The 'abolition' discourse*** is connected to the statutory abolition of torture, from the Treason Act (1708), which prohibited torture in Scotland, to the revisions in nearly all European criminal codes during the eighteenth and early nineteenth centuries. ***The 'civilisation' discourse*** played a role in Europe's nineteenth-century colonial mission to outlaw and penalise torture in distant places, including India with the British-drafted Indian Penal Code (1860). After the Second World War, the prohibition of torture was included in human rights instruments under the influence of ***the 'anti-totalitarian' discourse***. Finally, ***the 'global' discourse*** underpinned the adoption of the United Nations' (UN) Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Declaration) (1975) and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) (1984).

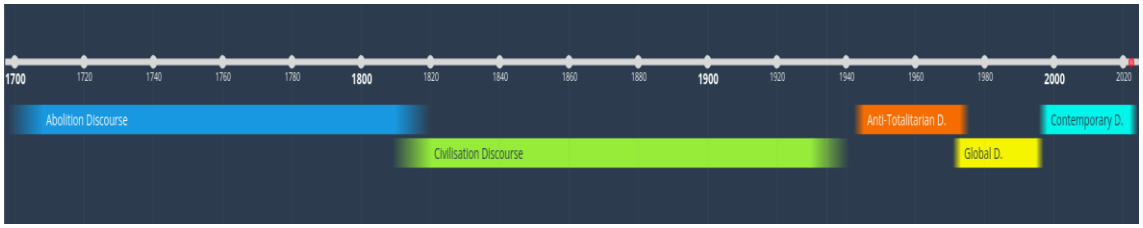

Figure 5: Timeline of torture discourses.

Torture historiography considers these legal events as pillars of the contemporary prohibition of torture and its centrality in human rights law (Peters 1985; Ross 2005; Barnes 2017). Today's universal ban on torture is contrasted with the fact that until the eighteenth century torture was a legitimate judicial procedure. A number of scholars have sought to explain the reasons behind the statutory abolition of torture. Against the conventional story that credits the abolition to the influence of the Enlightenment *philosophes* on European

monarchs (Mellor 1949; Lea 1866), John Langbein (2006) argues that this development resulted from changes in the law of proof. When a system of free judicial evaluation of evidence substituted the demanding law of proof that characterised European medieval criminal procedure, the legal systems liberated themselves from their dependence upon tortured confession. Though not dismissing the moral contribution of Enlightenment thought, Edward Peters (1985) explains the process of abolition in terms of legal and social developments concerning the law of proof and also the individual's relation to the state. Other authors have attributed the development of a more 'humane' criminal procedure, including the abolition of torture, to the changing structure of power in the late modern world. In particular, the disappearance of a need to hurt people's bodies has been connected to the emergence of a new system of social control working through the normalisation of behaviour (Foucault 1991a)[2] or a relocation of sovereignty from the king to the people (Kahn 2008).

Other work has discussed the context surrounding the aforementioned historical phases. Some scholars have explored how both the use and the prohibition of torture were central to the operation of colonial systems of rule in the nineteenth century (Heath 2021; Bhuwania 2009; Rao 2001). Others have focused on torture in the twentieth century, generally highlighting the gap between the strengthening of the legal ban and the proliferation of the practice (Rodley and Pollard 2011; Clark 2001). The pervasiveness of torture despite its prohibition has been another topic of research (Cobain 2012; Einolf 2007). The paragon in this area is Darius Rejali's *Torture and Democracy* (2007), which traces the development and application of torture techniques from the late nineteenth century to today. The history of torture and its prohibition has been well researched and documented. Yet little attention has been given to how, since the statutory abolition of the practice, the succession of torture discourses has led to the way we talk today about torture, human rights and penality. In this regard, I am not concerned with examining the degree to which torture was prevalent or used in the last three centuries. My aim is, rather, to investigate how historical torture discourses have helped constitute the relationship between penality and human rights.

As explained in the previous chapter, when today torture is approached from a human rights perspective, criminal accountability appears as so fundamental that any attempt to reduce the amount of penality engaged in this area is regarded as torture-apology. This chapter interrogates how we have come to give such importance to torture penalisation. To this end, I trace the steps that led to torture being discussed as it is, and how historically contingent knowledge generated around it has influenced its subjects and the social techniques used to outlaw it. This chapter contributes to the overarching arguments of the thesis by providing

2 Foucault's study does not deal directly with judicial torture (*question*) but with the transformation of the public executions of the *ancien régime* (*supplice*) into the nineteenth-century prison. Although today the term torture also refers to gruesome forms of punishment, until the nineteenth century torture was considered a judicial practice of procedure and, thus, separated from public executions (Langbein 2006, 3).

a second illustration of the 'acceleration' of human rights towards penality and by elucidating its conditions of possibility. It shows that the current preoccupation with punishment as the primary tool for obtaining recognition for the pain of torture derives from a gradual *depoliticisation*, *individualisation* and *legalisation* of torture discourses. Criminalisation and punishment of torture have been *a* strategy for dealing with the practice since the Napoleon's Code Pénal. However, penality has become a moral imperative—and not simply a choice—insofar as torture has progressively been presented as an *apolitical* humanitarian issue, committed against *individual* victims and prevented through *legal* regulation of the penal system. Put differently, torture discourses have 'accelerated' penality insofar as torture has become a specific violation of human rights law above nearly all others. The chapter further illustrates that the discursive history of torture is a continuous oscillation between attempts to strengthen the legal and moral condemnation of torture and attempts to limit its reach to protect the state or the sovereign. Put differently, each historical discourse has the seeds of both the 'national security' and the 'jus cogens' discourses. This history is made of continuities but also breaks, gaps, interruptions and shifts (Foucault 1972a, 3–10). While, on the one hand, contemporary discourses bring with them some elements of their antecedents, on the other, they differ in various ways.

This chapter lays out these arguments as follows. Section 1 discusses the role that torture played in the penal systems of European states before its statutory abolition. Sections 2–5 analyse each of the historical torture discourses, by focusing on their objects, subject positions and themes. Section 6 highlights the continuities and discontinuities between historical discourses and contemporary ones.

1. Torture before abolition

From the late Middle Ages to the end of the *ancien régime*, torture was an instrument of criminal procedure in most continental European states: it was used to investigate and prosecute crime before ordinary courts, had its own jurisprudence and was a learned speciality among jurists (Langbein 2006, 3; Peters 1985, 54). A complex system of rules regulated the deployment of torture to make coerced confessions reliable.[3] This law of torture emerged in the city-states in northern Italy in the thirteenth century and expanded across Europe along with the Roman-canon law of proof. The law of torture displaced an earlier system of criminal procedure, the ordeals, namely the subjection of the accused to severe pain, survival of which was taken as divine proof of innocence (Langbein 2006; Peters 1985). As the ordeals were meant to achieve absolute certainty, when sacred legitimation of

3 Torture was generally reserved for cases of serious crime, where death or physical maiming could be imposed; it could not be used unless other means of gathering evidence were lacking and there was sufficient suspicion against the accused; some people were exempted, including those deemed frail (children, pregnant women and elderly) or belonging to higher social classes (aristocrats, higher public officials, clergy, physicians and doctors of law); the confession made under torture was not itself valid, but had to be repeated away from the place of torture (Langbein 2006, 12–16; Peters 1985, 54–62).

judgments was replaced by a secular one, a demanding law of proof was introduced to enable judges, mere humans, to avoid judicial error and achieve a level of certainty equivalent to the one under the auspices of God (Langbein 2004; 2006; Damaška 1978). In cases of serious crime, a court could convict an accused only upon either the testimony of two eyewitnesses or the defendant's confession; circumstantial evidence was considered insufficient proof for conviction. Since the required witnesses could seldom be found and voluntary confessions were rarely available, European criminal procedure turned to torture, which became a routine confession-seeking instrument until the eighteenth century (Langbein 2006; Peters 1985).

During the *ancien régime*, torture had a juridical function but also a political one: it was a way through which sovereign power was manifested. As both Michel Foucault (1991a, 37–49) and Paul Kahn (2008, 22–23) illustrate, in a system where legitimate political order was based on force rather than consent, the sovereign's assertion of its authority had to be acknowledged. Without acknowledgement, the sovereign could exercise violence but not legitimate power.[4] Central to the act of acknowledgement was the confession, which accomplished both ends of establishing guilt and recognising authority (Foucault 1991a, 38; Kahn 2008, 23). In Foucault's (1991a, 38) words:

> [T]he only way that [the penal investigation] might use all its unequivocal authority, and become a real victory over the accused, the only way in which truth might exert all its power, was for the criminal to accept responsibility for his own crime and himself sign what had been skilfully and obscurely constructed by the preliminary investigation.

Hence, torture, by coercing confession, was an essential method for producing the truth needed for the sovereign power to be recognised. If the defendant could not endure torture, they would confess, affirm the sovereign's suspicion and enable its power to punish. The punishment, public and violent, would then serve to restore a sovereignty that was momentarily injured by the crime and display the sovereign's strength (Foucault 1991a, 48–49; Spierenburg 1984, 201–3). If, conversely, the accused resisted torture and did not confess, it would not only show their lack of guilt but also that the sovereign did not have authority to execute them (Foucault 1991a, 40–41).

While torture was a routine part of continental-European legal systems, it was never regularised in English criminal procedure as a method to investigate crime (Langbein 2006; Hope 2004). In England, the ordeals were substituted by the common law jury trial, whose rules of evidence permitted conviction based on circumstantial evidence and gave less importance to confession (Langbein 2006, 9). In this way, the problem of torture, as an evidence-gathering mechanism, became generally irrelevant (Peters 1985, 59; Langbein 2006, 77). Although it never made headway in common law, torture appeared in the sixteenth and seventeenth centuries in royal orders or warrants issued by the Privy Council (the body of

4 For a distinction between power and violence, see Arendt (1970, 44–56).

advisers to the British sovereign), primarily for investigating political crime (Langbein 2006; Hanson 1991; Hope 2004; J. Simpson 2011). Yet, never left in the hands of ordinary courts, torture was primarily used as an instrument for extracting information rather than eliciting formal evidence (Peters 1985, 80).

It would be a mistake to assume that English law did not contemplate torture due to its superior humanitarianism and rationality (Peters 1985, 85; Langbein 2006, 77). England knew sanctions as gruesome as the ones applied on the Continent: traitors were castrated, disembowelled and quartered, felons hanged, heretics burned at the stake (Langbein 2006, 77). English law also provided for a form of coercion, *peine forte et dure*, which was similar to today's conception of torture (the accused was laid over with weights that would crush them to death unless they relented). Yet *peine forte et dure* was not used to extract information but to compel defendants to submit to the jury trial by entering a plea at arraignment (Langbein 2006, 76). If in England torture never played the juridical function that it had on the Continent, it was arguably because of the different structure of the English criminal process: adversarial rather than inquisitorial and with a lower standard of proof. That said, when torture was used for investigating political crime, it arguably had a political function analogous to the one in the rest of Europe. Elizabeth Hanson (1991, 56) argues that, during the reign of the Tudors and Stuarts, resort to torture served 'to verify not just dubious treasons but an epistemology that would make those treasons, could they be proved to have referents in material reality, constitute the truth'. Through torture, the victim was forced to acknowledge the treason and accept the sovereign's authority.

2. The 'abolition' discourse

In 1708, the British Parliament enacted the Treason Act (1708), which was meant to improve the union between the Kingdoms of England and Scotland.[5] Section 8 states:

> [N]o person accused of any capital offence or other crime in Scotland shall suffer or be subject or liable to any torture[,] provided that this Act shall not extend to take away that judgment which is given in England against persons indicted of felony who shall refuse to plead or decline trial [*peine forte et dure*].

It was the first statutory abolition of torture in Europe (Hope 2004, 823). Within the space of a century, nearly all European states removed torture from the provisions of criminal procedure. As already mentioned, modern torture historiography connects the abolition of torture with juridical, moral, social and political changes which took place in the seventeenth and eighteenth centuries. By introducing lesser sanctions than death and maiming as punishment for serious crime (e.g., penal servitude), European society started accepting a

5 Until the Treaty of Union (1706), Scotland was an independent state. There, torture was prohibited by the common law, as in England, but until the end of the seventeenth century it was used for investigating crimes against the state and, occasionally, ordinary crimes (Hume 1797, II:463–64; Hope 2004, 812–23).

less strict standard of proof, which, in turn, reduced the dependence on confessions and made torture unnecessary (Langbein 2006). The transition from an early modern to a nation state also transformed sensibilities regarding physical suffering (Damaška 1978; Spierenburg 1984; Silverman 2001) and how sovereignty was manifested, less through force and more through normalisation of behaviour (Foucault 1991a) or consent (Kahn 2008). Due to these developments, torture became vulnerable to logical and moral criticisms which had long been known but had hitherto been ineffective (Peters 1985, 85).

After the abolition in Scotland, torture was abrogated in Sweden in 1734 (Law of Realm of 1734, in Pihlajamäki 2007, 574–76). In Prussia, Frederick the Great abolished the practice between 1740 and 1754 (Order of Fredrick II 1740; Decrees of Fredrick II 1754). Saxony put an end to judicial torture in 1770 (Schaffrath 1842, 990); Austria-Bohemia (Decree of Maria Theresa of Austria (Vienna) 1776) and Poland (Regulation of Poland 1776, in Verri 1843, 361) in 1776; Tuscany in 1786 (Criminal Law of Tuscany (Codice Leopoldino) 1786); France between 1780 and 1788 (Decree of King Louis XVI, Abolishing the Question Préparatoire 1780; Declaration of King Louis XVI 1788); the Austrian Netherlands (Belgium) in 1787 (Edict of the Emperor to Reform Justice in the Low Countries 1787); Sicily in 1789 (Ordinance of His Majesty on Military Jurisdiction, and on the Crimes, and the Punishments of the People of War 1789). By the mid-nineteenth century, torture had also been abolished in Spain, Norway, Portugal, Switzerland and the German states that had maintained the practice until then (Peters 1985, 90–91).

Modern historians tend to downsize the contribution of eighteenth-century publicists in inspiring European monarchs to abolish torture. Yet the torture discourse that underpinned the legislative projects of torture-abolition left some traces in how we talk about torture, penality and human rights today. This section explores the characteristics of the 'abolition' discourse. As we shall see, there is common ground but also divergence between it and contemporary discourses.

Table 16: The 'abolition' discourse.

Objects	Subject positions	Themes
Torture = • judicial practice for searching the truth • irrational and needless breach of due process	**Victim** = impersonal • 'tough' villain *vs.* virtuous-'weak' citizen • Shamed **Perpetrator** = • tyrannical and undeveloped country • powerful and arbitrary judge	• Abolition of torture to make penality more equitable • Abolition of torture to make penality more efficient

Formations of objects

In the 'abolition' discourse, torture was a judicial practice for searching 'the truth by means of torments' (Fierlant, in Hubert 1894, 171). In French it was *la question*; in English, other

than torture, 'the rack' or 'the question' (Blackstone 1795, 4:325). Torture was kept separate from the various painful modes of punishment against persons already convicted (Verri 1843, 330) and, as the Treason Act (1708) demonstrates, from *peine forte et dure*. What is today generally considered only a method of punishment (and not of torture), such as 'penitential imprisonment', at the time could be considered as a form of torture insofar as it was used 'for the purpose of compulsion' (Jeremy Bentham, in Twining and Twining 1973, 22–26). However, everyone knew that torture led to a suffering worse than most formal sanctions (Sonnenfels 1776, 44; Voltaire 2012, chap. 12). The discourse could not but contrast it with punishment and, from this comparison, derive the main injustice of the practice. Since torture was applied against 'a citizen while there is doubt about whether he is guilty or innocent', it was a punishment based on 'force' rather than 'right' (Beccaria 1973, chap. 16). Hence, the moral problem with torture was not merely its cruelty—corporal punishments, even very gruesome, were rarely criticised. Torture had to be abolished because it was an infringement of due process (Decree of the French Constituent Assembly of 8 and 9 October 1789). In Christian Thomasious's (2004) words:

> [I]t is apparent that many, if not most, who endure this torture have not done anything and in this way either experience unjust punishments or die undeserved deaths. … [I]t is preferable to let the crime of a guilty person go unpunished than to convict an innocent person.

In the name of the values of the Enlightenment, the 'abolition' discourse sought to mark opposition to the *ancien régime* as well as to the legal and moral barbarism of the early European world (Hume 1797, II:463–64; Peters 1985, 74). Torture became a symbol of what was wrong with the administration of criminal justice at the time. Voltaire (1901), for example, presented the case of the Chevalier de la Barre who, after a conviction for 'having sung impious songs', was tortured 'to discover precisely how many songs he had sung'. The *philosophe* added:

> It was not in the thirteenth or fourteenth century that this affair happened; it was in the eighteenth.

In contrast, English authors highlighted the absence of torture in the common law to affirm the superiority of their judicial system. William Blackstone (1795, 4:3) praised the English system:

> [W]here our crown-law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; … where torture is unknown.

The objection to torture, however, was not simply that it was contrary to natural law but rather that it was irrational and unnecessary (Montesquieu 1777). This is a difference from contemporary discourses, where utilitarian arguments are often used to condone torture rather than attack it. For the 'abolition' discourse, torture simply did 'not work as a means of

discovering the truth, because sometimes it delivers nothing, other times it delivers lies' (Verri 1843, 338). It was the 'needless cruelty' (Sonnenfels 1776, 16) the discourse objected to, rather than cruelty itself. Cesare Beccaria (1973, para. 16) wrote that torture 'is a sure route for the acquittal of robust ruffians and the conviction of weak innocents'. Accordingly, the discourse connected the immorality of the practice to the fact that it was so inefficient in identifying the guilty that it could endanger public security. Torture, says a Declaration of King Louis XVI (1788), 'is embarrassing for the judges' because it leads them 'astray rather than enlightening them'. The assertion that through torture 'robust scoundrels' could be absolved (Catharine II 1769, 57) laid the groundwork for framing torture as a crime. If the practice facilitated impunity, it was also an incentive to criminality and thus classifiable as a criminal offence (French Code Pénal 1810 art. 186).

Formations of subject positions

The 'abolition' discourse constructed the subjects of torture with a view to reinforcing the argument that torture was an outdated, useless and dangerous penal practice. The figure of the victim was quite impersonal. The concern was never about the suffering of the tortured in itself but rather that this suffering was gratuitous and incapable of generating social benefits. Albeit a criminal suspect, the victim was often labelled as 'innocent' (Beccaria 1973, chap. 16). Yet, contrary to today's 'jus cogens' discourse where the victim's innocence has a moral connotation, in the 'abolition' discourse innocence had only a legal meaning: innocent was 'a man whose crimes ha[d] not been proven' (Beccaria 1973, chap. 16). Some writers also acknowledged that torture could have a class component but only to highlight how arbitrary it was that torture was sometimes used for trivial crimes such as petty thefts (Anonymous 1776, 122, 128). Within the category of the victim, the 'abolition' discourse also conveyed a distinction between the 'tough' villain and the virtuous but 'weak' citizen (Beccaria 1973, chaps. 16, 38; Fredrich II 1913; Catharine II 1769, 57). While torture would spare from deserved punishment the former who, 'accustomed to a hard and wild life', could endure the pain (Verri 1843, 339), the latter would 'remain forever marked by the stigma of infamy in the eyes of society' (Voltaire 2012, chap. 22). Thus, *some* victims were shamed by torture, deprived of their dignity—yet not the human dignity of the 'jus cogens' discourse, but the dignity of a social status.[6]

The other subject position was the torturer. The discourse used this figure to form moral and social hierarchies of backwardness and enlightenment. The countries that tortured were 'despotic' (Montesquieu 1777) and governed by 'ancient atrocious customs' (Voltaire 1901); those that had abolished torture were humane and enlightened (Voltaire 1901). The figure of the judge, in particular, who gained 'pleasure' from applying torture, represented all that was too powerful, arbitrary and gratuitously cruel in the *ancien régime* (Verri 1843). As such,

6 For a discussion on the different conceptions of dignity and their historical and philosophical origins, see Waldron (2012).

this figure was presented as no different 'from the criminal who attacks the safety or the life of his neighbour by the sole right of the strongest' (Fierlant, in Hubert 1894, 208).

Formations of themes

The moral condemnation of torture that characterised the 'abolition' discourse had two connected functions in relation to penality. Through the abolition of torture, the discourse not only aimed to found the penal system on more equitable principles, it also sought to rearrange penality according to modalities that would render it more efficient and effective (cf. Foucault 1991a, 80).

First, by campaigning for torture-abolition, the Enlightenment writers intended to get rid of a penal practice that was '*excessive*' (Criminal Law of Tuscany (Codice Leopoldino) 1786, preamble), that is, outside the limits within which the sovereign could exercise its powers legitimately. Building upon the theory of social contract, Beccaria (1973, chap. 2) argued that the sovereign's penal power was constituted upon individuals' sacrifice of part of their liberty. However, this sacrifice had to be kept within the clear limits dictated by what was necessary to ensure peace and security: 'everything more than that', including torture, 'is no longer justice, but an abuse' (ibid.). Similarly, in the words of Goswin de Fierlant (in Hubert 1894, 229):

> [A sovereign] must undoubtedly employ all the means required by justice and equity to prevent the crimes that are committed in his states, but he cannot go beyond these means, that would be to follow the principle that justice can be sacrificed for convenience, a principle that destroys all civil liberties, which a just sovereign constantly abhors.

In a context where political legitimation no longer derived from force but from the preservation of the social order, the abrogation of torture became one of the first points of any reform of the judicial system inspired by rationality. As stated by the French Constituent Assembly (1789), it would not only 'reassure the innocence' but also 'honour the ministry of judges in the public opinion'.

Second, the 'abolition' discourse saw in the condemnation of torture a strategy for attacking the economic and political costs of the penal systems of the time. Here the aim was not to limit the sovereign's penal power but to make it more effective: 'not to punish less, but to punish better' (Foucault 1991a, 82). The Declaration of King Louis XVI (1788) that abolished torture to reveal accomplices put it quite neatly:

> Our invariable object … is to prevent the crimes …; to make the punishments inevitable, by removing from the penalty an excess of rigour which would lead to tolerate the crime rather than to denounce it to our courts … These considerations have determined us to try a gentler way, without being less certain, to force the criminals to name their accomplices.

Not by chance, the provisions that abolished torture were often accompanied by the indication that punishment was possible even without coerced confession: either because the evidence against the accused was already enough for conviction or because the accused could be sanctioned for improper behaviour at interrogations (Order of Fredrick II 1740; Decree of Maria Theresa of Austria (Vienna) 1776).[7]

In line with the 'jus cogens' discourse, the condemnation of torture was used to both limit and enable penality. Additionally, attempts to set moral and legal limits to penality were also here reconciled with the objective of reinforcing the state's penal machinery. Since 'the good of humanity is intimately connected with the interests of the state', wrote Joseph von Sonnenfels (1776, 6):

> [T]he abolition of torture … will not pose any risk to public security. This abolition could in fact diminish the danger over which the legislation must keep watch' (65).

However, what distinguishes the 'abolition' from the 'jus cogens' discourse is a distinct awareness on the part of the former that opposition to torture is instrumental to the delineation of the sovereign's penal power. In the 'abolition' discourse, anti-torture was ultimately political, namely related to how penality, as sovereign power, is and should be used in society.[8] This point is generally neglected in contemporary torture discourses, where anti-torture is primarily a moral endeavour. That said, once it acknowledged that anti-torture was political, the 'abolition' discourse moved in the direction of strengthening penal power rather than diminishing it. By showing that torture, by being excessive, was dangerous to the social order (Sonnenfels 1776, 43–45), the discourse opened the doors to a politically driven criminalisation of the practice. Article 186 of the Napoleon's Code Pénal (1810), presented in the introduction, is an example.

3. The 'civilisation' discourse

In 1911, the entry on torture in the *Encyclopaedia Britannica* stated: 'The whole subject is now one of only historical interest as far as Europe is concerned' (J. Williams 1911). Given the apparent success of the 'abolition' discourse, since the mid-nineteenth century and for about eighty years, it seemed that torture was a relic of older ages or a feature of 'uncivilised'

7 The difference between torture and punishment for improper behaviour at interrogations was largely one of rationalisation: defendants were beaten not to make them confess, but because they lied (Damaška 1978, 877).

8 However, by attacking torture as irrational, the 'abolition' discourse somehow legitimised and depoliticised acts of sovereign violence that were not needless but in fact appeared to meet their purpose. In this regard, there is continuity between the 'abolition' and the 'jus cogens' discourses: they both overlook those forms of violence that do not *prima facie* fall within the definition of torture.

peoples.[9] However, torture did not disappear. The same years also saw the emergence and spread of the police and the prison, which contributed, however secretly, to the continuation of the practice (Peters 1985, 113). Torture also did not cease to be talked about. While instruments of torture were displayed in museums (Brinkerhoff 1896, 104), nineteenth-century historians wrote about torture to illustrate the barbarism and superstition of the past and to praise the moral achievements of the present with a triumphant tone (Lea 1866; Dickson White 1896). Torture also became a subject-matter in relation to non-European, 'uncivilised', societies. In 1854, rumour reached the United Kingdom (UK) of the use of torture as a policing and tax extorting method in the Madras Presidency, which included most of today's southern India (Rao 2001; Bhuwania 2009; Barnes 2017, 52–57). The British Parliament commissioned an official report which confirmed the incidents and placed the blame on the native police (Madras Commission 1855).

European colonial missions were not seen as contributing to torture (Heath 2021) but as necessary to outlaw and penalise the practice in these distant places.[10] The report of the Madras Commission, for instance, recommended police reform as the solution to the problem of greater surveillance with the native police force. To incorporate the suggested changes, the Madras District Police Act (1859) was adopted. Taking the Irish Constabulary as a model, the Act ensured maximum control of Indian police officers by their European superiors (Bhuwania 2009, 22). Section 44 also criminalised torture:

> Every Police-officer … who shall offer any unwarrantable personal violence to any person in his custody, shall be liable on conviction before a Magistrate to a penalty not exceeding three months' pay, or to imprisonment with or without hard labour not exceeding three months or both.[11]

Two years later, the Madras model was extended to most of British India by the Indian Police Act (1861), which has regulated the police in the country until today. In the same years, the British colonial government enacted the Indian Penal Code (1860)—still the basis of most of the substantive Indian criminal law. Section 330 punished (and still punishes) with imprisonment up to seven years:

> Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct.

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9 Therefore, when in 1801 Thomas Picton, governor of Trinidad, inflicted torture on a child named Luisa Calderón, the chief concern was that "'British character" had been "stained" by the infliction of the cruelties of torture' (J. Epstein 2012, 20).

10 In addition to direct colonial rule, another example is provided by the nineteenth-century regime of unequal treaties between Western nations and 'semi-civilised' states (Japan, China and Siam). The imposition of favourable trade conditions and extraterritorial arrangements for Western powers was based on the assumed 'backward' nature of 'oriental' legal systems, mostly due to the use of judicial torture (Craven 2005, 345–46; Farrell 2022, 17).

11 Higher penalties were possible (sec. 51).

This section examines the 'civilisation' discourse that underpinned these developments.[12] Some—but not all—of its residues can still be found in contemporary discourses.

Table 17: The 'civilisation' discourse.

Objects	Subject positions	Themes
Torture = • infliction of pain to punish guilt or extort information • uncivilised and barbarous crime	**Victim** = • helpless, oriental subject *vs.* the 'criminally disposed' • demoralised **Perpetrator** = • oriental and uncivilised • lazy and inclined to cruelty	• Punishment of torture used to educate the punished • Punishment of torture used to legitimise the punisher

Formations of objects

In the 'civilisation' discourse, torture assumed a broader and less technical meaning: not simply 'an instrument for obtaining judicial truth' (Jardine 1837, 2) but more generally the infliction of pain 'by which guilt is punished' or information and goods 'extorted' (Madras Commission 1855, para. 54). What made a painful practice torture was neither its judicial use nor its high 'degree of violence' (Madras Commission 1855, para. 54), rather its being inflicted with needless cruelty 'under official authority' (Anonymous 1857, 444). This semantic shift made it possible to label some excessive corporal punishments as torture (P. A. Taylor 1875), but also to introduce the concept of 'mental' (Carpenter 1873, 351) or 'moral' torture (The Earl of Albemarle 1856, col. 381). The latter concept was often employed to criticise prison conditions (Dickens 1842; Fortescue 1860; Leighton 1884), especially when they were deemed incongruous with the presumed 'ethical advance in modern civilisation' (Barrows 1907, 81). 'We shudder at the torture chamber[s] … as relics of a barbarous age', wrote the social reformer Mary Carpenter (1873, 352), '[b]ut *our* whitewashed cells, with their dreadful monotony, in which a human being is confined year after year, without hope of release, *are not really more humane*'.

In a debate in the House of Lords, George Keppel, 6th Earl of Albemarle (1856, col. 975) said that torture was 'repugnant to natural Justice, abhorrent to Humanity, and highly disgraceful to the Character of this Nation'. If the name of torture caused 'such an abhorrence to English ears' (Anonymous 1857, 444), it was because, in line with the contemporary 'national security' discourses, the term embodied all that was 'un-English' (The Howard Association 1870) and 'barbarous' (Tallack 1897), thus serving to draw a line between civilised and uncivilised morality (Kelly 2011, 336). On the one hand were European values, whereby 'the bare assertion of the existence' of torture was 'as startling … as

12 A broader discourse of civilisation, which protested against the atrocities of the 'savage' while articulating legal justifications for imperialism, had started centuries before with the Spanish conquest of the Americas (Bowden 2009; Anghie 2005) and, albeit less explicitly, has continued until today (Tzouvala 2020; Farrell 2022).

abhorrent' (Madras Commission 1855, para. 82); on the other were the mores of 'oriental' society, where torture not only excited 'no abhorrence, no astonishment, no repugnance', but was 'freely practised in every relation of domestic life' (para. 66). In so doing, the 'civilisation' discourse used torture to define the higher moral development of European society, which had left behind 'ages of demoniac cruelty' and embraced 'a more humane system of treating criminals' (Tallack 1890). The inclusion of torture within the European 'standard of civilisation' had a major consequence: similarly to today's 'national security' discourses, the 'civilisation' discourse tended to condone violence when not attributable to 'savage' others. Infliction of pain akin to 'oriental' torture but practised by Western nations was hardly called torture but rather portrayed as 'civilised' violence. Like the 'national security' discourses, the 'civilisation' discourse could deny the practice ever taking place (The Master of Elibank 1909, col. 1070), narrow down its definition (Anonymous 1857, 444) or explicitly excuse some torture as necessary for protecting the nation (Tallack 1897).

The 'civilisation' discourse also constructed torture as a crime. As the barrister David Jardine (1837, 13) said:

> [T]he crimes of murder and robbery are not more distinctly forbidden by our criminal code that the application of the torture.

In comparison with the 'abolition' discourse, we see here a partial move from a politically driven to a morally based conception of the offence of torture. Torture was still treated as a crime due to its assumed dangerousness: torture 'makes robbers'—wrote, for instance, the Madras judge Malcolm Lewin (1857, para. 89). Calling torture 'crime' also served to stigmatise the practice to 'the utmost degree' (Tallack 1897) and to highlight its moral repulsion (Lewin 1856, 14).

Formations of subject positions

In the 'civilisation' discourse, the construction of the identities of the torturer and the tortured, both 'oriental' and 'demoralised', helped the speaking subjects, 'educated' Europeans, define themselves in opposition, 'by making clear what they were not, or rather were not *meant* to be' (Metcalf 1995, 7).

In constructing the torture victim, the discourse distinguished between the 'submissive', oriental subject (Madras Commission 1855, para. 71) and 'the criminally disposed' (Kerr 1873, 315).[13] The 'native' victims were depicted as so 'poor and ignorant and powerless' (Madras Commission 1855, para. 28) that they 'very seldom complain[ed] of personal violence exercised upon them' (para. 44). '[The] sufferers … are so timid, and so simple a

13 A diverse construction of the figure of the tortured was provided by the Spanish Atrocities Committee (1897), an organisation created to denounce the torture that the Spanish police had inflicted upon anarchists in Barcelona. Somehow anticipating the 'global' discourse, the Committee portrayed 'the tortured comrades' as political prisoners.

race,' we find in an 1820 report (in Madras Commission 1855, para. 18) 'that it is necessary for the Government to endeavour to protect them by a summary and efficacious judicial process'. In contrast, the 'criminal victims' were 'cruel and brutal men' (Tallack 1889, 292) who would have deserved torture had it not been such an unacceptable method:

> The brutal man cannot suffer in any beneficial or reformative sense. … A brutalised convict, set free, is a worse man than before, and more disposed than ever to prey upon society (Kerr 1873, 315).

In both cases, torture was deemed the wrong method to (re)educate the victim. There was little room in the discourse for empathy. The Liberal MP Peter A. Taylor (1875, col. 1855) made this explicit when he said:

> It is not the suffering of the [victim] that moves me in this matter so much as the demoralization of society.

The 'civilisation' discourse portrayed the perpetrator of torture as lacking 'the moral restraint and self-respect which education ordinarily engenders' (Madras Commission 1855, para. 81). Unlike in the 'abolition' discourse, it was not excessive power that generated the torturer, but moral and anthropological backwardness. In relation to the episodes of torture in Madras, an order of the local government (in Madras Commission 1855, para. 15), for instance, stated:

> So deep rooted … has the evil been found, and so powerful the force of habit … that it has not been practicable, notwithstanding the vigorous measures adopted, wholly to eradicate it [given] the almost innate propensity of the generality of native officers in power to resort to such practices.

Similarly, the lawyer James Fitzjames Stephen (1883, 1:442) reported that during the preparation of the Indian Code of Criminal Procedure (1872) a colonial civil servant attributed the Indian police's habit of torturing prisoner to their 'laziness' by saying:

> It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than go about in the sun hunting up evidence.

By grounding the torturers' identity on their 'innate propensity' or 'laziness', the 'civilisation' discourse could dismiss the idea that European functionaries, by failing to suppress the practice, were somehow accommodating it (Barnes 2017, 55).[14] More importantly, the discourse could give moral boost to the colonial mission—aimed at exporting assumed

14 Karl Marx (1857) wrote a harsh critique of the Madras Commission's conclusion, directly blaming the British authorities for the torture in Madras and denouncing their attempt to shield the colonial government from responsibility. According to Deana Heath (2021, 89–90), shifting the blame for torture from the colonial regime to Indian officials served to justify, and perpetuate, torture as a tactic of colonial rule.

civilised standards of justice and humanity or, in Talal Asad's (1996, 1091) terms, at creating 'new human subjects'.

Formations of themes

The centrality of torture as a measure of civilisation also emerges from the ways the 'civilisation' discourse framed the relationship between morality and penality. To confirm their identity as 'civilised', European nations, on the one hand, had to show that their penal system had been depurated from torture; on the other, they had to show eagerness to punish torture in the distant places where they had 'a mandate' to rule.

For the 'civilisation' discourse, the statutory prohibition of torture was not enough. Since torture 'disgrace[d] the administration of criminal justice' (Jardine 1837, 3), the penal system as a whole had to be 'humanised' to prevent the practice. We may notice similarities with the 'shield' function of today's 'jus cogens' discourse. European nations had to prevent torture both in their own penal system and in their colonial territories. It is no coincidence that, faced with allegations of torture in India, the Madras Commission (1855, para. 88) suggested reforming the Indian police:

> It cannot be doubted that a better paid, better organised police force …, placed under European officers, … would in a very short time interpose an effectual check to the resort to torture to elicit confessions. … Every allegation of maltreatment would receive instant attention and investigation, and be followed, wherever detected, by prompt and adequate punishment.

The right to rule over 'uncivilised' people, so the discourse maintained, could be made legitimate only through just governance:

> Only by adopting a different system [of policing], and by making our rule really beneficial to the people, can we hope … to fulfil that which is, I trust, our destiny—to remain for ever the lords of India (The Earl of Ellenborough 1856, col. 982).

Not only the 'shield' but also the 'sword' function of the 'jus cogens' discourse finds an antecedent in the 'civilisation' discourse. 'Savage' societies had to be made to desist from using torture and the solution was found in heightened penal control. The discourse framed punishment, 'aided by the spread of education and more humane and just ideas', as the most efficient means of turning an 'uncivilised' people with a propensity to torture into a reformed, 'civilised' one (Anonymous 1857, 460). Conversely, the 'inadequacy' of punishment was said to encourage the native population 'to persevere in their old practices' (Madras Commission 1855, para. 48). The imposition of exemplary punishment also became an instrument for lending legitimacy to the punisher. By punishing torture in distant societies, European nations could justify their colonial intervention as exporting the light of justice in

places of 'native and congenital darkness' (The Earl of Carnarvon 1856, col. 1573).[15] As the Madras Commission (1855, para. 70) put it:

> [A]ll [the natives] seem to desire is, that Europeans … should themselves take up and investigate complaints of names brought before them; … the whole cry of the people … is to save them from the cruelties of their fellow natives.

This is also why allegations that torture was not adequately punished appeared so upsetting (Madras Commission 1855, para. 48). These allegations brought into question the quality of the colonial mission and also the coloniser's self-image as 'civilised':

> [T]he public spirit of England should now be evoked to put down these abominable practices and to punish their perpetrators, or the people of Europe would believe that we continued to sanction these atrocities. If we acquiesced in these enormities we should desert our duty, disgrace our ancestors, cast aside the glorious precedents of the Munros and Mountstuart Elphinstones, and would become responsible for the misdeeds of their degenerate and unworthy successors (Lord Monteagle 1856, col. 997).

4. The 'anti-totalitarian' discourse

In December 1948, the newly established UN General Assembly (UNGA) adopted the Universal Declaration of Human Rights (UDHR) (1948). Though not formally binding, the Declaration aimed to reconstruct the foundations of civilisation upon 'the inherent dignity' and 'inalienable rights of all members of the human family' after the horrors of the Second World War (preamble). Article 5 stated:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The torture discourse had changed again: torture had become a human rights violation.

The Nazi atrocities had made clear to everyone that torture was not merely an 'oriental' practice but, with the appearance of the totalitarian state, was used by Europeans upon other Europeans (Mellor 1949). For at least twenty-five years, the Nazi abuses were the benchmark for all talk about torture. Torture was seen as standing in absolute opposition to liberal democracy, founded on human rights and the rule of law, and a marker of distinction between democracy and left- or right-wing totalitarian regimes (Kelly 2013, 8). The dominant discourse of the period, the 'anti-totalitarian' discourse, was central to the adoption of torture provisions in treaties and human rights conventions adopted in the two decades after the Second World War. Common article 3 of the Geneva Conventions (1949), which established basic rules for non-international armed conflict, listed 'torture' along with other

15 Heath (2021, 97–100) shows, however, that convictions for torture in India remained relatively rare and largely involved the subordinate police. Torture was largely used as an instrument of colonial rule, but punishment was occasionally imposed (never on Europeans) when torture allegations were too serious to be dismissed.

prohibited acts. Article 3 of the European Convention on Human Rights (ECHR) (1950) reproduced article 5 UDHR almost verbatim, only omitting the word 'cruel'. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) (1966) also mirrored the UDHR, as well as prohibiting another feature of the Nazi regime, namely, anyone being 'subjected without his free consent to medical or scientific experimentation'.

While liberal democracies were at the forefront of establishing these instruments, they generally assumed that the provisions did not serve to improve their law and practice, which, they believed, already embodied human rights principles (Kelly 2013, 30). Yet democracies did use torture in this period, especially in the anticolonial wars they fought.[16] Torture became routine in France's war against Algeria (Alleg 1958; Lazreg 2008); Britain employed torturing methods of interrogation and detention in Malaya, Kenya, Cyprus, Aden and Northern Ireland (Curtis 2003; Elkins 2005; Rejali 2007; Cobain 2012; Mumford 2014; Webb 2018). The allegations stemming from these events undermined the 'anti-totalitarian' discourse, but the official responses that sought to deny them also reinstated the discourse (cf. Foley 2021, 113–14).[17] The characteristics of the 'anti-totalitarian' discourse are explored in this section. While for some aspects it resembles contemporary discourses, for others it appears quite different.

Table 18: The 'anti-totalitarian' discourse.

Objects	Subject positions	Themes
Torture = • a way to describe the deliberate and severe infliction of pain • anti-democratic and totalitarian human rights violation	**Victim** = • blameless-helpless victim of authoritarian states *vs.* 'fake' victims of democracies **Perpetrator** = • totalitarian/authoritarian state • corrupted and powerful	• Limited use of penality to condemn torture • Right to be free from torture used to condemn totalitarian states

Formations of objects

With the 'anti-totalitarian' discourse, the term torture appeared in international legal instruments, but without gaining legal precision (Klayman 1978). During the drafting of article 5 UDHR, the Lebanese philosopher Charles Malik stated that 'considering what had happened in Germany … it was better to err on the side of vagueness than on the side of legal accuracy' (UN Commission on Human Rights - Drafting Committee 1948, 3). Torture

16 For a convincing discussion around the apparent paradox whereby 'civilised' states abhor torture but use it as an instrument of their 'civilising' mission, see Farrell (2022).

17 The French government denied and downplayed the use of torture in Algeria to protect its self-image as 'democratic' and 'civilised' (Barnes 2017, 103–6). Accounts of torture took a long time before appearing in the press and being discussed in the National Assembly. The government also engaged in censorship tactics (e.g., preventing the printing of Alleg's *The Question* (1958)). A government-commissioned report, the Wuillaume Report (1955, translated in Vidal-Naquet 1963, 169–79), admitted that some violence had been used but denied it constituted torture.

had lost its precise meaning of painful judicial practice for eliciting evidence that it had had with the 'abolition' and, to some extent, the 'civilisation' discourses. Torture was a way to describe the deliberate and severe infliction of violence, but hardly the only one. Other terms like 'brutalities', 'cruelties', 'atrocities' and 'inhuman acts' were often used (Nuremberg Military Tribunals 1946, 175). Torture was also kept separate from 'cruel, inhuman or degrading treatment or punishment', which, in turn, were distinguished from painful but lawful acts, such as 'corporal punishment' (ECommHR 1956, 13) or 'roughness of treatment of detainees' (*The Greek Case* 1969, 501). The threshold that made an act torture was also unclear:

> There is a wide spectrum between discomfort and hardship at the one end and physical or mental torture at the other end. … Where, however, does hardship and discomfort end and for instance humiliating treatment begin, and where does the latter end and torture begin? Whatever words of definition are used opinions will inevitably differ as to whether the action under consideration falls within one or the other definition (Lord Parker of Waddington 1972, para. 9).

In the 'anti-totalitarian' discourse, torture was a human rights violation: not simply an abuse of due process, but a grave assault 'on the inherent dignity of the human person' (Amnesty International 1972, 38). The 'anti-totalitarian' discourse also used the term more generically to signify moral and political opposition to totalitarian forms of government (Kelly 2013, 28), thus continuing the 'civilisation' discourse's use of the concept as a measure of civilisation. As Malik explained, the prohibition of torture 'had been considered against the background of criminal events that took place in Nazi Germany' (UN Commission on Human Rights - Drafting Committee 1948, 3). Its 'basic idea' was to act as a general moral statement explaining that 'the conscience of mankind' had been 'shocked by inhuman acts in Nazi Germany' (ibid.).

The association of torture with Nazi crimes had two, apparently conflicting, consequences. On the one hand, the discourse constructed torture as falling below 'an absolute minimum standard of civilised behaviour' (Amnesty International 1972, 41).[18] During the drafting of article 3 ECHR, the British representative Seymour Cocks insisted that:

> [T]orture cannot be permitted for any purpose whatsoever, either for extracting evidence, for saving life or even for the safety of the State … it would be better even for Society to perish than for it to permit this relic of barbarism to remain (ECommHR 1956, 3).

On the other hand, by making Nazi crimes the benchmark, the discourse framed torture as 'so outrageous' a practice (Lord Diplock 1972, 32) that no democracy, no civilised state could ever admit committing it—it would be admitting to being like the Nazis (Farrell 2022). For

18 The absolute prohibition of torture is enshrined in common article 3 of the Geneva Conventions, article 15 ECHR and article 4 ICCPR.

the 'anti-totalitarian' discourse, democracies could 'mistreat' but not really 'torture'.[19] For instance, the committees established by the British government to investigate allegations of brutality and serious ill-treatment in Northern Ireland in the early 1970s did not contemplate that torture could have been inflicted.[20] A first committee, chaired by Sir Edmund Compton (1971), confirmed that what had become known as the 'five techniques'[21] were in use and amounted to 'physical ill-treatment' but not 'physical brutality'. In a second committee, the majority, with the chair Lord Parker of Waddington (1972), concluded that, if the 'five techniques' were used with care, they were acceptable given the circumstances. Conversely, the minority report of Lord Gardiner (1972) was unequivocal that the procedures were immoral and illegal. In all reports there is hardly any mention of torture (Kelly 2013, 34). Even Gardiner (1972, para. 11) argued that he avoided the term 'torture' as it was vague and open to doubt. Similarly, Amnesty International (1968a, 2) could 'objectively state that torture' was 'deliberately and officially used' in the context of the Greek dictatorship. Yet, when it came to assess the British actions in Northern Ireland, it accepted that 'the physical ill-treatment' used there was 'less severe than the methods of ill-treatment used by other regimes in other countries' (Amnesty International 1972, 38).[22]

The connection with Nazi atrocities also influenced how the 'anti-totalitarian' discourse framed torture as a crime (Barton 1968). Though not mentioned in the Nuremberg Charter (1945), torture appeared in the definition of 'crimes against humanity' used in the *Medical Cases* of the Nuremberg Trials (1946, 172–73). Torture was also made a war crime in the Geneva Conventions, which mentioned it among the 'grave breaches' of the law of war.[23] Torture was thus 'placed amongst those crimes which constitute an attack on the fundamental rights of the human person' (Coursier 1971, 488): not merely an offence 'against the criminal law' (*The Greek Case* 1969, 503), but 'a crime against high heaven and the holy

19 Although this was the dominant position, some critics did argue that democracies used torture. The most criticised use of torture by a democracy was by France in Algeria between 1954 and 1962. A minority of French society actively protested against torture and helped shift public opinion away from French colonial rule to an acceptance of Algerian independence (Barnes 2017, 99). While most critics highlighted how French soldiers were putting France's identity as a 'democratic' and 'civilised' state into question (e.g., Ligue des Droits de l'Homme et al. 1958; Vidal-Naquet 1963), there were more radical critiques that directly linked torture to colonialism (Sartre 1958; Fanon 1963). Anticipating today's critical voices (chapter 5), Simone de Beauvoir (1962) wrote: 'To protest [torture] in the name of morality against "excesses" or "abuses" is an error which hints at active complicity. There are no "abuses" or "excesses" here, simply an all-pervasive *system*'. In Northern Ireland, the actions of British forces were described as torture, for example, in a report by Northern Aid (1971), an organisation supporting Irish republicanism.

20 These allegations of ill-treatment surfaced immediately after the British introduced internment without trial in Northern Ireland in August 1971 and over three hundred suspected Nationalist subversives were arrested in one day (Gearty 2021).

21 Deprivation of sleep; wall standing; hooding; continuous noise; bread and water diet.

22 See section 5 for subsequent developments and the involvement of the European Commission and Court of Human Rights.

23 Article 50 of the First Convention (1949), article 51 of the Second Convention (1949), article 130 of the Third Convention (1949) and article 147 of the Fourth Convention (1949).

spirt of man' (Cocks, in ECommHR 1956, 4) and 'a crime against the moral law' (World Conference on Religion and Peace 1968, 364).

Formations of subject positions

Similarly to today's 'jus cogens' discourse, the 'anti-totalitarian' discourse showed an interest in the *individual* subjects of torture: on the one hand, the moral-defenceless victim; on the other, the immoral-powerful perpetrator. Yet this dichotomy was at times complicated by the introduction of the 'fake' victim and the 'fake' perpetrator—figures that are now part of the 'national security' discourses.

Formally, *everyone* could be a victim of torture. In the UDHR and the ICCPR, the opening words 'No one shall be subjected' were chosen in preference to 'It shall be unlawful to subject', to emphasise the right of every human being rather than the obligation of states (UN Secretary-General 1955b, 87). Sometimes, however, the discourse granted the status of victim only to certain individuals. For instance, it distinguished between 'defenseless and powerless' victims of dictatorships (Nuremberg Military Tribunals 1946, 198) and 'vicious and ruthless' persons who used torture allegations for propaganda purposes (Home Secretary, in Compton 1971, vi). Democracies, so it was argued, had to take 'an interest in the sufferings' of other, non-democratic, countries (Fraser 1968, col. 1652), but also protect their national security from 'persons suspected of terrorism' (Lord Parker of Waddington 1972, para. 2). While dictatorships' victims were 'reliable and truthful' (Amnesty International 1968b, 1), democracies' victims were primarily criminal suspects. As stated in the Parker Report (1972, para. 33), 'interrogation in depth'[24] could even serve to 'reveal [the suspects'] innocence … and allow of [their] release from detention'.

As with the 'civilisation' discourse, the 'anti-totalitarian' discourse constructed the figure of the torturer to help the speaking subject define itself in opposition as protector of morality and the rule of law. Initially, the perpetrator of torture had to come from totalitarian states, such as Nazi Germany or the Soviet Union (Levie 1962). Soon, however, the discourse extended the category to state officials in other authoritarian countries (*The Greek Case* 1969). At times, when allegations of torture involved liberal democracies, the 'anti-totalitarian' discourse reversed the accusations and labelled as real torturers those who had presented themselves as the victims. For instance, faced with allegations that the British had mistreated prisoners during the Mau Mau rebellion in Kenya, it was argued that it was in fact the Mau Mau who inflicted torture on Kikuyu people (Corfield 1960, 167–68). Similarly, in Northern Ireland, it was often the IRA that was accused of torture (Kilfedder 1972, col. 1795).[25]

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24 A euphemism for the 'five techniques'.

25 In the 1970s, Amnesty International was often urged to investigate not only state abuses but also those inflicted by the IRA or similar groups (e.g., A. Harris 1972; H. Greer 1978).

Formations of themes

Unlike both contemporary and older discourses, with the 'anti-totalitarian' discourse ethical opposition to torture played a marginal role in the delineation of penality. For the discourse, condemnation of torture was at once an *apolitical* and a prominent *political* endeavour. On the one hand, torture, linked to Nazi atrocities, was a self-evident wrong, over which no political debate was needed for agreeing on its prohibition. On the other hand, torture was associated with totalitarian regimes and its aversion used to signify political opposition to these forms of governments. Both these approaches reduced space for condemning torture through penality.

First, since torture was said to occur in dictatorships, the 'anti-totalitarian' discourse identified in regime change the main course of action for preventing torture and protecting human rights (Becket 1970, 113). When in the late 1960s Denmark, Norway, Sweden and the Netherlands brought an application against Greece in the European Commission of Human Rights (ECommHR) (*The Greek Case* 1969), they were mostly concerned with the replacement of democracy with military dictatorship. Torture was not even included in the original submission but added subsequently (Keys 2012, 204). The 'anti-totalitarian' discourse considered free press and free elections as important for preventing torture as ensuring 'strict control of police', 'independence of the judiciary' and 'better prison conditions' (Becket 1970, 108). Conversely, in democratic countries, the full application of the law appeared as sufficient in itself for upholding the values underlying freedom from torture. For instance, a report of Amnesty International (1972, 39) stated:

> Morality and law are inextricably joined, and the belief that the use of ill-treatment for the purposes of interrogation is immoral is enshrined in both the municipal law of Northern Ireland and in the international conventions to which the United Kingdom is a party.

Second, given the self-evident immorality of torture, the judicial process was not essential to reaffirm the wrongfulness of the practice when the prohibition of torture was violated. Criminal law was not a priority but one of the many tools for dealing with the practice. In the *Greek Case* (1969), the ECommHR censured the Greek government's failure to 'order enquiries, either administrative or judicial, into allegations of torture' but did not recommend any specific courses of action, much less criminal prosecutions (para. 502). Amnesty International (1968b, 3) did call for instituting criminal proceedings against officials accused of torture in Greece, but only as an alternative to the establishment of a public inquiry. Additionally, when allegations of torture involved liberal democracies, the ill-treatment was either denied or presented as necessary given the circumstances and, thus, not suitable of being repressed with punishment. For example, in his report on the 'five techniques' in Northern Ireland, Lord Parker (1972, para. 38) accepted that these procedures could 'constitute criminal assaults'. He nonetheless suggested that the Minister concerned 'take steps to ensure protection for those taking part in the operation' (ibid.).

5. The 'global' discourse

During 1972 and 1973, Amnesty International launched its Campaign for the Abolition of Torture and published a report (1973) on the use of the practice around the world. It was a watershed moment. Amnesty had focused on torture in previous reports but neither routinely nor systematically.[26] For instance, the reports on Greece (1968a; 1968b) were directly concerned with the practice, but the one on Northern Ireland (1972) used the word 'torture' only a handful of times. Instead, the 1973 report singled out torture as the most concerning human rights violation of the time. Recent conflicts in Algeria, Vietnam and Northern Ireland had helped reveal that the practice was not confined to some dictatorships but was a 'world-wide phenomenon' (7).

Amnesty International was significant in putting the prohibition of torture at the centre of the international agenda (Kelly 2013, 35; Clark 2001). Insisting on its political neutrality, Amnesty, with the support of other NGOs, campaigned for strengthening the legal prohibition of torture at the UN rather than addressing its political causes. In 1975, the UNGA adopted the Torture Declaration. Although not legally binding, the declaration provided the first internationally agreed definition of torture (art. 1) and demanded that 'criminal proceedings' be instituted against torture offenders (art. 10) (see also chapter 2). The next step was the drafting of a treaty, which was eventually adopted by the UNGA in 1984 as the Torture Convention. As shown in chapter 2, this convention represented a clear move towards protecting human rights, and in particular freedom from torture, through penal mechanisms. The Torture Convention called on states to make all acts of torture 'offences under [their] criminal law' and to punish them 'by appropriate penalties' (art. 4). It also required that all alleged torturers be prosecuted, regardless of where they had carried out the acts, if they were in the territory of a state party and were not extradited (arts. 5–7). It was the principle of universal criminal jurisdiction:[27] if torture was a global problem, the penal mechanisms to oppose it had to be of global reach as well.

The discourse that developed around torture throughout the 1970s and 1980s, the 'global' discourse, is explored in this section. Though not yet a contemporary torture discourse, it gradually brought into focus many of the characteristics that we find in today's discourses.

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26 Amnesty International decided to give special attention to torture in 1966 (Amnesty International 1976, 5–6) and organised an international conference on it in 1968. In the conference, Amnesty expanded its mandate (originally limited to the plight of prisoners of conscience) to violations of article 5 UDHR concerning all prisoners (excluding, however, advocating for the *release* of prisoners who used violence) (Barton 1968; Engle 2015, 1073–74),

27 For some authors (e.g., Ryngaert 2014, 124) the principle of *aut dedere aut judicare* should be distinguished from the universality principle.

Table 19: The 'global' discourse.

Objects	Subject positions	Themes
Torture = • legally defined • global human rights violation and crime	**Victim** = • blameless prisoner • suffering body **Perpetrator** = • public official • powerful-corrupted torturer of dictatorships *vs.* over-zealous officer of democracies	• Legal reform of penality used to educate to anti-torture • Penality used to enforce the right to be free from torture

Formations of objects

Drawing mostly upon the Declaration, the Torture Convention defined torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person', directly or indirectly by a public official, for a specific purpose (obtaining information, punishment, intimidation/coercion or discrimination) (art. 1(1)). Through this definition, torture regained legal precision. Yet only a precise type of pain or suffering could now be labelled as torture: 'pain or suffering arising only from, inherent in or incidental to lawful sanctions' was excluded (art. 1(1)); other forms of ill-treatment were also excluded—still prohibited but treated differently from moral and legal points of view.[28] Torture also became an issue of precise legal debate (Kelly 2011, 340). When Ireland brought the UK to the ECommHR in relation to the 'five techniques', the Commission found that 'the systematic application of the techniques for the purpose of inducing a person to give information' was torture within the meaning of article 3 ECHR (*Ireland v United Kingdom* 1976, para. 402). This finding was, however, overturned two years later, when the European Court of Human Rights (ECtHR) stated that the British acts were a form of inhuman or degrading treatment, but that the suffering inflicted was not so intense as to deserve the special 'stigma' attached to torture (*Ireland v United Kingdom* 1978, para. 167).[29] In so doing, not only did the ECtHR confine torture within narrow legal boundaries, but it also made these boundaries constitutive of what was particularly shameful and what was not. By controlling the legal definition of torture, the 'global' discourse could modulate the force of its moral reproach and its penal implications towards certain actors and states, while shielding others (who, paradoxically, could persist with practices of torture) (Farrell 2022).

During the drafting of the Torture Declaration, the delegate from the newly established democratic government of Greece, Anestis Papastephanou (1975, para. 14), identified two kinds of torture:

28 Obligations to criminalise, prosecute and punish in the Torture Convention are formally provided for torture but not for other ill-treatment.

29 For a comprehensive account of the role played by the ECHR during the conflict in Northern Ireland, see Dickson (2010). For an in-depth analysis of *Ireland v United Kingdom*, see Duffy (2019).

> [E]ither it [is] an unusual phenomenon, regarded only as a marginal practice engaged in by officials who [have] gone beyond permissible limits … or it [is] systematic and constitute[s] a recognized means of maintaining and stabilizing a regime.

The 'global' discourse acknowledged this distinction—the torture of democracies, characterised by exceptional single acts, and the torture of dictatorships, 'part of the state-controlled machinery to suppress dissent' (Amnesty International 1984, 4). Nonetheless, the discourse preferred to highlight the commonalities. As the first UN Special Rapporteur on torture, Pieter Kooijmans (1986, para. 14), put it:

> [N]o society, whatever its political system or ideological colour, is wholly immune to torture. Torture may happen everywhere and in fact—in varying degrees—it occurs in all types of society.

Torture was a global phenomenon and 'was equally reprehensible in all cases' (Heaney 1974, para. 15). By emphasising the common immorality of torture wherever it took place, the discourse preoccupied itself with formulating norms of universal prohibition rather than focusing on the different political causes of the practice. Torture, so it was argued, had to 'be considered from the humanitarian, rather than the political, point of view' (D. Wilson 1974, para. 8).

Unlike other rights, such as the right to property or freedom of opinion, which, in the context of the Cold War, were considered contentious, torture could be 'seen essentially as a non-political issue' (Kooijmans 1986, para. 20). For the Sweden delegate to the UN, Jan Ståhl (1974, para. 23), 'there could be no doubt about the common rejection and abhorrence of torture'. Thus, the 'global' discourse elevated the practice to the archetypal human rights violation that it is today. This development had two consequences. On the one hand, a moral prioritisation of torture—torture as 'the most flagrant denial of man's humanity' and 'the ultimate moral corruption' (Amnesty International 1973, 23); on the other, a delimitation of the ethical aspects of torture to it being a human rights abuse that entailed 'the destruction of exactly that which makes a man a human being' (Kooijmans 1986, para. 5). Put differently, torture became the default term to describe serious suffering, while human rights emerged as the tool to morally condemn it (Kelly 2013, 27).

Finally, the 'global' discourse described the prohibition of torture as a 'rule of jus cogens' because torture 'was outlawed unreservedly and unequivocally' (Kooijmans 1986, para. 3; also O'Boyle 1978, 687). To signal its universal prohibition, the discourse defined torture as an 'international crime' (Shue 1978, 143) and a 'crime against humanity' (Amnesty International 1977, 70). Yet, unlike the 'anti-totalitarian' discourse, the 'global' discourse did not use the label 'crime' just to signal outrage at the phenomenon. Instead, torture was addressed as a criminal phenomenon which required the certainty of a penal response. The text of the Torture Declaration, for example, was originally drafted and approved at the Fifth

UN Congress on the Prevention of Crime and Treatment of Offenders (1975), devoted exclusively to the discussion of *criminal matters*. Similarly, the essence of the Torture Convention was to impose upon contracting states *penal obligations*. Its ratification involved adopting *criminal legislation*, such as the UK Criminal Justice Act (1988), which made torture a specific offence in British law (sec. 134).

Formations of subject positions

With the 'global' discourse, the victim of torture came forcefully into the spotlight. The presence in Western Europe and North America of several refugees from authoritarian regimes in Latin America probably contributed to placing the experiences of individual survivors as the driver behind anti-torture activism (Kelly 2013, 38–39). Most 1970s and 1980s Amnesty International reports contained first-person narratives enumerating the suffering inflicted upon torture victims to make the reader empathise with them. Although the victims were often identified as political prisoners (Kooijmans 1986, para. 19), the 'global' discourse concentrated mostly on their being 'prisoners', while leaving behind the 'political' aspect of their condition (A. M. Miller 2004, 27–28). As 'prisoners', they were 'defenceless' (Shue 1978, 125) and in need of protection to 'assuage [their] sufferings' (Heaney 1974, para. 18). As the UK MP Stuart Bell (1988, col. 631) put it:

> I often think of the individual victim of torture—who may be in some solitary cell in a country in the near east. Who wonders what will happen to him, who is listening to his tiny voice, feels for him and is prepared to do something for him?

On the other hand, torture victims' diverse political militancy was diluted into righteous activism against abuses (Kooijmans 1986, paras. 127–128). Purified from the potentially contentious aspects of their position, they were represented as suffering bodies with whom everyone could side:

> Pain is a common human dominator … Within every human being is the knowledge and fear of pain, the fear of helplessness before unrestrained cruelty (Amnesty International 1973, 17).

In line with previous discourses, the 'global' discourse framed the identity of the perpetrator as a state official. Furthermore, while the 'anti-totalitarian' discourse somewhat accepted that non-state groups could inflict torture, the 'global' discourse gradually focused *exclusively* on state actors. In 1975, the Torture Declaration still contemplated that non-state 'entities exercising effective power' could torture (preamble). Conversely, the Torture Convention, nine years later, fixed in law that torture was only 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity' (art. 1(1)).

The 'global' discourse distinguished between two torturers. In authoritarian countries, torture was used by 'military police and paramilitary groups' to suppress dissent (Kooijmans 1986,

para. 99); in democracies, torture resulted from 'over-zealous officers' who, 'interrogating detainees and trying to get a "quick solution" of the case', happened to lose 'control of themselves' (para. 110). The image of a powerful, 'sadistic' (Amnesty International 1984, 4) torturer who degrades their victim while degrading themselves—now central in the 'jus cogens' discourse—emerged out of this 'global' discourse (Amnesty International 1973, 22), but originally in relation to the torture of authoritarian countries. The image of the other torturer, at the service of democracy, remained more ambiguous: certainly powerful, but not so morally corrupt when they tortured under 'extreme strain' (*Ireland v United Kingdom* 1976, 387) or to 'maintain peace and order in a dangerous situation' (381).

Formations of themes

With the 'global' discourse, penality gained more importance as both the space to be regulated for ensuring freedom from torture and the main tool for responding to instances of the practice. In this way, the discourse laid the groundwork for the contemporary role of human rights as both shields and swords of penality.

Despite acknowledging that, in many countries, torture played 'an integral role in the political system itself' (Amnesty International 1973, 16), the 'global' discourse moved away from the political solutions, including regime change, that the 'anti-totalitarian' discourse had put forward. Instead, the new discourse sought to counter torture by strengthening 'the rules governing the conduct of those exercising authority' over people at risk of being ill-treated (Speekenbrink 1974, para. 5). The assumption was that, to infuse the system with the values underlying the prohibition of torture, legal limits had to be imposed on what state officials could do to investigate or repress criminal conduct. Thus, legal regulation was used as an instrument of moral education. In 1979 and 1982 the UNGA approved a Code of Conduct for Law Enforcement Officials and a series of Principles of Medical Ethics, respectively. These instruments did not merely prohibit torture (art. 5; principle 2); they also established a series of rules to minimise the possibility of torture and educate law-enforcement officers and doctors in the dignity and worth of the human person.

This new understanding of torture as a global phenomenon arguably contributed to revitalising penal enforcement as the preferred instrument for upholding the torture prohibition. When torture involved a democratic state, the authorities could 'no longer be content to condemn' the practice (Mbaye 1979, 17), but they had to demonstrate their will 'to adhere to the rule of law' by prosecuting and punishing perpetrators (Kooijmans 1986, para. 104). With the 'global' discourse, the interest in criminal accountability markedly increased, but did not become as fundamental as it is today in the 'jus cogens' discourse. In *Ireland v United Kingdom* (1978), for instance, the ECtHR asserted that it did not have 'the power to direct' a state 'to institute criminal or disciplinary proceedings in accordance with its domestic law' (para. 186)—yet we know from chapter 2 that the ECtHR has indeed repeatedly claimed this power more recently.

Anticipating the 'jus cogens' discourse, the 'global' discourse entrusted penality with 'practical' and 'expressive' roles. First, criminalisation of torture served to ensure 'effective protection' of human rights by reinforcing the prohibition of torture with a 'machinery of control' (UNHRC 1982, para. 1). The discourse assumed that 'the prospect of severe punishment' would deter potential perpetrators (Papastephanou 1975, para. 14), while criminal proceedings for torture would 'sort out individual responsibility' and 'apportion blame' (Amnesty International 1977, 12). Second, in the 'global' discourse, torture penalisation played an expressive role. Commenting on the first trial for torture that occurred in Greece after the return of the democracy, Amnesty International (1977) celebrated the event as 'significant for all nations' (70):

> The main value of the trial lies in the exposure of such a practice and in setting the example that torturers, even though protected and sponsored by a political regime, can be brought to trial and punished (58).

Similarly, in the debate to mark the ratification of the Torture Convention, most British parliamentarians seemed to agree that the introduction of the offence of torture into domestic law would make little difference to actual practice in the UK. Rather, it served to send 'a message' that Britain would 'use all the pressure' that it could 'to ensure that human rights [were] upheld in other countries' (Bell 1988, col. 631).

6. Emergence of contemporary discourses

With the end of the Cold War, the protection of freedom from torture by means of penality increasingly seemed to become a reality and not simply a moral and legal aspiration. As discussed in chapter 2, the wave of transition in Latin America and Eastern Europe raised the opportunity to ensure criminal accountability for the abuses of past regimes, including torture. In the same period, the atrocities that occurred in the former Yugoslavia and in Rwanda prompted the UN Security Council (UNSC) to establish ad hoc criminal tribunals for the former Yugoslavia in 1993 and Rwanda in 1994. This development, in turn, led the way to the establishment of the International Criminal Court in 1998. Torture was given a prominent place in the list of international crimes under the jurisdiction of these tribunals. Another significant move towards criminal accountability for torture seemed to be the arrest and extradition proceedings of Chilean dictator Augusto Pinochet in London on a Spanish warrant for torture and other human rights violations (Roht-Arriaza 2005). Pinochet was never prosecuted, but this case stood as an exemplary application of universal jurisdiction enshrined in the Torture Convention. As we have seen, today's 'jus cogens' discourse stems from these developments. Torture has maintained its place as the archetypal human rights violation, while punishment for torture has become a moral and legal imperative (chapter 5). Then came the 'war on terror'. Many state officials and public intellectuals explained that the danger that international terrorism posed to national security required a reconsideration of the scope of the torture prohibition. In the public and intellectual debate that has since then

arisen around torture, the 'national security' discourses have questioned the absolute prohibition of torture advanced by the 'jus cogens' discourse. However, while the US, British and other Western nations' involvement in torture has been repeatedly denied or condoned, these acts of denial and tolerance have also sparked further indignation and more forceful calls for punishing those responsible.

The 'jus cogens' and the 'national security' discourses emerge as the latest steps of the history explored in this chapter. Yet they are not the unfolding of a linear and progressive evolution, but the product of three gradual, non-linear and contingent processes. One is a process of *depoliticisation*. Over the eighteenth and nineteenth centuries torture moved from being a legitimate penal practice to a crime. This change was driven not merely by sensitivity to suffering but by awareness that opposition to torture, an inefficient penal practice, was instrumental to the political legitimacy of the sovereign. Conversely, the human rights campaigns of the 1970s and 1980s, which sought to strengthen the criminal prohibition of torture internationally, were only marginally concerned with torture as a political problem and much more with its humanitarian aspects. Second is a process of *individualisation*. Until the Second World War torture was opposed because it degraded society rather than out of concern for the suffering of individual victims. Moreover, until very recently, states—not individuals—were considered the 'real' perpetrators of torture. The third is a process of *legalisation*. In the eighteenth century, statutory abolition of torture was conducted through legal reform of the penal system. Yet when Western Europe 're-discovered' torture after the Nazi atrocities only limited attention was initially given to changes of the law. The prohibition of torture returned as a matter of legal regulation after the 1970s, especially with the production of an internationally agreed definition of torture in the Torture Convention. Despite their differences, both the 'jus cogens' and the 'national security' discourses are the culmination of these three processes. They, however, manifest in contrasting forms given these discourses' distinct genealogies.

Table 20: The 'jus cogens' discourse (from chapter 5).

Objects	Subject positions	Themes
Torture = • archetypal human rights violation • exceptional wrong and crime	**Victim** = • blameless • suffering body **Perpetrator** = • morally corrupted • powerful	• Right to be free from torture used to humanise penality • Penality used to give force and recognition to the absolute right to be free from torture

Table 21: The 'national security' discourses (from chapter 5).

Objects	Subject positions	Themes
Torture = • measure of civilisation • moral wrong that can be condoned in exceptional circumstances	**Victim** = • ambiguous victim • distant victim • victim of the victim • 'fake' victim **Perpetrator** = • heroic perpetrator • distant perpetrator • 'rotten-apple' perpetrator • 'fake' perpetrator	• Demanding penality against the torture of the 'enemies' • Limiting penality for the torture of the 'friends'

The roots of the 'jus cogens' discourse

In the 'jus cogens' discourse, the processes of depoliticisation, individualisation and legalisation manifest through the construction of torture as a specific violation of human rights law above nearly all others. By placing the emphasis on the absolute evilness of torture, political ground is ceded to moral ground. The 'jus cogens' discourse is more interested in distributing blame for acts of torture rather than opposing or distributing the political power that enables their infliction (see further in chapter 7). Furthermore, it is the nature of torture as a violation of human rights law that demands a clear perpetrator and a clear victim. Placing the suffering of identifiable people at the centre and implicating others as the perpetrators enable the 'jus cogens' discourse to identify individuals and groups to be given reparation or held accountable. Yet it may also leave unimplicated the politics that leads to torture in the first place. Finally, by making torture a legal issue, the 'jus cogens' discourse lends 'the authoritative voice of the international community and the state to back one norm (torture is an absolute wrong) and condemn another (torture is acceptable under some conditions)' (Celermajer 2018, 46). In particular, the stigmatising force of criminal law (chapter 7) is called upon with full force to highlight the absolute disapproval of the practice. Any approach that would even seem to imply a laxity towards perpetrators' responsibility is thus rejected as it would convey the message that torture is less than an absolute moral wrong (Celermajer 2018, 13).

What has the 'jus cogens' discourse taken up or left behind from torture's discursive past? In terms of *objects*, torture has gained its centrality in human rights law only in the late twentieth century, when it was legally defined and became the symbol of what is most cruel and painful ('global' discourse). Torture had previously moved from being an infringement of due process ('abolition' discourse) to a sign of barbarism ('civilisation' discourse) and totalitarianism ('anti-totalitarian' discourse). In relation to *subject positions*, the 'jus cogens' discourse pits a helpless-principled victim against a powerful-corrupted perpetrator (see also 'anti-totalitarian' and 'global' discourses). However, until the mid-twentieth century, the victim's suffering or the perpetrator's evilness played only a marginal role in the

condemnation of torture. Rather, references to the subjects of torture served to establish moral, social and anthropological hierarchies of backwardness and development ('abolition' and 'civilisation' discourses). As for what concerns its *themes*, the 'jus cogens' discourse assigns a 'shield' and a 'sword' function to freedom from torture in relation to penality. The emergence of these two functions is neatly connected with the unfolding of the discourse's historical antecedents. The formal abolition of torture did not erase the practice from modern penality. Torture, carried out in secret, has remained an aspect of policing and punishing (Asad 1996, 1085). Aware of this problem, historical torture discourses sought to 'humanise', 'civilise' or 'democratise' the penal system ('abolition', 'civilisation', 'anti-totalitarian' and 'global' discourses). However, this process of moral and legal governance has become a vehicle of new penality, which, purportedly devoid of 'uncivilised' and 'inhuman' practices, has run more deviously but also more effectively (cf. Foucault 1991a). This new penality has long played a part in backing up the moral condemnation of torture with criminalisation and punishment. Yet it was only when torture was primarily being opposed from a human rights perspective that penal control became the main anti-torture strategy ('global' discourse) and, more recently, a moral and legal imperative.

The roots of the 'national security' discourses

The history of torture discourses is made up not only of efforts to strengthen the torture prohibition legally and morally, but also of attempts to limit the reach of the ban to protect the interests of the state or the sovereign. The 'national security' discourses have their roots in this side of history. Although these discourses are not in essence human rights discourses, I have examined them because they form the oppositional stance against which the 'jus cogens' discourse mobilises (chapter 5). In the 'national security' discourses, emphasis on torture's apolitical, individualistic and legalistic aspects may serve to attack some acts of torture while denying or condoning other. For instance, by dismissing the political connotations of torture, moral and legal debates may contribute to overlooking the torture that does not appear abhorrent or is perpetrated under the cover of law. In addition, insistence on torture as the work of individual perpetrators in foreign countries or of 'a few bad apples' may help immunise domestic torturers or be used to dismiss any institutional complicity.

The *objects* of the 'national security' discourses are to be found in the understanding of torture as a marker of distinction between civilised Western democracies and uncivilised authoritarian states, as well as in attempts to dismiss torture when not attributable to savage or totalitarian others ('civilisation' and 'anti-totalitarian' discourses). The 'national security' discourses' *subject positions* are loaded with moral ambiguity. When the victims of torture are not the submissive prey of uncivilised regimes ('civilisation' discourse), they are often represented as serious criminals ('abolition' discourse) or ruthless impostors who use torture allegations for political propaganda ('anti-totalitarian' discourse). On the other hand, when

the perpetrators are not described as foreign and barbarous ('civilisation' discourse), they tend to be cast as over-zealous officers who inadvertently broke the law ('global' discourse). In terms of *themes*, the prohibition of torture is used as an instrument of foreign policy to enhance the reputation of the state and justify penal interventions abroad ('civilisation' and 'global' discourses). Yet, when allegations of torture hit closer to home, unlawful violence is denied or condoned rather than punished ('anti-totalitarian' discourse).

7. Conclusion

Torture and criminal law have a long and complex relationship that continues to the present day. Once torture was an instrument of criminal procedure; now criminal liability and severe penalties are given a significant role in redressing acts of torture. Especially when torture is opposed from a human rights perspective, punishing perpetrators is not simply a desirable prospect but a moral and legal imperative. This chapter has explored how we have come to give such an importance to torture penalisation and the role human rights have played in this respect. Through a discourse analysis on texts written between the eighteenth and the late twentieth centuries, the chapter has provided a 'history of the present' about contemporary torture discourses. Torture's discursive present, far from being the inevitable offspring of its past, has emerged out of that past's transformations and deviations. Certain discursive elements have been conserved, but many were abandoned or embraced along the way.

Torture was already a violation of natural rights in the 'abolition' discourse, which developed along with the statutory abolition of torture in the eighteenth century. Yet it was not repulsion of cruelty in itself but concern for the excessive nature of the practice that made torture immoral and also problematic for the legitimate use of penal powers. In the nineteenth century, the 'civilisation' discourse used the torture prohibition to impose, by means of penal interventions, assumed civilised standards of justice and humanity on a subject population. However, it was not the suffering of the victims that mobilised the discourse but the idea that torture condemnation was at the core of what it meant to be civilised. After the Second World War, the 'anti-totalitarian' discourse understood torture as a human rights violation and as standing in absolute opposition to liberal democracy. Yet this discourse rarely resorted to penality to condemn the practice, preferring instead more political solutions. When, with the 'global' discourse, torture was given ethical priority and was legally defined, the importance of penal enforcement increased considerably but still did not become as inseparable from the absolute ban on torture as it is today.

This chapter has argued that the assumption that any ambiguity with regard to criminal accountability for torture is a form of torture-apology derives from a gradual depoliticisation, individualisation and legalisation of torture discourses. Since the early nineteenth century, penality has played a role in the process of formally banning torture. However, its importance has increased, eventually making anti-torture a penal imperative, along with the growing importance given to humanitarian, individualised and legalistic

solutions to counter the phenomenon. In other words, the same processes that have rendered torture the archetypal violation of human rights law have also contributed to 'accelerating' torture penalisation and making it appear as universal and necessary—albeit largely symbolic given the rarity of actual prosecutions.

This and the previous chapter have unearthed the historical and contemporary assumptions that support, and lie behind, the relationship between human rights and penality in the context of torture. Together with chapters 3 and 4 (on human trafficking), they constitute the empirical part of the thesis, based on discourse analysis. The next chapter will not use discourse analysis but will build upon the findings of chapters 3–6 to illustrate *why* human rights are so dependent on penality for their enforcement.

PART 3—THE ‘WHY’ QUESTION

7

Human rights-driven penal desires

In spring 2020, at the peak of the 'first wave' of the COVID-19 pandemic, the UN Office of the High Commissioner for Human Rights (OHCHR) published an information note on its website. The OHCHR (2020) recalled that 'prison overcrowding is never acceptable' and that, during a pandemic, 'States have a greater duty to prevent violations of the rights of persons deprived of their liberty, avoiding overcrowding and ensuring hygiene and sanitation in prisons and other detention centers'. Then, it added:

> However, the legitimate and necessary measures to protect against COVID-19 and overcrowding should not lead, *de jure* or *de facto*, to impunity for persons convicted in various parts of the world for serious violations of human rights.

The OHCHR indicated that measures against overcrowding should not primarily concern those imprisoned for committing serious human rights violations. Only if the problem persisted were states recommended to relocate such prisoners to other prisons or, when impossible, to provide for temporary house arrest. But under 'no circumstances' should these individuals be granted 'amnesties, pardons, exemptions from criminal liability or benefits in the enforcement of a sentence'.

The OHCHR's note contains both punitive and non-punitive elements. It relies upon human rights principles to promote a humane and moderate penal policy. However, this role of human rights co-exists with (and is somewhat subordinate to) the other presented throughout this thesis, which aims to ensure that human rights violators do not go unpunished. In the words of Françoise Tulkens (2012, 156), human rights are both the 'bad conscience' and the 'good conscience' of penality.[1] Not only do they limit the state's punitive action by giving 'bad conscience' to such intervention, but they are also 'the drivers of intervention and justification' for the deployment of penality by giving a 'good conscience' to state punitive logic (Tulkens 2012, 156). It is not difficult to understand why human rights are the 'bad conscience' of penality. As the OHCHR's note indicates, if penality (including detention) runs out of control, it violates several human rights, 'including the protection of the right to physical and mental integrity'. However, it is less clear why human rights are also

1 Another similar distinction is between the 'shield' and 'sword' functions of human rights in the application of criminal law (van den Wyngaert 2006; Tulkens 2011).

the 'good conscience' of penality. After all, as an enforcement tool, criminal law is not very successful. It is widely acknowledged that most human rights violators are not held criminally accountable and most likely never will be (Lohne 2019, 128). *Why*, then, did the OHCHR state that impunity for serious human rights abuses is never acceptable—not even when prisons became incubators of a deadly virus? *Why* are criminalisation and punishment so important for human rights that they cannot do without them? The previous part of the thesis used discourse analysis to explore *how* it is possible that human rights and penality have become so entangled. The focus was on *understanding* the process of knowledge production about human rights and penality rather than on *explaining* the reasons underlying their relationship. This chapter deals with the latter question, namely *why*, given the described process of knowledge production, human rights are made dependent on penality for their enforcement. The chapter moves beyond discourse analysis and places the findings of part 2 (chapters 3–6) within broader theoretical context. Particularly, these findings are read through the critical lens of works in sociology of punishment (e.g., Durkheim 1933; Garland 1990a), political theory (e.g., Nietzsche 2006; Wendy Brown 1995) and human rights theory (e.g., Moyn 2010; Marks 2013; Wendy Brown 2004). The choice of these works depends not only on my research question and theoretical dispositions, but also on the fact that their engagement with human rights morality and/or penality offers explanatory insights into my findings of part 2.

Despite a growing scholarship on the relationship between human rights and criminal law, the question of why human rights have embraced penality remains controversial. The usual justifications for punishment—retribution and deterrence—do not provide satisfactory answers (Drumbl 2007, 149). It is no surprise that criminal law constantly fails to deliver retribution for rights violations. As Hannah Arendt (1958, 241) points out, some abuses are so egregious—they are, in Immanuel Kant's words, 'radical evils'—that no punishment seems to be severe enough.[2] Criminal law also does not appear to deter most human rights violators, given the very low chance of them ever being taken into the custody of penal institutions (Drumbl 2007, 169). Recent scholarship, especially in the context of international criminal law, has insisted on a third justification: expressivism (e.g., Sander 2019b; Stahn 2020). Expressivists contend that prosecution, conviction and punishment of human rights violations strengthen faith in the rule of law or communicate values (Drumbl 2007, 173–74). It is probably true that criminal law has greater, albeit still limited, success in attaining expressive, rather than retributive or deterrent, goals to the benefit of human rights (Drumbl 2007, 149). However, insofar as it is treated as a theoretical justification provided a priori, expressivism (like retribution and deterrence) addresses a different 'why question' than the

2 In later work, Arendt (2006) argued that the most serious crimes, even if beyond the capacity of law, simply require retributive punishment. For a critique, see Moyn (2016). On a broader discussion on the failure of retributive punishment to address human rights breaches, see Nino (1996, 140–43); Williams (2013).

one I explore in this chapter.[3] It provides a prescriptive explanation (why should human rights embrace penality?) rather than a descriptive one (why do human rights actually embrace penality?) (cf. Fassin 2018, 63–64).

Work that has directly addressed the 'why question' from a diagnostic, a posteriori, perspective is scarce. Kathryn Sikkink (2011, 20) suggests that one 'key explanation for both the initial adoption and the spread of the criminal accountability model [for human rights abuses] was that it was familiar and obvious to people from their experience with it domestically'. But why was criminal accountability 'the obvious' model to adopt? (Lohne 2019, 129). Adnan Sattar (2019) has probably provided the most detailed answer so far. Human rights, owing to their theoretical kinship with Kantian philosophy, embody a 'paradoxical commitment to human autonomy and dignity, on the one hand, and the notion of punishment as categorical imperative on the other' (Sattar 2019, 230). The production of penality is thus intrinsic to the theoretical foundations of human rights, which prescribe that a wrongdoer must always be held to account. While Sattar's explanation is persuasive, it is not totally convincing in assuming the predetermined (in this case, Kantian) nature of human rights. Human rights do not in fact have an essential or trans-contextual nature, but their concrete meaning is continuously shaped and re-shaped by the discourses and practices around them (O'Connell 2018b, 984). Accordingly, this chapter leaves aside discussions on the essence of human rights and its (assumed) affinities with liberal penality (cf. Sattar 2016).[4] Instead, it provides a theory to explain why *dominant* human rights *discourses* (more precisely, dominant anti-torture and anti-trafficking discourses) have intricately interwoven human rights with penal agendas at the domestic and international level.[5]

Building upon the finding of part 2 that human rights-driven penality is correlated to a moralisation of discourses, this chapter contends that emotion—even desire for punishment—is key to explaining human rights' dependence on penality. This argument is developed as follows. Section 1 brings together and generalises the findings of part 2 with the help of existing literature on human rights-driven penality. First, I outline the contemporary and historical assumptions underlying the relationship between human rights and penality, which I identified and discussed in previous chapters. Second, I show how

3 I distinguish here between expressivism as a theoretical justification for punishment (punishment is a deserved response to crime given its communicative character) and expressivism as sociological explanation of punishment (we punish to express value). While the former is based on legal and moral theory and, in particular, Kant's philosophy (see Feinberg (1965); Duff (2001)), the foundations of the latter can be traced back to the sociological work of Durkheim.

4 Sattar (2016) argues that both human rights and liberal penality share the same philosophical underpinning, associated with the Enlightenment and focused on individuals seen as free and autonomous subjects and, thus, accountable for their misbehaviours regardless of other considerations.

5 Unless otherwise indicated, when I write about 'human rights discourses' in the chapter, I refer to the dominant ones. My analysis also does not focus on all dominant human rights discourses, but only on those concerned with a set of human rights violations that are deemed 'serious' and tend to attract criminal liability (e.g., torture and human trafficking).

rights-based discourses—while not the only factor—have become a decisive vehicle for the promotion of expanded penality. Building upon these observations, section 2 illustrates and criticises the tendency of human rights discourses to moralise in the place of political engagement. I draw on Friedrich Nietzsche's (2006) and Wendy Brown's (1995; 2001) critiques of 'moralising politics' to argue that human rights discourses facilitate three connected moralising processes. First, they address violence and domination through a supposedly apolitical posture of moral reproach which masks their involvement with politics and power. Second, they develop a moral critique of power from the perspective of the powerless which codifies the dichotomy between vulnerable-moral victim and powerful-evil perpetrator. Third, even as they present themselves as countering state sovereignty, they defer to the state, its laws and institutions for protection and recognition.

In section 3, I argue that these moralising processes prompt a resort to, and a justification of, penality. Building upon Émile Durkheim's (1933) theory of punishment, I explain that the urge to criminalise and punish human rights abuses does not depend so much on the will to control undesirable behaviours as on the moral outrage at serious violations of rights. Put differently, human rights discourses rely on punishment because it offers emotional release in the face of moral indignation. This indignation is then rationalised in a desire to give force and public acknowledgement to universal human rights norms. I assess the implications of this vision by moving from Durkheim's to Nietzsche's (2006) conception of punishment. Driven by human rights, penality no longer expresses a 'will to power', but it dictates to the powerless the necessity of conveying their moral reproach. It becomes a hideous but also an inevitable business: an essential weapon to be used by 'the weak' in their reaction against 'the strong'. Section 4 moves beyond the 'why' question and concludes the chapter by advising caution in focusing on human rights as the main catalyst of justice. We may not only lose sight of other instruments for people's political emancipation but also reproduce discourses which reinforce the very structures of power that contribute to violence and domination. It is true that the relationship between human rights and penality is not given by nature. Yet it is not purely fortuitous either. While counter-carceral human rights are not impossible, thinking that human rights can easily be reoriented away from penality neglects how this possibility is fundamentally constrained by the very systemic forces that have brought rights-driven penality into being.

1. The penal force of human rights discourses

We tend to think of human rights discourses as moderating state power. Their ambition is to develop a righteous critique of the state from the perspective of the powerless. However, human rights discourses are also drivers of state power. In recent decades, they have increasingly mobilised penality as a means of delivering human rights protection. This development is particularly evident in relation to initiatives to counter human trafficking and

torture. The conditions of possibility that sustain human rights-driven penality in these contexts have been investigated in chapters 3–6 using discourse analysis.

Anti-trafficking is a cause around which disparate individuals, groups and states mobilise, using the language of both human rights and penality. Two discourses have particular traction and are substantiated in practice: the 'law enforcement' 'law enforcement'and the 'victims first' discourses (chapter 3). The 'law enforcement' discourse aims to protect the social-moral order of the state, while the 'victims first' discourse focuses on the moral dignity of the victim. Despite their differences, the competition between them have aligned human rights with penality, which in turn becomes a necessary element for the fulfilment of rights (chapter 3). The roots of this alignment can be found in a century-long attempt to prohibit and control the trade in prostitution. Trafficking—be it *sex* trafficking or *human* trafficking—has long been a matter of right and wrong, requiring penal intervention to protect value and suppress vice (chapter 4).

If human trafficking is a growing human rights concern, torture has long been the archetypal human rights violation. Two basic sets of discourses are advanced around the prohibition of torture: the 'jus cogens' discourse, which aims to strengthen the absolute ban on the practice, and the 'national security' ('national security') discourses, which, conversely, attempt to limit the reach of the prohibition to protect the state (chapter 5). When torture is approached as a human rights violation, criminal accountability becomes so fundamental that any ambiguity with regard to it appears as a form of torture-apology (chapter 5). This preoccupation with penality as the primary tool for addressing the wrong of torture has been accompanied by a gradual depoliticisation, individualisation and legalisation of torture discourses. The importance of penality has historically increased, eventually making anti-torture a penal imperative, along with the growing importance given to humanitarian, individualised and legalistic solutions to counter the practice (chapter 6).

Since trafficking and torture are different social phenomena, the discourses and representational practices around them are not interchangeable. It is only with respect to torture that bringing *all* perpetrators to justice is a moral and legal imperative and not simply a desirable prospect. Anti-trafficking discourses endorse the necessity of penal intervention but accept that specific cases of trafficking may not be prosecuted to pursue other legitimate countervailing interests. In the 'victims first' discourse, for example, people who have been exploited should never be punished, even when they have been involved in trafficking themselves. In contrast, the 'jus cogens' discourse requires the prosecution and punishment of *every* act of torture *in all circumstances*. Impunity is regarded as a violation of human rights in itself and a cause of torture. The situation is reversed when we move from discourse to action. Penality for torture is rare and sporadic. Despite the great emphasis on criminal accountability, very few torturers are in fact tried and punished. In contrast, crime control, as a model, has much more success in the context of trafficking. Not only is the number of

criminal trials for traffickers much higher than for torturers, but the global anti-trafficking framework has also led many states to allocate more resources to penal institutions, to increase their policing efforts and to impose longer custodial sentences (Pinto 2020). In this respect, it is worth highlighting the diverse degree of support on the part of state-oriented discourses ('law enforcement' and 'national security' discourses) for penal measures against trafficking, on the one hand, and torture, on the other. Since trafficking is a crime committed predominantly by private actors, the 'law enforcement' discourse's insistence on crime control serves the interest of the state: it empowers law-enforcement institutions and obscures the state's role in facilitating exploitation (e.g., through its labour and migration laws and policies). In contrast, torture is generally understood as a crime that requires state action. Consequently, the 'national security' discourses have little interest in seeing state officials prosecuted for torture when publicly exposing the practice would supposedly damage the nation's reputation and security. Interestingly, among state-oriented discourses only the 'law enforcement' discourse, which is unambiguous with respect to punishing traffickers, widely invokes human rights. Since penality for torture is tied to human rights, when the 'national security' discourses fail to punish the practice, they also refuse to use human rights language.

Dominant discourses around trafficking and torture have common traits. Three aspects are worth highlighting: together they contribute to the main findings of the discourse analysis. First, human rights-driven penality is sustained by the competition between victim-centred and state-oriented discourses. Victim-centred discourses ('victims first' and 'jus cogens' discourses) uses human rights as both the 'shield' and the 'sword' of penality (van den Wyngaert 2006). As a 'shield', human rights place moral and legal limits on what penal institutions can do to repress criminal conduct; they also reorient the focus of penality from public order to victim protection. As a 'sword', human rights require penality as an enforcement tool. Penality gives practical effect to rights provisions and symbolically communicate their social and moral value. State-oriented discourses ('law enforcement' and 'national security' discourses), on the other hand, use the language of human rights strategically to support the state's crime-control agenda and protect its social-moral order. Second, the victim-centred discourses (and, sometimes, also the state-oriented discourses) provide a moral reading of trafficking and torture, their subjects and their solutions. On the one hand, torture and trafficking are deemed moral wrongs, victims and perpetrators are constructed around categories of goodness and evilness; and penality is mobilised to give enforcement to human rights morality. On the other hand, these discourses seem less interested in engaging with the broader socio-economic and political landscape that produces abuses and vulnerabilities in the first place. Third, the moral perspective of dominant discourses has been accompanied, both historically and today, by appeals to penal action. While criminalisation and punishment have been used for centuries to suppress trafficking and torture, the latter have been framed as human rights violations only in the second half of the twentieth century. When the moral language of human rights pervaded anti-trafficking

or torture discourses, the resort to penality was not discontinued but conserved (in the case of trafficking) and strengthened (in the case of torture).

Are the findings of chapters 3–6 generalisable? As already discussed in chapter 1, a number of commentators have critically traced the emergence of discourses that resort to rights language to make sense of penality. Some of these contributions are set in contexts involving large-scale human rights violations and regime change (Engle, Miller, and Davis 2016a); others concern domestic penal law and practice (Sattar 2019). Some works deal with specific case studies, such as sexual violence in conflict (Engle 2020), sexuality, gender and reproduction (A. M. Miller and Roseman 2019) or violence against women at the national level (Tapia Tapia 2022b; Polavarapu 2019). Others look at specific institutions or organisations, such as the European Court of Human Rights (Lavrysen and Mavronicola 2020) or human rights nongovernmental organisations in international criminal justice (Lohne 2019). By complementing the findings of previous chapters with the existing literature on rights-driven penality, a number of general points can be made on how the penal force of human rights discourses tends to develop.

Human rights discourses generally offer justifications for both the use of and the protection from penal action. As Sattar (2019, 194) observes, they reveal 'both expansionist and reductionists tendencies in relation to the criminal law'. What may appear as a contradiction (Widney Brown 2018), a paradox (Tulkens 2011) or an 'ambiguity' (Lazarus 2012) is rather the result of how human rights discourses approach the penal system (Burchard 2021b, 42; Tapia Tapia 2018, 236). Human rights discourses do not question the functions of criminal law in society but are concerned with its abuses. They oppose penality, including detention, when it operates in an arbitrary and disproportionate way, rather than in itself (Sedacca 2019, 321). They acknowledge that, in certain circumstances, arbitrariness can be pervasive and, therefore, focus on providing limits on the exercise of penal power. Yet, no matter how ubiquitous, abuse is never treated as the normality. Human rights discourses assume that penality can be made human rights-compliant if it is reformed and monitored better. Moreover, inasmuch as the spectre of abuse is refuted, human rights discourses are silent on whether the state should extend or reduce criminal regulation. The only clear principle is that criminalisation should not directly violate the normal exercise of a right. Given this default position of (suspicious) neutrality towards the state's penal power (Malby 2019, 169–70), we understand why, for example, long-term imprisonment is deemed a legitimate form of punishment; but we also learn why the human rights regime is very active in terms of monitoring and developing standards to avoid human rights violations in places of detention (chapter 5; Renzulli 2022, 101).

While human rights discourses adopt a position of broad permissibility when the penal system is engaged with 'ordinary' crimes, they shift to a position that demands penal intervention when serious human rights abuses are committed. Here, human rights

discourses do not call for any kind of penal intervention but for a rights-compliant one, where due process and high standards of detention are respected (Lohne 2021, 11). By placing a premium on penal tools as means of protection, human rights discourses have in many ways underpinned an expansion of penality. Of course, beyond the penal force of human rights discourses, there are many non-rights-oriented rationales that play a role in the penalisation of acts like trafficking, torture, arbitrary killings, sexual and domestic violence, hate speech or child abuse. Human rights discourses are hardly the dominant factor behind the expanding punitive outlook of contemporary society. Indeed, as observed in several studies (e.g., Garland 2001; Pratt 2005; Simon 2007; Wacquant 2009), the reliance on penality for dealing with social problems is a key feature of our times. However, the contribution of human rights discourses in facilitating and authorising penal responses cannot be overlooked. Their insistence on criminal accountability motivates policing, prosecutorial and punitive responses rather than efforts to understand and deal with the causal forces that underpin violations or the dynamics that sustain systemic injustice (Marks 2011). Even if we accept that human rights discourses have not directly widened the net of penal control, they have nonetheless normalised penality as the default answer to serious human rights violations. Their confidence in calling for criminalisation, prosecution and punishment has given penality a new legitimacy as the 'sharp edge of the sword' of human rights (Woetzel 1968). It has also presented criminal governance as both an avenue for social change and the answer to problems that are commonly acknowledged as complex and multi-faceted (cf. Aviram 2020). Human rights-driven penality, when put into practice, confers power on the state in pursuing punitive agendas by invoking better protection for victims and compliance with international obligations (Van Kempen 2014, xxii). Long prison sentences, far-reaching prosecutions and proactive policing efforts become reasonable and even desirable when advanced in the name of human rights (Tapia Tapia 2018, 292; Otto 2015, 121).

As explored in chapter 2, this use of human rights to justify and expand penality has proliferated since the late 1970s. The analyses in chapters 4 and 6 empirically confirm how this phenomenon has occurred in the context of trafficking and torture. Far from having a non-criminal past, it appears that human rights embraced penality from the very moment they emerged as the dominant moral language of international politics.[6] Karen Engle (2015) uses the phrase 'the turn to criminal law in human rights' to indicate this development; Alice M. Miller and Tara Zivkovic (2019, 40) write of 'the tectonic shift of human rights advocacy from primary defensive vis-à-vis the punitive state to primarily offensive'. However, the idea of a 'turn' or 'shift' may give the perception that in the past human rights were separated from punitive structures and that the recourse to penality is an incident from which human

6 As in the rest of the thesis, I follow Samuel Moyn's (2010) genealogy of the contemporary human rights movement.

rights can be rescued (Hannum 2019, chap. 2).[7] As already mentioned in chapter 1, 'acceleration' of human rights towards penality would be more accurate. This wording better explains how the more human rights have become the global language of justice, the more they have lent themselves to, and 'accelerated', the reinforcement of penal solutions. If trends concerning the role of human rights in the expansion of penality have recently become more evident (chapter 2), this is due to the growing relevance of discourses that have affirmed, perpetuated and legitimised this development (chapter 3–6).

Having discussed *how* human rights have 'accelerated' towards penality—within discourses around trafficking and torture but also, to some extent, within human rights discourses more generally—the next sections develop a theory as to why this 'acceleration' has occurred.

2. The moral force of human rights discourses

In *On the Genealogy of Morality* (2006), Nietzsche advances a wide-ranging critique of Western moral commitments, together with their foundations in Christianity. He explains that, originally, 'the good' was equated with aristocratic value judgments: 'the noble, the mighty, the high-placed and the high-minded' (I, 2). These values were opposed to what was considered to be bad: 'everything lowly, low-minded, common and plebeian' (ibid.). Modern morality was born out of a reversal, which Nietzsche (I, 7) terms '*the slaves' revolt in morality*', which rejected 'the aristocratic value equation (good = noble = powerful = beautiful = happy = blessed)' by affirming a new morality:

> Only those who suffer are good, only the poor, the powerless, the lowly are good; the suffering, the deprived, the sick, the ugly, are the only pious people, the only ones saved, salvation is for them alone, whereas you rich, the noble, the powerful, you are eternally wicked, cruel, lustful, insatiate, godless, you will also be eternally wretched, cursed and damned!

This revolt lies at the basis of Western civilisation: 'a revolt which has two thousand years of history behind it and which has only been lost sight of because—it was victorious' (I, 7). Nietzsche (I, 10) explains that: 'the beginning of the slaves' revolt in morality occurs when *ressentiment* itself turns creative and gives birth to values: the *ressentiment* of those beings who, denied the proper response of action, compensate for it only with imaginary revenge'.[8] In *States of Injury* (1995), Wendy Brown argues that much contemporary political life establishes itself in terms of such a Nietzschean *ressentiment* that uses moral ideas as a weapon for the weak to undermine the powerful. Morality, argues Brown (1995, 44), is used as 'a critique of

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7 However, Engle (2012, 15) herself admits that 'the change [from a human rights movement critical of criminal justice to one dependent on it] might not be as great as it seems'. Moreover, Engle's work is primarily critical and diagnostic, rather than prescriptive, and, probably, it is not her intention to try to rescue human rights from penality language (Engle 2019).

8 In Nietzsche, *ressentiment* means the desire to live a moral existence and thereby position oneself to judge others, apportion blame and determine responsibility (Buchanan 2010).

a certain kind of power, a complaint against strength, an effort to shame and discredit domination by securing the ground of the true and the good from which to (negatively) judge it'. I want to suggest that human rights discourses are committed to a form of moralising politics like the one exposed by Brown (and Nietzsche), insofar as they counter violence and domination (e.g., killings, torture, ill-treatment, sexual violence, slavery, human trafficking and discrimination) mainly through moral reproach to the detriment of political engagement. In particular, the moralising politics of human rights discourses facilitates three connected moralising processes: i) moralisation of violence and domination; ii) moralisation of victims and perpetrators; and iii) moralisation of the state.

Moralisation of violence and domination

Human rights discourses tend to describe their strategy as an apolitical—even anti-political—endeavour. The emergence of these discourses can be read as an attempt to provide a moral alternative to the failure of political discourses and practices (e.g., socialism, anti-colonialism, etc.). In *The Last Utopia* (2010), Samuel Moyn explains that the contemporary success of human rights 'depended on leaving behind political utopias and turning to smaller and more manageable moral acts' (147). When they emerged in the mid-1970s, human rights discourses involved the 'substitution of moral for political utopianism' (Moyn 2010, 171). Even today, when human rights 'stand for an exploding variety of rival political schemes', the discourses around them 'still trade on the moral transcendence of politics' (Moyn 2010, 227). The non-political stance of human rights discourses is often an essential part of their self-presentation. Many human rights activists pride themselves on acting beyond politics and advancing, in Wendy Brown's (2004, 453) words, 'a pure defence of the innocent and the powerless against power'.[9]

This non-political posture in part derives from the moral valence of human rights as the highest values, which everyone should accept, whatever other systems of belief they may hold or reject (Marks 2012, 313–14). The ostensibly universal language of human rights claims to transcend politics (Golder 2014, 78) on the basis that the commitment to human dignity and equality not only concerns every human being but is also a non-contentious and non-negotiable issue. The association of human rights with universalism positions morality 'outside of and above politics' (Wendy Brown 2004, 456) but would not alone lead to 'anti-politics'. What contributes to it is also the stark realisation that human rights, discursively produced as a self-evident moral truth (Hoffmann 2010, 1), are in fact constantly violated and disregarded. Faced with this problem, human rights discourses develop a sense of impotent rage which, as Nietzsche recognises, turns into a moralising (re)action. In particular, the discourses attempt to secure the enactment of human rights values by naming, shaming

9 But see Paul O'Connell (2018a), who argues that social movements routinely mobilise the language of human rights in a clearly political manner, alongside narratives of class, race, gender and economic justice. More generally, on the politics of human rights, see Meister (2011); Gready (2003); Ignatieff (2001).

and stigmatising states and individuals that affirm or embody the power to neglect or reject those values (cf. Adler-Nissen 2014, 150). Experiences of violence and domination are thus not simply cast as inflictions of suffering on concrete victims or breaches of human rights *law* but primarily as ruptures of a supposedly universal moral order. As I have illustrated in the cases of trafficking and torture, all the complexity of these experiences, including their being sites of political and socio-economic power, are either neglected or erased. Torture is no longer a brutal exercise of sovereignty, intimately connected to the state's power to punish, but merely a repugnant act that degrades both victims and perpetrators. Trafficking ceases to be the consequence of global inequality, immigration controls and exploitative labour and becomes a case of criminal villains doing evil.

In Nietzsche's telling, the ultimate force of morality is denial that it has an involvement with power, while it is in fact an expression of a 'will to power' (cf. Wendy Brown 1995, 46). The same can be said of human rights discourses. By providing normative grounds on which individuals can be protected against violence and domination, these discourses develop a righteous critique of power. Yet they also advance 'a particular form of political power carrying a particular image of justice' (Wendy Brown 2004, 453). While human rights discourses are generally expressed in an apolitical form, their moralising force nonetheless sets in motion certain kinds of politics (Kennedy 2005). The promotion of legal and policy projects for improving the world and protecting everyone's dignity is a political endeavour. This politics (albeit often not recognised as such) is explicit and premised on cosmopolitanism and moral equality. There is also a more implicit politics resulting from these discourses. Human rights discourses develop what Wendy Brown (2004) calls a 'politics of fatalism'. They condemn violence and domination but dismiss the political and socio-economic forces that produce them; they seek to relieve suffering but fail to give proper regard to why it occurs (Marks 2013, 229). This politics equates empowerment with 'liberal individualism' (Wendy Brown 2004, 455), that is, agency within existing historical, political and economic constraints. As Susan Marks (2013, 229) rightly observes, fatalism 'is a politics because, and to the extent that, by treating actuality as though it were fate', human rights discourses 'help to make it become so'. Ultimately, this moralising politics 'displaces, competes with, refuses, or rejects other political projects, including those also aimed at producing justice' (Wendy Brown 2004, 453).[10] In particular, human rights discourses, despite their promise of empowerment and democratisation, do very little to foster political contestation and deliberation.[11] Indeed:

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10 O'Connell (2018a) challenges this argument, which he terms 'the displacement thesis', by arguing that it ignores the concrete experiences of social movements engaged in struggles for rights. Confined to dominant human rights discourses and practice, however, Brown's critique remains convincing, as O'Connell (2018a, 23) also acknowledges.

11 To return to Moyn (2010), this may explain why the rise of human rights to hegemonic influence has accompanied the demise of political projects of radical contestation of our society's basic economic arrangements.

> [T]hey may function precisely to limit or cancel such deliberation with transcendental moral claims, refer it to the courts, submit it to creeds of tolerance, or secure an escape from it into private lives (Wendy Brown 2004, 458).

Moralisation of victims and perpetrators

Human rights discourses express a moral critique of violence and domination from the perspective of the powerless. They form a moral 'we', presented as weak and vulnerable but also as 'the "good one"', that is opposed to an immoral 'they', 'the powerful, dominating one', constituting 'the "evil enemy"' (Nietzsche 2006, I, 10–11). We have seen in previous chapters how these subject positions have a central place within anti-trafficking and torture discourses. Both trafficking and torture are constructed as involving a power relation where, on the one hand, the morally corrupted violator embodies the possibilities of action and, on the other, the innocent victim is helpless and vulnerable. This imbalance of power, in turn, produces moral outrage to which human rights discourses purport to respond. However, as Nietzsche (2006, I, 13) explains, this righteous defence against power risks construing 'weakness itself as freedom'. In the philosopher's sardonic words:

> When the oppressed, the downtrodden, the violated say to each other with the vindictive cunning of powerlessness: 'Let us be different from evil people, let us be good! And a good person is anyone who does not rape, does not harm anyone, who does not attack, does not retaliate, who leaves the taking of revenge to God …'—this means, if heard coolly and impartially, nothing more than: 'We weak people are just weak…'—but this grim state of affairs … has, thanks to the counterfeiting and self-deception of powerlessness, clothed itself in the finery of self-denying, quiet, patient virtue, as though the weakness of the weak were itself … a voluntary achievement, something wanted, chosen, a deed, an accomplishment (I, 13).

Put differently, by treating power and impotence as opposite moral categories, human rights discourses risk consolidating the identities of the victim (vulnerable) and the violator (powerful) as inevitable subject positions (cf. Wendy Brown 1995, 27).

This approach precludes a more complex appreciation of the position of the victim, who may well be powerless but who can also exercise active struggle against violence and domination (Ticktin 2006, 44). It also disregards a holistic appreciation of how power operates in the production of injuries. Experiences of violence and domination are not necessarily the work of aberrant individuals but are often the result of everyday social and institutional malpractices. To use a metaphor developed by Maurice Punch (2003), human rights discourses tend to focus on the few 'bad apples', while disregarding the role of the poisoned 'orchards' and the social-economic and political landscape that produces the poison (Celermajer 2018, 9). Finally, insofar as the moral force of human rights is explicitly directed against strength, human rights discourses do not seek to augment the political power of

those injured or subordinated (cf. Wendy Brown 1995, 27).[12] Rather, it is the perpetrator, whose power is an expression of vice, that must be impaired and incapacitated—by means of punishment, for example.

Moralisation of the state

As Moyn (2010, 7) persuasively contends, what distinguishes human rights from other rights (natural rights, civil liberties, constitutional rights) is their invocation in order to transcend the state's authority. While individual rights asserted in national constitutions and domestic bills of rights were central to the construction of the nation and attached to the concept of citizenship, human rights discourses appeal to a universal community of humanity (Moyn 2010, 12–13). Yet, without an authority responsible for protecting them in an ultimately state-centric international order, human rights soon revealed their inherent vice, namely their lack of protection and enforcement (Adelman 2011). Arendt (1966, 294) noted this clearly when she stated that 'the "Rights of Man", supposedly inalienable, proved to be unenforceable … whenever people appeared who were no longer citizens of any sovereign state.' Constitutional rights and civil liberties presuppose, and are achieved within, a political community (the nation state) where they are recognised and protected (Moyn 2010, 11–43). Their promotion is internal and granted by the same system that allows them to exist in the first place. Conversely, human rights were born *weak*, without membership and internal protection (Moyn 2010, 12; also E. Posner 2014, 79–104). The more human rights discourses seek to detach rights from a political community, the more they require a stronger external authority to ensure rights protection (Kennedy 2002, 113). For Moyn (2010, 43), the history of rights is 'the move from the politics of the state to the morality of the globe'. However, human rights discourses have not stopped there but have gone back in search of sovereignty, because the 'morality of the globe' cannot grant rights recognition, implementation and enforcement (Asad 2003, 137). This is what Martti Koskenniemi (2011, 153) calls 'the paradox of international law': whilst aiming at creating a universal moral order that would be opposable to the politics of states, human rights are given sense, applied and determined by the politics of states.

This apparently paradoxical attempt of human rights discourses to concomitantly transcend and reinscribe state sovereignty largely depends on the fact that their critique of the state is often expressed as a moralistic reproach. Human rights discourses 'implicitly cast the state as if it were or could be a deeply democratic and nonviolent institution' (Wendy Brown 2001, 36). Rather than 'offering analytically substantive accounts of the forces of injury and injustice' that the state facilitates or embodies, these discourses 'condemn the manifestation of these forces' in particular events (Wendy Brown 2001, 35). In Wendy Brown's (2001, 36) terms, the state is not treated as an entity with 'specific political and economic investments'

12 Human rights discourses do, however, seek to provide *legal* empowerment of those injured, through legal representation, legal aid and access to justice.

or 'the codification of various dominant social power', but rather as if, in allowing human rights abuses to persist, it was 'a momentarily misguided parent who forgot her promise to treat all her children the same way'. This reproachful moralism condemns the 'baddy' state that permits human suffering, but also grants recognition, justification and legitimacy to the 'goody' state that ostensibly operates in accordance with human rights (Perugini and Gordon 2015, 128). When it is a government that appears to inflict or tolerate violence and domination, human rights discourses also authorise other states (and international governing bodies) as appropriate protectors.

From being the potential violator of human rights that must be contained, the state is eventually legitimised as the guarantor of human rights that must be empowered (Perugini and Gordon 2015, 20–21). Human rights discourses are aware of this problem. Nonetheless, they set it aside on the assumption that the state can be governed through rights (Sokhi-Bulley 2016); or, put differently, that, by rendering its institutions and laws human rights-compliant, it would be possible to isolate deviant behaviours and hold their perpetrators accountable. However, the determination of whether an abuse has occurred and whether the state has in fact complied with human rights is generally left to the state's legal apparatus.[13] In the context of human trafficking, for example, human rights discourses heavily rely on court proceedings to review the government's fulfilments of its obligations to identify, prevent and combat trafficking. In the case of torture, the challenge becomes even greater: torture is an act which may be inflicted by state actors, yet those very same state actors are the ones meant to investigate allegations of torture and ensure accountability for those responsible. The same institutions (such as the police and the prison) and the same laws (such as criminal law) that, in theory, are seen as invested with the power of injury, in practice, are treated as 'neutral arbiters of injury' (Wendy Brown 1995, 27).

3. Moral affirmation of rights through penality

The three moralising processes that I have illustrated in the previous section lay the groundwork for a further process, which helps us understand why human rights have 'accelerated' towards penality. To see violence and domination as morally heinous acts stimulates a reading of these experiences in terms of criminal conduct. If the focus is on subjects as the vulnerable-moral victim and the powerful-evil perpetrator, we can easily regard them as a victim of crime and a criminal. Insofar as the state that drapes itself in human rights is empowered, its most authoritative and visible instrument of social regulation, namely criminal law, becomes the prime guarantor of human rights. Thus, human rights

13 Thus, human rights discourses resort not only to the state but also to law for protection and recognition. Human rights organisations—informing the discourses—are dominated by lawyers, whose legalism ('the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules' (Shklar 1964, 1)) becomes a dominant frame for making sense of acts of violence and domination (Lohne 2019, 130–31).

discourses also entail a re-moralisation of penality.[14] These discourses rely on the function that penality has in (re)affirming moral norms and reinforcing a normative order, chiefly described by Durkheim (1933). However, while criminal law can give force and symbolic representation to universal values, the normative order that it sustains is precisely one which depends on punishment for its stability and preservation. As observed by Nietzsche (2006), when punishment is no longer the expression of the 'will to power' (we can say, a political choice) but the will of *ressentiment*, it becomes a necessary and required instrument, while in fact remaining highly symbolic.

Human rights-driven penality and Durkheim

David Garland (1990b, 4) argues that 'modern punishment is a cultural as well as a strategic affair; … it is a realm for the expression of social value and emotion as well as a process for asserting control'. Many sociological analyses of why social phenomena are dealt with by means of penality focus on punishment as a strategic affair: they appraise or question its utility as an instrument of social control (e.g., Foucault 1991a). Yet punishment in particular and penality more broadly also have symbolic and emotional aspects. An engagement with them is crucial to understand why penality is so important for human rights discourses, despite its questionable instrumental value in deterring abuses. As illustrated in previous chapters, it is true that human rights discourses often justify penality in terms of its practical utility: it supposedly gives substance to the soft law of human rights, deters violations and delivers justice to victims. Yet, paraphrasing Henrique Carvalho and Anastasia Chamberlen (2018, 219–20), it can be argued that, while human rights activists may resort to penality 'because they believe it has utility', they may also want to believe penality 'has utility because of the way it makes them feel'. In fact, if the reasons for resorting to penality were only rational or instrumental, human rights discourses would be more preoccupied with enquiring about and distinguishing what actually works from what does not (cf. Peršak 2020, 151). Instead, no real explanation is often even attempted: the validity of human rights-driven penality 'goes without saying' (Moyn 2016, 71). There must be something else that is not, strictly speaking, rational and instrumental but rather is emotional. This is where Durkheim comes in. His theory of punishment and social solidarity offers important insights to explain why the moral force of human rights discourses turns into a penal one.[15]

In Durkheim's (1933) view, punishment (but we can say penality more broadly) is a moral institution: its operation depends on the existence of strong moral bonds and, in turn, results in the reaffirmation and strengthening of those same bonds (Garland 1990a, 28). In other

14 '*Re*-moralization' as the connections between penality and morality are much older than human rights discourses.

15 My work is not the first to draw upon Durkheim's theory to describe and explain certain penal elements within the human rights project. However, most work so far has focused on international criminal law rather than on human rights-driven penality more broadly (e.g., Nimaga 2007; Tallgren 2013; Lohne 2019, chap. 7).

words, morality (or, in Durkheim's terms, social solidarity) is both a cause and effect of penality. It is a cause of punishment because crimes are those wrongful acts that violate a society's '*conscience collective*', that is, the fundamental moral code which a society holds sacred (Durkheim 1933, 79–81; Garland 1990a, 29).[16] Certain acts are criminalised and punished because they offend sentiments that are deeply ingrained in society; they provoke moral outrage, anger and desire for vengeance (Durkheim 1933, 86; Garland 1990a, 30). For Durkheim (1933, 86–87), 'passion … is the soul of punishment' and 'vengeance' (a vengeance that is not 'useless cruelty' but 'a veritable act of defence') is the primary motivation that drives punishment. While violations that are perceived as less serious can be sanctioned by other means, crimes shock all 'healthy consciences' and produce a necessary punitive reaction (Durkheim 1933, 73). Durkheim (1933, 77–78) stresses that the moral feelings whose violation provokes punishment are 'strongly engraven' in our consciences and fundamental to who we are:

> [W]hen it is a question of a belief which is dear to us, we do not, and cannot permit a contrary belief to rear its head with impunity. Every offense directed against it calls forth an emotional reaction, more or less violent, which turns against the offender (Durkheim 1933, 97–98).

Morality is also an effect of penality because 'the true function' of punishment is not to control crime but to enhance social solidarity (Durkheim 1933, 108; Garland 2012). Durkheim (1933, 108) acknowledges that people ascribe instrumental objectives to punishment, but, in his view, punishment works poorly 'in correcting the culpable or in intimidating possible followers'. Instead, according to Durkheim (1933, 108), by channelling the moral outrage into collective rituals of condemnation, punishment works well in maintaining 'social cohesion intact, while maintaining all its vitality in the common conscience'. Penality emanates from state power, but a much wider population is involved in its operation, by supplying the context of social support and valorisation within which penal power originates (Garland 1990a, 32). Crime, Durkheim (1933, 102) explains, 'brings together upright consciences and concentrates them'. The sanction that results serves as an occasion to express moral disapprobation, reaffirming group solidarity and restoring the moral order violated by the offender (Durkheim 1933, 102; Garland 2012, 25–26).

Durkheim's theory has its limitations;[17] yet, circumscribed to a morality-driven penality such as the one stemming from human rights, it provides a compelling perspective on the

16 Durkheim (1933, 79) defines the '*collective* or *common conscience*' as the 'totality of beliefs and sentiments common to average citizens of the same society'.

17 Scholars, for instance, have criticised Durkheim's one-dimensional account (concerned only with punishment's moral content), his conception of the *conscience collective* (given the complexity of our pluralistic society), his lack of concern for power (he takes the *conscience collective* as a social fact that is given) and his assumptions that punishment always embodies commonly shared values or promotes 'social solidarity' (see, generally, Garland 1991, 124–27). Nonetheless, especially in relation to offences with a clear moral content,

conditions which cause punishment to come about. As illustrated in section 2, human rights discourses posit the existence of a human rights-based moral order. Although this order is constantly in danger of being breached, human rights discourses never question its validity and truthfulness. Their commitment to human rights values has the character of a sacred attachment and appears, following a contemporary cliché, almost as a secular religion (Marks 2012, 313). It is no stretch to say that, within human rights discourses, serious violations of human rights are akin to violations of Durkheim's '*conscience collective*'.[18] They provoke moral outrage, offend the wider, human, community (Luban 2004) and, as stated in the preamble of the ICC Statute (1998), 'deeply shock the conscience of humanity'.[19] Following Durkheim's theory, it is this passionate reaction—this urgent feeling to 'do something' (Lohne 2021, 12)—that causes penality to be invoked within human rights discourses. When serious abuses occur, human rights morality is weakened and appears to be less than universal in its binding force. However, its importance within human rights discourses is such that it brooks no devaluation. It is a punitive reaction that appears to restore the universal authority of human rights. Conversely, a significant failure to criminalise and punish can quickly result in an intolerable moral unravelling. This argument finds support in the findings of previous chapters. In the case of torture, we have seen that any approach that would imply that some torture may go unpunished is regarded as torture-apology, because it would convey the message that torture is less than an absolute moral wrong (chapter 5). Similarly, it is a deep-rooted conviction within anti-trafficking discourses that, in the absence of penal enforcement, the fight against trafficking risks losing its grip (chapter 3).

Durkheim's work also explains why, in the very moment human rights discourses call for penality, they also try to restrain and humanise it. The French sociologist points out that, with the rise of humanism and individualism (and, we can say, of human rights),[20] the same moral sentiments which provoke outrage when they are breached lead to sympathy for the offenders' own suffering when they are punished (Durkheim 1983, 125–26; Garland 1990a, 38). Accordingly:

Durkheim's analysis succeeds in explicating important aspects of punishment that are not otherwise apparent.

18 For a discussion on how Durkheim's approach somehow anticipates the reasoning offered today for a universal human rights project, see Lukes and Prabhat (2012); Cotterrell (2015). I tend to concur with Kjersti Lohne's (2019, 212) observation that, despite their claim to universality, the *conscience collective* that human rights discourses aim to protect is 'an expression of the dominant moral order' rather than an '"authentic", or universal conscience'.

19 A critique of Durkheim's theory that can also be applied to human rights discourses is that they fail to account for the role of power in defining which harmful acts are considered human rights violations. They assume that human rights necessarily represent universal norms rather than norms crafted at a particular time in history, by particular actors in a position to set global agendas (I am grateful to Lohne for urging me to clarify this issue).

20 Roger Cotterrell (2015, 21) argues that Durkheim's moral individualism 'can be seen as the prototype of universal human rights discourse'. On Durkheim's understanding of human rights, see Pickering and Miller (1993).

> [T]he same cause which sets in motion the repressive apparatus tends also to halt it. The same mental state drives us to punish and to moderate the punishment. Hence an extenuating influence cannot fail to make itself felt (Durkheim 1983, 126).

These words explain well why human rights are constructed as both the 'good conscience' and the 'bad conscience' of penality (Tulkens 2012). Human rights discourses acknowledge that there would be 'a real and irremediable contradiction in avenging the offended human dignity of the victim by violating that of the criminal' (Durkheim 1983, 126). Therefore, in order to alleviate this difficulty (which, as Durkheim recognises, is insoluble), they do not renounce punishment but try to lessen it 'as much as possible' (Durkheim 1983, 126).

Penality, albeit humanised and moderated, is an essential component of the moralising politics of human rights discourses. It is driven by outrage, indignation and revulsion at serious violations of rights. Following Durkheim, the primary motivation that leads human rights discourses towards penality is not a rational desire to deter future violations but vengeance, albeit somewhat driven by sympathy for the victims and their suffering.[21] Although human rights discourses do not initially invoke penality as a means to an end, they soon rationalise its operation and ascribe a series of functions to it. Notably, the expressive function of reinforcing moral values exposed by Durkheim has a central space within human rights discourses.[22] We have seen in chapter 3 how anti-trafficking crime-control measures are often regarded as necessary tools to communicate that trafficking is a serious wrong and, thus, morally unacceptable. In chapter 5, I have illustrated how the criminal condemnation of acts of torture is said to promote the absolute moral prohibition of the practice, by alerting everyone that violations are not tolerated. In other words, in the face of data attesting the pervasiveness of trafficking or 'national security' discourses condoning certain torturous practices, human rights discourses resort to penality to contribute to the survival and further development of human rights norms (cf. Lukes and Prabhat 2012, 377–80).

In sum, within human rights discourses, penality is not (only and mostly) a system for controlling undesirable behaviours but an apparatus for the disapprobation of wrongs and the expression of values.[23] Defining human rights violations as crimes and punishing them accordingly have a number of assumed moralising effects. They limit the demoralising effects of human rights violations and reinvigorate public revulsion against them. They strengthen a human rights-based moral order. They uphold the authority of human rights as the highest moral precepts. They reinforce solidarity among human rights advocates and make them 'feel

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21 This is exemplified by the reaction of many human rights activists in the face of Russia's aggression and atrocities in Ukraine and their passionate calls to bring the perpetrators to justice.

22 For a discussion of expressivism as a fundamental purpose of international criminal law, see Mégret (2014); Sander (2019b); Stahn (2020).

23 Similarly, in relation to international criminal law, see Mégret (2014); Lohne (2021).

good' that something has been done.[24] When human rights discourses trigger the state's penal power, they know that some degree of hardship upon the offender is inevitable. However, they overcome this difficulty on the assumption that arrests, prosecutions, trials, convictions and imprisonments will stigmatise the violation and signal the moral force of human rights. In this way, along with Durkheim, human rights discourses tend to focus on the external forms of penality, namely its moralising signs directed at the community of humanity. This expressive aspect of penality is separated from, and prioritised over, the internal forms of penality, which concern the lived experiences of those subjected to the state's penal power and are mostly control-oriented rather than moral (cf. Garland 1990a, 46).

Human rights-driven penality and Nietzsche

Durkheim's theory provides a convincing answer of why human rights discourses resort to penality but end up casting penality in essentially benign terms. Similarly, when justified by reference to human rights, the criminal process from arrest to incarceration tends to be portrayed as a humanitarian, rather than a punitive, endeavour (McMillan 2016, 31; cf. Kendall and Nouwen 2020, 741–45). In chapters 3 and 5, I have outlined how counter-discourses around trafficking and torture have challenged this approach. These critical voices see penality as generating further vulnerability rather than protection of values. Criminal governance also appears to reproduce patterns of oppression, while leaving intact the social processes that underpin violence and exploitation. For counter-discourses, an engagement with criminal law in terms of its expressive force obscures the fact that penality, in practice, operates as an instrument of social control and domination. This critique is important but does not take seriously the role of penality in evoking social values and sentiments. In this way, it misses the main reason behind human rights' 'acceleration' towards penality. The work of Nietzsche (2006) offers a critique that complements and integrates Durkheim's arguments: one that does focus on the emotions that motivate punitive justice but avoids painting them in forms that are too sanitised and free from base impulses (Garland 1990a, 63; Fassin 2018, 81).[25]

For Nietzsche, punishment is not simply a reaction due to violated moral sentiments but a pleasure. To punish another is to gratify 'an ancient, powerful, human-all-too-human' impulse that drives us 'to *make* someone suffer' as a measure of power (Nietzsche 2006, II, 6). Nietzsche (2006, II, 5) explains that punishment was originally a 'right of the masters' against the debtor:

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24 However, the 'global' community that is reinforced is often situated in a particular segment of 'humanity' (Lohne 2019, 214). As Roger Cotterrell (2015, 17) argues, references to an 'international community' or 'community of humanity' remain for the most part purely rhetorical because they are not grounded in any sociological inquiry about what 'community' might mean and what kind of existence it might have.

25 Nietzsche does not discuss punishment systematically but as part of his more general critique of Western morality. For a discussion of Nietzsche's ideas on punishment in relation to contemporary experience, see Hörnqvist (2021, 149–169).

> [A] sort of pleasure … given to the creditor as repayment and compensation,—the pleasure of having the right to exercise power over the powerless without a thought, the pleasure "*de faire le mal pour le plaisir de la faire*".

With the rise of modern morality, punishment is no longer seen as pleasure to inflict cruelty. Conversely, it appears as the primary means of 'the weak' for upholding justice by meting out retribution, for reproaching and improving others or for preventing crime (Tunick 1992, 22). Although contemporary punishment can hardly be described as an instrument of 'the weak' that seek justice, this definition fits well with human rights-driven penality. Yet, as Nietzsche notes, such a way of punishing (which denies its association with cruelty) belies its origins, while conserving all its original passions behind a veil of hypocrisy.

> [P]leasure in cruelty does not really need to have died out: perhaps, just as pain today hurts more, it needed, in this connection, some kind of sublimation and subtilization, it had to be transformed into the imaginative and spiritual, and adorned with such inoffensive names that they do not arouse the suspicion of even the most delicate hypocritical conscience (Nietzsche 2006, II, 7).

Punishment was an expression of the 'will to power' and 'the will of life'; now it is an expression of the will of 'the weak' and the will of revenge and *ressentiment* (Nietzsche 2006, II, 11–12). The instrument of punishment was appropriately used by its original users, who held the power to deploy it but also to abstain from it and grant mercy.

> It is not impossible to imagine society *so conscious of its power* that it could allow itself the noblest luxury available to it,—that of letting its malefactors go *unpunished*. 'What do I care about my parasites', it could say, 'let them live and flourish: I am strong enough for all that!' (Nietzsche 2006, II, 10).

As a society increases its strength and becomes self-confident, punishment increasingly loses its value (and become less and less necessary) because the individual's transgressions are no longer as 'dangerous and destabilizing for the survival of the whole as they did earlier' (Nietzsche 2006, II, 10). Conversely, in the hands of 'the weak' and 'the insecure', punishment is under no control: it dictates to 'the powerless' the necessity of seeking retribution and expressing their *ressentiment* (Tunick 1992, 22). To punish is no longer a sign of power and those who administer punishment are too weak to be able not to punish.

Nietzsche's irony about punishment applies perfectly to human rights discourses (thus, enriching the contribution offered by Durkheim's theory). By resisting being cruel, human rights-driven penality also becomes a 'just' and 'humane' enterprise: a necessary weapon to be used by 'the weak' in their reaction against 'the strong'. In this way, the resort to penality is no longer a political *decision* but a moral *obligation*. The questions of what, when and how much a state should criminalise and punish no longer invite political answers related to how

a state has to fulfil its security obligations.[26] The boundaries of crime and the forms of sanctions are no longer dependent upon the choices of a political community. Rather, criminalisation and punishment spring spontaneously and boundlessly from universal moral values. The more sorts of behaviours come to be regarded as serious human rights violations with the passage of time, the more penality has to grow and expand on the domestic and global stages. The fact, for instance, that environmental damage or business corruption have increasingly been considered human rights violations seems to have encouraged an expansion of their penalisation. Examples are the attempts to make 'ecocide' a crime subjected to international adjudications (Higgins, Short, and South 2013; "Making Ecocide a Crime" n.d.) or the efforts to prosecute the real import of bribery on an extraterritorial basis (Mégret 2019, 35).

However, the inevitability of penality within human rights discourses does not reflect confidence, but insecurity. In Nietzsche's (2006, II, 10) telling, a political community that is confident in its power and aware of its limits does not seek punishment in every circumstance, because single breaches of its normative order do not appear to be so destabilising for its survival. A sign of true power is to accept punishment as a human instinct and 'a warrant for and entitlement to cruelty' (Nietzsche 2006, II, 5) while being above any *ressentiment* or desire for vengeance: to 'have claws and not to use them' (Kaufmann 1974, 372). Conversely, when it is invoked by those who feel anxious and insecure about their political agency, penality cannot be tamed. Used expressively as an instrument of moral reproach, it dictates the necessity of seeking vengeance at all costs to restore a neglected value-based order, while remaining highly selective or even symbolic (Tunick 1992, 22). Nietzsche has no doubts that a politics of *ressentiment* and punishment, like the one of human rights discourses, is ultimately doomed to failure. To this futile moralising politics he opposes something akin to what Chantal Mouffe (2013; 2014) calls 'agonistic politics': a valorisation of the political struggle between adversaries over opposing ways of dealing with values and power. In Nietzsche's (2001, sec. 321) words:

> Let's stop thinking so much about punishing, reproaching, and improving! We rarely change an individual … Let's rather make sure our own influence *on all that is to come* balances and outweighs his influence! Let's not struggle in a direct fight, which is what reproaching, punishing, and desiring to improve amount to. Let's rather raise ourselves that much higher …. No—let's not become *darker* on their account, like those who punish and are dissatisfied! Let's sooner step aside! Let us look away!

26 In political theory, criminalisation and punishment are among the most salient manifestations of state authority (Zedner 2016, 10). Criminal law contributes to one of the ultimate aims of the state, namely the provision of security and order (Hobbes 1995; Beccaria 1973).

4. Beyond penality and human rights

Human rights discourses cannot do without penality. The basic assumption is that human rights would become vain without the state's acknowledgement through its penal system that serious violations have occurred. These discourses may try to moderate penality or use it in the least costly form possible. However, they do not deprive criminal law of its penal character, notably its reliance on police control and incarceration as well as its potential to be enforced disproportionately and arbitrarily. Both international and national courts rely on police forces to identify and arrest alleged human rights violators. If their trials conclude with a guilty verdict, they need prisons where those sentenced can be sent (Grady 2021, 360). Additionally, despite all attempts to ameliorate the penal system, its concrete functioning remains highly discriminatory today. It is selective in relation to the provision of state security, which is largely accorded to the socially advantaged groups in society; and it is biased in the processes of criminalisation and imprisonment, which almost exclusively affect racial minorities and poorer social classes (Baratta 1985, 445; Widney Brown 2019, 75). The context of discriminatory criminalisation, police brutality, harsh prison conditions and mass incarceration across many regions of the world would be expected to advise reflexivity and caution in invocations of penality. However, by fore-fronting the expressive function of criminal law, human rights discourses move concerns about the inequality, prejudice and violence that stem from penality to the shadows. Led by human rights discourses, penality arrives in a progressive guise and is easily welcomed into the system, raising only little criticism (Burchard 2021b, 55; Tapia Tapia 2022b, 10). As I have shown in chapter 5, the same human rights actors who criticise harsh prison conditions and over-criminalisation in the context of 'tough-on-crime' policies, gladly accept extensive penal control to promote universal values around the world. Human rights discourses endorse criminal accountability as necessary to uphold human rights morality because they assume that penality can become benevolent when used for the right purpose. But, in this way, they risk giving strength to a system that in its concrete operation often turns against the very marginalised groups human rights discourses aim to protect (see Fassin 2018; Wacquant 2009).

Dominant human rights discourses aspire to justice. However, they have developed a dependence on penality which, at best, reduces justice to criminal justice and, at worst, contributes to discrimination and oppression rather than emancipation and empowerment.[27] In view of their relationship with penality, dominant human rights discourses' quest for justice also has little to no space for those initiatives that exclude the use of penality altogether, such as anti-carceral restorative or reconciliatory approaches to justice (Sattar 2019, 226). These considerations prompt warnings that caution against treating human rights

27 As Mark Drumbl (2020, 255) notes, if justice is a synonym of anti-impunity, a place where justice has been successful 'would be a place of perpetual penalization. It would be a place with jails everywhere, many jailers, and so many prisoners'.

as the only avenue to justice. The discourses I have described are hegemonic in shaping the meaning of rights and the form of human rights advocacy. Accordingly, if we focus on human rights as the main catalyst of justice, we should be conscious that the discourses we are likely to reproduce do not defy the state's penal power but build on its power and legitimacy. Even invoking human rights in a well-motivated way risks inadvertently contributing to the perpetuation and even the expansion of the most prominent state power: criminal law (cf. Aitchison 2018, 25).

It is important to highlight that human rights discourses promote only a selection among, or narrowing of, possibilities of justice and emancipation. Their goal is not to transform society from top to bottom, but to promote a universal moral order, whose stability relies on the state and its penal power. Arresting, prosecuting and punishing human rights violators can probably have a role in re-instating human rights values and the imperative of normative compliance. However, as Moyn (2014, 68) puts it, 'it is not wrong to ask how much, and at what cost to other battles for justice'. What can we do, then, if we care about human rights values, such as social justice, equality, and emancipation, but we do not want to endorse the criminal law and its enforcement mechanisms? The counter-discourses retraced in previous chapters represent important resources for resistance now and potential sources of non-penal alternatives in the future (Garland 2004, 168). They exert their influence from marginal positions and they are not without limitations. Yet they show us at least two 'ways-out' from human rights-driven penality. I outline some ideas along these lines below, conscious that a new research project is needed to examine these alternatives in detail.

A first possibility is to re-think human rights in counter-carceral terms (Scott 2017). If current arrangements are the result of an 'acceleration' of human rights towards penality and, therefore, this 'acceleration' is contingent and not inevitable (chapters 4 and 6), we can try to operate a 'deceleration' and, then, a reorientation of human rights towards non-penal futures. Today's mainstream configuration of human rights as a moralising language requires a form of condemnation of violations by the state. Penality currently plays this key role. Counter-carceral human rights should either accomplish this condemnation without criminal law or forgo any moralising politics. The former approach seems difficult in today's pluralistic societies, where penality appears among the remaining few public means of expressing and evoking shared beliefs of what constitutes an egregious wrong (Durkheim 1933; Donini 2015; Burchard 2021a). The latter approach means, following Nietzsche's suggestion in the previous section, to turn to power and political contest rather than to morality and *ressentiment*. Instead of relying on the state's power for protection, counter-carceral human rights should aim to democratise power—where democracy signifies 'not merely elections, rights, or free enterprise but a way of constituting and thus distributing political power' (Wendy Brown 1995, 5). This entails seeking power and deepening democratic engagement for the injured as well as articulating resistance to, critique of and dissent from the state's coercive powers (Scott 2017, 58). Against the mainstream understanding of human rights as

a minimalist, apolitical, language (Ignatieff 2001), counter-carceral human rights require a bolder political vision of what they stand for and against in relation to penal institutions and techniques. Not only should human rights actors be more explicit about their relationship with politics and power (Gready 2019, 427), but they should also enhance support for movements seeking transformation or abolition of, rather than reform within, the penal system. A counter-carceral human rights-based approach to imprisonment, for instance, cannot be limited to improving prison conditions (Renzulli 2022, 121), but should engage in international and local politics to tangibly limit, or even abolish, its use (cf. Jouet 2022).

A 'deceleration' and reorientation of human rights towards non-penal futures is advisable but not straightforward. As we have seen in chapters 4 and 6, the relationship between human rights and penality is the result of specific transformations, political choices and exercises of power that were by no means inevitable, but neither were they purely fortuitous. As Marks (2009, 2) observes, '[w]hile current arrangements can indeed be changed, change unfolds within a context that includes systematic constraints and pressures'. Counter-carceral human rights are not impossible. Yet, thinking that human rights can easily be dislodged from penality neglects how this possibility is fundamentally constrained by the systemic forces that have brought rights-driven penality into being. Human rights actors and institutions, in particular, operate within a structured field of forces, the logic of which has led human rights law and practice in certain directions that cannot easily be reversed. These constraints appear clearly when we consider that discourses that aim to 'rescue' human rights from penality already exist, but they have so far had little influence in shaping mainstream human rights practice (e.g., the 'incompatibility' discourse regarding trafficking or the 'penal minimalism' discursive position regarding torture). Moreover, by reproducing certain features of dominant human rights discourses—such as their tendency to conflate politics with morality understood in rationalistic and universalistic terms—they often preserve what they denounce. Theoretically, we may probably create an 'afterlife' for human rights after their entanglement with penality is put into question (Perugini and Gordon 2015, 129). Yet the question arises as to whether such a theory can really be put into practice within the current social and political context.

A second possibility is to let human rights 'go criminal' (chapter 2) and to invest our theoretical and practical energies in other emancipatory projects (Kapur 2018, 1–3). To imagine a world in which penality is used sparingly, if not at all, we probably need a much broader vision of justice and emancipation than the one offered by human rights (Sattar 2019, 237). As Engle (2019, 93) observes, human rights are 'no longer necessarily the lingua franca of emancipatory political struggles'. 'If emancipatory struggles are operating on new planes,' Engle (2019, 108) continues, 'maybe we need to be willing to move to those planes.' This does not mean that we should abandon human rights—quite the contrary. Human rights are still important tools that individuals can use against certain forms of abusive state power. But if we think that a quest for justice cannot ignore the violence, suffering and

disfranchisement arising from penality, 'other kinds of political projects, including other international justice projects, may offer a more appropriate and far-reaching remedy for injustice' (Wendy Brown 2004, 461–62).[28] Not by chance, those who most vocally question the state's presumed role in preventing informal justice and realising rights by means of penality do not come from the mainstream human rights community. Rather, they belong to different intellectual traditions of restorative or transformative justice, radical criminology and penal (prison and police) abolitionism (Sattar 2019, 235).

Perhaps a viable avenue to comprehensive justice opens up only by moving beyond penality *and* human rights. This pathway is yet to unfold, but we can try to imagine some of its features. Heading along this way would probably entail articulating our demands for justice in more political terms, either avoiding the universalistic language of human rights or using its non-punitive elements (its 'shield' function) in a strategic manner.[29] It would likely require us to seek accountability and repair not directly through the state, but through community interventions and long-term organising plans that address the broader socio-economic and political factors leading to specific forms of violence and domination. Also, a quest for justice along this pathway would not include a 'redistribution of punishment' from those who have had too much to those who have historically had too little (Mavronicola 2020). Rather, it would demand a more substantive democratisation and redistribution of political power.

5. Conclusion

For the OHCHR (2020), in line with dominant human rights discourses, measures that reduce or extinguish the term of imprisonment for those convicted of serious human rights violations are 'null and void, and have no legal effect'. They could not even be contemplated during the COVID-19 pandemic, when prisons around the world became incubators of a highly infectious, often lethal, disease. At the same time, like other human rights actors, the OHCHR has been active in the protection of prisoners' rights and the scrutiny of detention conditions. During the recent pandemic, it promoted measures to reduce prison overcrowding, provided that they did not concern serious human rights violators. This chapter has developed a theory to explain why these two positions (punitive and non-punitive) co-exist within human rights discourses: why, in the moment these discourses seek to mitigate penality, they turn back to penality as something they cannot do without. To this end, I have combined the findings of previous chapters with existing critical and theoretical discussions of human rights and punishment. I have shown that deeply embedded with the

28 See also Kennedy (2006, 133): 'There are lots of ways to pursue social justice. Human rights is but one, and not always the most appropriate.'

29 What must be used strategically are not the expressive features of penality, as illustrated by Barrie Sander (2019b, 867–71) and suggested by Itamar Mann (2021), but the non-punitive aspects of human rights.

desire for human rights protection is also a desire for, and an emotional impulse towards, punishment.

Central to human rights discourses' 'acceleration' towards penality is their tendency to moralise rather than promote socio-political renovation to achieve justice and emancipation. Their critique of human rights abuses develops around the assumed universality of human rights, in terms of their nature (as concerning every human being) and prescribed recognition (values that are non-negotiable). Faced with the problem that human rights are constantly violated and their universal commitment is not achieved, human rights discourses turn to moral reproach to compensate for their sense of loss of traction. This leads them to stigmatise (but not transform) contexts of violence and domination; to separate (but not empower) subjects to be saved from subjects to be condemned; and to temper (but not vanquish) the state's ability to commit abuses. In this context, human rights discourses are also driven to seek criminalisation and punishment in order to reinvigorate the universality of human rights values. The forces that drive human rights discourses to penality are not (only) rational but (mostly) emotional: the anger at the breach of universal values and the fear that letting human rights be violated without resistance would inexorably jeopardise their authority. However, in recruiting criminal law in their moral crusade against abuses, human rights discourses make the confirmation and reinforcement of human rights norms dependent on penality—and, thus, also on the inequality, prejudice and violence that penality produces. Human rights discourses may try to humanise the state's penal power, but the practice of penality—made a moral obligation—ultimately represents impulses and drives that outrun their humanisation.

In the last section of the chapter, I have briefly left my diagnostic and critical analysis to imagine what it would mean to think of justice without penality and beyond human rights. However, whether and how we can reorient human rights away from penality or, rather, whether we should leave human rights for other non-penal emancipatory projects are questions that require a new and different research project. Having explored *whether*, *how* and *why* human rights have 'accelerated' towards penality, I believe that the groundwork for this future project has been provided. Directions for future work will be further explored in my concluding chapter, together with a summary of the key findings of the thesis, a reflection on my methodology and a discussion of my contribution to knowledge.

8

Conclusion

> *Of course, in virtuous people love of power camouflages itself as love of doing good, but this makes very little difference to its social effects. It merely means that we punish our victims for being wicked, instead of for being our enemies.*—Russell (2004, 106–7).

Human rights became the dominant moral language of international politics in the late 1970s (Moyn 2010). Since then, appeals to human rights have increasingly been used to enlarge the reach of penal powers around the world. This expansion has entailed the creation of international criminal tribunals, the institution of criminal proceedings against human rights violators and the introduction of new human rights-based offences. The use of human rights to strengthen penality also occurs at the level of discourse. In particular, the twin assumptions that effective human rights protection requires criminal accountability and that impunity causes further human rights violations have become essential parts of the ways we generally think and speak about human rights. This thesis has investigated this role of human rights in fostering and justifying penality. It has shown that, within dominant human rights discourses, penality assumes a necessary function in preserving the moral authority of human rights. While dominant human rights discourses support a 'humane' criminal law, they also make the safeguarding of universal human rights values dependent on the exercise of penal powers. By regarding criminalisation and punishment of a certain set of abuses as moral *obligations* (and no longer resulting from the *choices* of a political community), dominant human rights discourses perpetuate and even intensify penality and the sufferings it causes. They do so while reproducing the idea that they are on the side of right rather than power, and that they are inflicting the pain of punishment in the name of universal justice.

This concluding chapter reflects on what this study has accomplished. Section 1 revisits the thesis's key findings and outlines the contributions to the debate surrounding human rights-driven penality. Section 2 elucidates the methodological offerings of the thesis, highlighting the use of discourse analysis to study law as a social phenomenon. Finally, section 3 presents a series of suggestions for future research on the topic.

1. Key findings and substantive contributions

In chapter 1, I expressed my ambition to examine the extent of, assumptions behind and reasons for the expansion of penality by reference to human rights. As I explained, I have taken human rights-driven penality as my analytic object and embarked on a study that has been not only diagnostic but also critical. While I have looked at things for what they are, I

have also sought to problematise current arrangements and expose the risks that they may entail. In doing so, I have been guided by three sets of questions, which I can now answer:

i. (To what extent) have human rights become triggers of expanded penality?

ii. How is it possible that human rights have become intricately intertwined with penality?

iii. Why are human rights made dependent on penality for their protection and promotion?

The '*whether*' question

The thesis has demonstrated that human rights have contributed to fostering and justifying penality around the world. As fundamental and universal moral values, human rights set limits within which legitimate penal powers may be exercised. Yet they also furnish penality with justification when it appears to be necessary to realise human rights objectives. As I have shown, a significant source of criminalisation at national and international levels draws on human rights. In many countries, the intertwining of victims'-rights claims and human rights language has acted as a vehicle for both the promotion of punitive policies and their presentation as catalysts of social justice. Legislatures have produced new offences, for example to address hate crimes or new forms of people trafficking, and have enlarged the scope of some existing crimes, such as sexual offences. Internationally, a growing number of conventions and declarations have urged states to criminalise, prosecute and punish serious human rights breaches. Human rights bodies have also imposed positive obligations in criminal matters. Pursuant to these bodies' decisions, states have introduced new offences, started new investigations, overturned amnesties and created new institutions to facilitate prosecution.

I have highlighted the fact that penal expansion by reference to human rights is also related to the creation of international criminal tribunals. These tribunals appear as the cornerstones of a broad human rights agenda: the 'fight against impunity'. Yet the protection of human rights through criminal adjudication is not limited to prosecutions in international fora. Through the principle of complementarity, international criminal law purports to encourage the implementation of penal mechanisms at the domestic level. Moreover, the fight against impunity has entailed the creation of hybrid and internationalised tribunals that integrate domestic and international structures. As I have shown, several countries that have undergone a regime change since the end of the Cold War have also launched criminal proceedings against human rights violators. More recently, universal jurisdiction has become a common jurisdictional basis for preventing impunity for human rights abuses. Lastly, I have illustrated that human rights have at times acted as drivers of stronger punishment. This trend emerges from victim-driven campaigns for reforming the penal system—some of which have promoted harsher sanctions and mandatory sentencing laws for offenders. It also

concerns human rights bodies' insistence that human rights violators should not receive too lenient penalties.

Overall, I have demonstrated that human rights have been important sources of penality in a variety of geographical and institutional contexts. The international, regional and domestic levels have all been involved, with discourses and practices of one level influencing the others. Human rights-driven penality have derived from campaigns of victims' and human rights organisations in countries across six continents; from the advocacy of feminist movements; from negotiations at the United Nations and other international fora; from decisions of national and international bodies and tribunals; and from the work of policymakers, practitioners and academics. My study contributes to the debate surrounding human rights-driven penality by exposing the transnational scope of the development, with multiple yet interconnected sites, trends and applications. The study has also located the entanglement between human rights and penality historically, thus enhancing our understanding of its emergence. Between the 1970s and the early 1980s, we saw the rise of victims' rights at the national level and the first penal obligations in international instruments. Transitional justice began to emerge in the late 1980s, together with positive obligations in criminal matters imposed by human rights bodies. International criminal law was reinvented as the sharp edge of human rights only in the 1990s, which is also the decade when human rights-driven penality was gradually normalised.

The '*how*' question

The core substantive contribution of this study comes from the empirical identification of a number of assumptions that sustain and lie behind human rights-driven penality. Through the discourse analysis of texts about human trafficking and torture, I have offered a detailed and comprehensive analysis of how human rights language is used to promote penal expansion. In particular, I have shown how the entanglement between human rights and penality is made sense of by the actors involved and framed by their discourses. I have identified two dominant sets of contemporary discourses: some discourses are victim-centred (the 'victims first' and the 'jus cogens' discourses) and others more state-oriented (the 'law enforcement' and the 'national security' discourses).

Within victim-centred discourses, human rights-driven penality is based on the following assumptions. First is the idea that human rights place moral and legal limits on penality: the result—a penality that respects victims' rights and adheres to human rights standards—would be more effective in promoting human rights and securing justice for the most vulnerable. This assumption is connected to another idea, notably that penality can and should be reoriented away from marginalised members of society and towards powerful ones. For instance, victim-centred discourses advocate for curbing criminalisation of trafficking victims ('victims first' discourse) or for reducing overcrowding in places of detention ('jus cogens' discourse), but also support proactive investigations and harsher

punishment against traffickers or torturers. In this way, I have shown that, within these discourses, the so-called 'shield' and 'sword' functions of human rights in the application of penality are not in 'paradoxical' opposition (Tulkens 2011) but rather bolster each other. They are mobilised towards the same objective: the redistribution of penality from those who have had too much to those who have had too little. Victim-centred discourses also perpetuate assumptions about the role of penality in society. On the one hand, penality is said to play an expressive function in signalling the exceptional wrongfulness of certain human rights abuses and in alerting everyone that public authorities (and society more broadly) take them seriously. On the other hand, penality is assigned a more practical task in giving weight and legal enforcement to the 'soft law' of human rights. Overall, I have shown that penality is discursively constructed as *a single but essential element* of a broader set of tools for protecting and promoting human rights.

My analysis has also illustrated the prominence of state-oriented discourses in framing human rights-driven penality. As I have shown, these discourses use human rights strategically to support the state's crime-control objectives and protect its social-moral order. They express the idea that effective human rights protection depends on heightened police control, extensive criminalisation and severe punishment. They endorse rights-oriented measures but only insofar as these measures are incorporated in a criminal justice paradigm. They deploy human rights as instruments of foreign policy, for instance by inviting investments in penal projects in the global South. State-oriented discourses, however, remain ambivalent, if not openly hostile, to human rights-driven penality against state actors (unless coming from 'rogue' and foreign states). Behind this position lies the idea that publicly exposing state abuses through criminal proceedings could damage the nation's reputation and security. While victim-centred and state-oriented discourses occupy most discursive space, they do not cover all that is sayable about human rights-driven penality. I have identified counter-discourses and alternative voices that challenge or reject the dominant discursive formations. Among counter-discourses, I have further distinguished between those that seek to rescue human rights from the grip of penality and those that see human rights as insufficient—and even counterproductive—for addressing the structural causes of violence and domination.

Through my analysis, I have elucidated how the competition between victim-centred and state-oriented discourses shapes the practice of human rights-driven penality. The call for human rights action is primarily accommodated by passing new criminal statutes and adopting new treaties that enshrine obligations to criminalise, prosecute and punish. At the domestic level, an important form of action focuses on criminal justice reforms. These may include the creation of specialised police units for proactive detection and prosecution of specific crimes (e.g., trafficking) or the implementation of human rights training for law-enforcement and security personnel. Emphasis is often on proactive policing, intelligence-led investigations and covert surveillance. Even when penal institutions are identified as usual

sites of abuses, they are validated and compelled to act to prevent and repress human rights violations. As I have shown, the more that dominant discourses are articulated and circulated, the more ideas incompatible with their penal parameters are set aside and dropped out of mainstream human rights initiatives. The net of penal control is widened, although the number of human rights violators who are held criminally accountable remains very low.

Another crucial contribution of this thesis comes from unearthing some historical assumptions upon which our present ways of protecting human rights through penality depend. I have argued that human rights have discursively appeared as a moral alternative that supplanted outdated moralities as well as more politically oriented approaches. When human rights language was taken up, the resort to criminal law for protecting emerging moral and humanitarian issues was conserved (in the case of trafficking) or strengthened (in the case of torture). In fact, while criminalisation and punishment have been methods for dealing with trafficking and torture for centuries, these abuses only became human rights issues in the late 1960s and the late 1940s, respectively. For this reason, I have conceptualised the embrace of penality by human rights as an 'acceleration' rather than a rupture. Since their emergence, dominant human rights discourses have encapsulated a tendency towards the state's penal powers. This tendency, however, has become distinctively marked only in the last three decades.

As I have shown, in relation to trafficking, human rights-driven penality stems from a century-long attempt to suppress vice and protect virtue through penal interventions. Throughout its history, people trafficking has been many things: an abuse of young white prostitutes, an act against the well-being of the race, a socio-hygienic evil, a threat to society's welfare and a human rights violation. Yet, the wrong of trafficking, namely the reason which justified anti-trafficking action, has always remained a moral one. The content of morality changed and was redefined, but the reliance on criminalisation and punishment was never discontinued. On the other hand, I have revealed how, in relation to torture, human rights-driven penality depends on three non-linear and contingent processes. First, depoliticisation: if initially opposition to torture was instrumental to the political legitimacy of the sovereign, since the 1970s the fight against the practice has mostly focused on its humanitarian, 'non-political', aspects. Second, individualisation: for centuries, torture was opposed because it degraded society rather than individual victims; its 'real' perpetrators were states, not state officials. Third, legalisation: torture returned as a matter of legal regulation in the 1970s, after almost a century in which only limited attention was given to legal reforms.

The '*why*' question

On the question of why the fight for human rights is waged through penality, this study has found that human rights discourses rely on punishment because it offers emotional release in the face of moral outrage at serious rights violations. This finding contributes to the existing literature by offering a theory to explain the 'accelerated alignment' of human rights

with penality. To reach this conclusion, I have complemented my discourse analysis with a critical theorising of punishment and morality which draws on political theory and sociology of punishment. As I have shown, dominant human rights discourses are committed to a form of moralising politics that facilitates three connected processes. First is moralisation of violence and domination. These discourses develop a righteous condemnation of violence and domination which disguises their involvement with politics and power. Second is moralisation of victims and perpetrators. Dominant human rights discourses treat power and vulnerability as opposite moral categories, thereby consolidating the dichotomy between vulnerable-moral victims and powerful-evil violators. Third is moralisation of the state. These discourses condemn the state that permits human suffering but also reinscribe its laws and institutions as necessary elements of human rights protection.

I have illustrated how these processes laid the groundwork for a further process, which underpins the 'acceleration' of human rights towards penality. As I have explained, the urge to criminalise and punish certain human rights abuses does not depend so much on the utility of penality, but on the feeling of moral accomplishment that derives from punishing what is outrageous. This sentiment is then rationalised and channelled into a desire to give force and public recognition to a universal and cogent morality. In this way, I have distanced my theory from the 'dominant' scholarship that explains human rights-driven penality through the usual justifications for punishment (its retributive, deterrent and expressive goals). But I have also distinguished it from those 'critical' accounts that focus only on the social-control effects of penality and do not take seriously its emotional elements. Next, I have critically assessed the passions that underpin human rights-driven penality. As I have argued, when penality is grounded on human rights, it ostensibly rejects cruelty while in fact conserving its original impulses behind a veil of hypocrisy. It is no longer an expression of the 'will to power' but derives from the *ressentiment* of the vulnerable towards the powerful. Human rights-driven penality appears as a 'just', 'humane' but also inevitable enterprise. It does not depend on the choices of a political community but springs spontaneously and necessarily from universal values. While penality becomes an instrument to reinforce human rights morality, the image of human rights norms that is reproduced is one which depends on punishment (as well as on its agents and violence) for protection.

These findings contribute to the existing debate on human rights-driven penality by suggesting scepticism over two opposing claims that the critical scholarship has advanced. One is the idea that a reliance on public penal powers is intrinsic to the essence of human rights, given its affinities with liberal penality (e.g., Sattar 2019). The second is the opposite claim that human rights' dependence on penality defies what human rights truly and traditionally stand for (e.g., Lazarus 2012; Hannum 2019, 11–25). Unlike the first claim, I have shown that the entanglement between penality and human rights is not given by the nature of human rights, but socially and discursively produced. At the same time and unlike the second claim, I have argued that human rights-driven penality is not a misapplication of

human rights either. Although counter-carceral human rights are also possible, thinking that human rights have simply been co-opted by a language of criminal accountability ignores all the ways human rights have had a lead role in justifying and fostering penality.

2. Methodological contributions

Based on my research questions, in the thesis I have explored the relationship between human rights and penality through a socio-legal perspective. The benefits of this perspective have been considerable. By shifting attention from purely legal issues to other social considerations that contribute to law's operation, I have shined a light on aspects of human rights-driven penality that would not otherwise be revealed. A socio-legal perspective has also enabled me to rely on the research toolkits of different disciplines (law, sociology and political science) as well as to develop and use a discourse analysis method.

A first methodological contribution of my studies comes from its 'transnational' scope, which has derived from placing the international, regional and domestic levels 'in dynamic tension within a single analytic frame' (Halliday and Shaffer 2015, 3). I have taken the view that a comprehensive analysis of human rights-driven penality was required to overcome the dichotomy between the study of international law and national law, and of international regimes and national politics. Through this approach, I have attended the multiplicity of ways in which the entanglement between human rights and penality has been generated, circulated, promoted and resisted in a wide variety of places and law levels. This study has flattened the artificial distinction, which has been advanced in some literature (e.g., Robinson 2008, 930), between the domestic level, where human rights supposedly constrain penality, and the international focus on anti-impunity and victims' entitlement to criminal justice. I have revealed that the apparent contrast between the domestic and international stages is not as clear as sometimes contended (see also Sedacca 2019, 339). Not only are the discourses and practices of one level mutually dependent on those of the other level(s) but, within both international and domestic criminal contexts, human rights act simultaneously as the 'shield' and 'sword' of penality. They require penality as an enforcement tool—albeit a penality 'humanised' and in line with human rights standards. This is a different finding than what might have been concluded in an inquiry focused only on either international or national law. Indeed, many of the dynamics uncovered in this study would have been overlooked had I adopted a more traditional focus.

An overarching claim of this study has been that law's dependence on language and texts makes discourse a useful medium to explore law from a sociological perspective. The linguistic properties of law have been the object of much research and debate not only by scholars specialised in law and linguistics (e.g., Solan and Tiersma 2012), but also by lawyers and judges engaged in legal interpretation. My focus, however, has not been on legal language as such. I have not used legal texts to establish the true content of law. Rather, by resorting to the concept of discourse, I have considered the use of legal language as a social practice

and the analysis of legal texts as a method for understanding how law is socially organised. Discourse analysis and other ways to study discourses are increasingly popular methods with which to conduct social science research. However, there are still very few studies that use the concept of discourse in a rigorous and systematic manner to research law and society. With this thesis, I have contributed to socio-legal methodology by showcasing how legal discourses can be studied as empirical indicators of how law is formed, transformed and contested in society, as well as how it affects social action. To this end, I was not satisfied with using the concept of discourse without grounding it on a particular theoretical approach, as sometimes occurs in legal publications (referring loosely to, e.g., 'the human rights discourse', 'the legal discourse', etc.). Conversely, I have developed a methodology that rigorously connects my research topic (human rights-driven penality) with a theoretical framework (associated with Michel Foucault and other post-structuralist theorists), a particular understanding of discourses (systems of meaning-production) and the materials to be analysed (legal texts). This methodology can now be readapted and used for other socio-legal projects.

The core methodological contribution of the thesis derives from the specific discourse analysis I have developed. The choice of discourse analysis, as a method to unearth the assumptions underlying human rights-driven penality, was a result of my theoretical commitments and the theoretical contribution I wanted to make. Alternative methods of data analysis, such as thematic or content analysis, would not do justice to my conception of legal matters as socially constructed and ordered by dominant unities of meaning, thereby determining what is 'right' or 'truthful'. My discourse analysis was informed by Foucault's and other post-structuralists' readings of discourse and was specifically created to examine legal discourses. While I was guided by a critical approach to human rights-driven penality, my analysis was given reliability, depth and specificity by my rigorous engagement with the empirical material (480 texts) that I gathered. My discourse analysis has proven to be a conducive method for critically examining how the alignment between human rights and penality has arisen, how it has been put into practice and how other possible forms of action have been foreclosed. It has also allowed me to explore the discursive formations underlying this alignment both in the present and throughout their historical emergence. My discourse analysis has thus provided a socio-legal method of data analysis that combines critical theories of law and empirical research. This method can be applied to other areas of legal research. Examining how certain legal discourses have been generated, circulated, internalised and resisted could help us all to understand better the assumptions that they embody and which possibilities of action they privilege or preclude.

3. Future studies

My findings enhance our understanding of the relationship between human rights and penality and may serve as a useful basis for future studies. There are many new directions

that scholarship can take in continuing the examination of human rights-driven penality. There are also outstanding issues that I could not cover exhaustively in the thesis due to space limitations. Suggested avenues for future research concern in particular: i) the examination of additional case studies or a focus on other countries; ii) the use of other socio-legal methods to test my findings and include non-discursive aspects of human rights-driven penality; iii) the translation into action of my conclusions; and iv) the exploration of alternatives with which human rights-driven penality competes.

First, there is scope for complementing my investigation with additional case studies. Examination of discourses in the context of abuses other than trafficking and torture would certainly provide further evidence about the role that human rights play in fostering and justifying penality. As noted in chapter 1, there is already ample research on violence against women. New research might encompass cases such as discrimination and hate speech or corporate criminal liability for breaches of socio-economic rights. Most research, including mine, has so far focused on practices that were widely criminalised prior to their recognition as human rights violations. However, it would also be important to consider phenomena that became human rights issues prior to their criminalisation or for which criminalisation is invoked but not always implemented (cf. Malby 2019, 78). A focus on discrimination and corporate criminal liability for breaches of socio-economic rights would rectify this omission. The latter would also extend the analysis of human rights-driven penality to new actors (e.g., corporations) and beyond civil rights. Relatedly, it would be interesting to explore human rights-driven penality in other countries and, particularly, in the global South. In fact, distinct local legal contexts shape the 'vernacularization' of human rights;[1] these contexts equally reflect diverse approaches to penality. Such inquiries should give more space to the legacy of colonialism, to indigenous justice and to non-liberal (as opposed to illiberal) articulations of freedom. One challenge would probably be the researcher's command of local languages; another the accessibility of legal texts. Silvana Tapia Tapia (2022b) has already explored the emergence of a 'rights-based penality' in Ecuador, but further work in other countries or regions is warranted.

A second avenue for future research concerns the use of other socio-legal methods to integrate and test my discourse analysis findings. Discourse analysis can be combined with other methods of data gathering to enrich the research. I already used content analysis in this thesis (through NVivo) to facilitate data sampling and identify texts that contained clear articulations of the relationship between human rights and penality. A future project could combine discourse analysis, other methods of data collection, such as interviewing and observation, and different forms of data, including transcribed talk and the researchers' fieldnotes (S. Taylor 2013, 30). This could include interviews with key actors (e.g., judges,

1 Selly Engle Merry (2006a) calls 'vernacularization' the process of translation and adaptation of global human rights norms from local to global areas and back to local social contexts.

policymakers, nongovernmental organisations and legal practitioners) and observations of trials, parliamentary debates and conferences of key stakeholders. Combining discourse analysis with other methods and forms of data has the potential to better capture what lies beyond discourse (Banakar and Travers 2005c). Discourses, including those about human rights and penality, are in fact part-shaped by non-discursive aspects of the social world.[2] When the focus is only on pre-existing texts, non-discursive aspects are hard to access and considered as only part of the context which gives meaning to a text. The use of other qualitative methods, on the other hand, would allow the researcher to identify discourses while they occur. In this way, the researcher could better record how the textual and linguistic elements of human rights-driven penality interact with, and are informed by, the material world.[3]

Third, a new research project is needed to examine how my conclusions about the assumptions and reasons of human rights-driven penality can be translated into action. Although my study has not provided a comprehensive answer to what might be done in terms of transformation of policies and practices, it has offered an important starting point for developing alternatives to current arrangements. Criminalisation and punishment have today become 'the preferred and often unquestioned' methods for attempting to end human rights violations (Engle, Miller, and Davis 2016b, 1). Acknowledging that the assumptions and reasons that lie behind human rights-driven penality are not obvious, but rather questionable, opens the door for new responses to violence and domination that do not depend on penal solutions. As Foucault (2000, 457) points out, 'as soon as people begin to have trouble thinking things the way they have been thought, transformation becomes at the same time very urgent, very difficult, and entirely possible'.

At the end of chapter 7, I have briefly illustrated two possible 'ways-out' from human rights-driven penality. One option is to reorient human rights away from penality and towards an uncompromised resistance to the state's coercive powers. We could, however, overestimate the room for radical change that is realistically available within the existing human rights framework. My findings show that, unless human rights are re-thought in political terms, their foundation in universal morality risks pulling human rights back to penality. A second possibility is to move beyond penality and human rights and invest our theoretical and practical energies in other emancipatory projects. Here the risk is embracing the unknown while losing an imperfect yet important bulwark against some of the state's worst abuses. Despite the challenges, there is already movement in both directions. There is an emerging scholarship that is not satisfied with criticising human rights-driven penality but which also

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2 Foucault (1972a, 162) lists non-discursive practices as including 'institutions, political events, economic practices and processes'.

3 Legal materiality offers a potentially useful approach to place the discursive and non-discursive elements of law within the same analytic frame, see Kang and Kendall (2019).

makes proposals and predictions about its future evolution.[4] Equally, as I have illustrated, there are counter-discourses that, albeit from a marginalised perspective, resist the idea that penality is a viable avenue to justice. Future research might investigate this some more and amplify these critical voices to help identify which routes can be taken and which are precluded.

Finally, and relatedly, new projects could follow Samuel Moyn's (2016, 88) invitation to explore the 'hypothetical alternatives with which [human rights-driven penality] competes or which it even rules out'. At various points in this thesis, I have mentioned that dominant human rights discourses' insistence on criminal accountability risks marginalising efforts aimed at reducing the net of penal control. However, I have not been able to unfold this topic further. In particular, there is more to be done for evaluating whether and how the alignment of human rights with the state's penal powers displaces calls for the fundamental transformation or abolition of the penal system. In the last few years, radical reformist and abolitionist arguments against the police and prison have garnered ever-wider support (McLeod 2019; Akbar 2020; cf. Fleetwood and Lea 2022). In this context, we may wonder whether social movements and struggles that wield human rights language to contest penality have a chance of success or instead risk strengthening its hold. While some authors see human rights as holding some potential for boosting and internationalising abolitionist campaigns (Simon 2019; Weber 2021), others express scepticism and highlight that human rights are often 'part of the problem' (Engle 2021, quoting Kennedy 2002). Research on this topic can empirically examine how social movements engaged in opposing penality (e.g., sex worker organisations against the Nordic Model; Black Lives Matter activists; movements organising against the 'crimmigration'[5] system; etc.) understand and use the language of human rights. It can also amount to an exercise of re-imagining, by investigating what it would entail for human rights institutions and advocates to take seriously calls for penal abolition, decriminalisation and other penal reforms that 'unravel rather than widen the net of social control' (Gilmore 2007, 242).

4. Closing note

Human rights can serve as sources of penality. The same rights that we use to delimit state powers can enable one of the state's most coercive powers. The same rights that we use to contest violence, by triggering the intervention of penal institutions, can nourish the violence that underpins our penal systems. Although those who punish in the name of human rights seek not suffering but justice, their weapon remains punishment—the kind of punishment that is available in our society, often involving incarceration. This penality does not come

4 See, e.g., the papers presented at the workshop *Human Rights Penality: The Next Decade*, supported by the *Modern Law Review* and held in Birmingham on 25 March 2022 (Engle 2022; Malby 2022; Mavronicola 2022; Pinto 2022; Tapia Tapia 2022a).

5 'Crimmigration' refers to the interconnection between crime and immigration control (Stumpf 2006).

from the usual, 'law-and-order', quarters. It comes from people (at least many of them) who mean well for all—victims and perpetrators. And yet, it is a penality that comes with a deep sense of urgency and necessity because their advocates do not punish in order to exhibit power (so we are told) but to uphold a universal morality. Most would deny that there is anything problematic with human rights-driven penality. But for those who were already sceptical and for those who will be alerted by my study, I hope this thesis will serve as an invitation to engaged debate, innovative approaches and reinvigorated critique about the relationship between human rights and penality.

Appendix

This appendix provides the list of texts selected and analysed through Discourse Analysis.

Chapter 3

Positive legal texts

1. Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later. 2013. PC.DEC/1107/Corr.1. Organization for Security and Co-operation in Europe.
2. *Allen v Hounga*. 2014 [2014] UKSC 47. UK Supreme Court.
3. Beijing Declaration and Platform for Action. 1995. A/CONF.177/20 and A/CONF.177/20/Add.1. UN Fourth World Conference on Women.
4. *Chowdury and Others v Greece*. 2017 App No 21884/15. European Court of Human Rights.
5. *CN and V v France*. 2012 App No 67724/09. European Court of Human Rights.
6. *CN v United Kingdom*. 2012 App No 4239/08. European Court of Human Rights.
7. Council of Europe Convention on Action against Trafficking in Human Beings. 2005. CETS No 197.
8. *EOG v Secretary of State for the Home Department*. 2020 [2020] EWHC 3310 (Admin). UK Queen's Bench Division (Administrative Court).
9. EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. 2011. 2011/36/EU. European Union.
10. Improving the Coordination of Efforts against Trafficking in Persons. 2015. A/RES/70/179. UN General Assembly.
11. *MS v Secretary of State for the Home Department*. 2020 [2020] UKSC 9. UK Supreme Court.
12. Modern Slavery Act. 2015. United Kingdom.
13. OSCE Action Plan to Combat Trafficking in Human Beings. 2003. PC.DEC/557 & Annex. Organization for Security and Co-operation in Europe.
14. *O v Commissioner of Police of the Metropolis*. 2011 [2011] EWHC 1246 (QB). UK Queen's Bench Division.
15. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime. 2000. 2237 UNTS 319.
16. *R (Haile) v Secretary of State for the Home Department*. 2015 [2015] EWHC 732 (Admin). UK High Court of Justice (Queen's Bench Division Administrative Court).
17. *R (PK (Ghana)) v Secretary of State for the Home Department*. 2018 [2018] EWCA Civ 98. UK Court of Appeal (Civil Division).
18. *R (QSA) v Secretary of State for the Home Department*. 2018 [2018] EWHC 407 (Admin). UK Divisional Court.
19. *R (SF (St Lucia)) v Secretary of State for the Home Department*. 2015 [2015] EWHC 2705 (Admin). UK Queen's Bench Division (Administrative Court).
20. *R (TDT) v Secretary of State for the Home Department*. 2018 [2018] EWCA Civ 1395. UK Court of Appeal (Civil Division).
21. *R v Connors and others*. 2013 [2013] EWCA Crim 324. UK Court of Appeal (Criminal Division).
22. *R v Joseph (Verna Sermanfure)*. 2017 [2017] EWCA Crim 36. UK Court of Appeal (Criminal Division).
23. *R v L*. 2013 [2013] EWCA Crim 991. UK Court of Appeal (Criminal Division).
24. *R v LM*. 2010 [2010] EWCA Crim 2327. UK Court of Appeal (Criminal Division).
25. *R v N*. 2012 [2012] EWCA Crim 189. UK Court of Appeal (Criminal Division).
26. *R v O*. 2008 [2008] EWCA Crim 2835. UK Court of Appeal (Criminal Division).
27. *Rantsev v Cyprus and Russia*. 2010 App No 25965/04. European Court of Human Rights.
28. *Reyes v Al-Malki*. 2017 [2017] UKSC 61. UK Supreme Court.
29. *Siliadin v France*. 2005 App No 73316/01. European Court of Human Rights.
30. *SM v Croatia*. 2020 App No 60561/14. European Court of Human Rights, Grand Chamber.

31. Traffic in Women and Girls. 1995. A/RES/50/1995. UN General Assembly.
32. ———. 2000. A/RES/55/67. UN General Assembly.
33. Trafficking in Women and Girls. 2018. A/RES/73/146. UN General Assembly.
34. UN Global Plan of Action to Combat Trafficking in Persons. 2010. A/RES/64/293. UN General Assembly.
35. UNSC RES 2331. 2016. S/RES/2331. UN Security Council.
36. UNSC RES 2388. 2017. S/RES/2388. UN Security Council.
37. *VCL and AN v United Kingdom*. 2021 App Nos 77587/12 and 74603/12. European Court of Human Rights.

Policymakers' documents

1. Brussa, Lucia. 1991. "Conclusions of the General Rapporteur." In Seminar on Action against Traffic in Women and Forced Prostitution as Violations of Human Rights and Human Dignity - EG/PROST (91)13. September 25-27, 1991. Strasbourg: Council of Europe - European Committee for Equality between Women and Men.
2. Ertürk, Yakin. 2009. *Addendum: 15 Years of the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences (1994-2009): A Critical Review*. A/HRC/11/6/Add.5. Geneva: Human Rights Council.
3. European Commission. 2012. *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016*. COM(2012)-286 final. Brussels: European Commission.
4. ———. 2013. "Trafficking Explained." Together Against Trafficking in Human Beings - European Commission. February 6, 2013. Accessed July 25, 2022, https://ec.europa.eu/anti-trafficking/citizens-corner/trafficking-explained_en.
5. ———. 2017. *Reporting on the Follow-up to the EU Strategy towards the Eradication of Trafficking in Human Beings and Identifying Further Concrete Actions*. COM(2017) 728 final. Brussels: European Union.
6. ———. 2019. *EU Anti-Trafficking Action 2017-2019 - At a Glance*. European Union. Accessed July 25, 2022, https://anitp.mai.gov.ro/ro/docs/Publicatii%20internationale/EU%20anti-trafficking%20action%202017-2019%20At%20a%20glance.pdf.
7. ———. 2021. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025*. COM(2021) 171 final. Brussels: European Commission.
8. Ezeilo, Joy Ngozi. 2012. *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo*. A/HRC/20/18. Geneva: Human Rights Council.
9. Giammarinaro, Maria Grazia. 2015. *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*. A/70/260. New York: UN General Assembly.
10. ———. 2020. *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*. A/HRC/44/45. Geneva: UN Human Rights Council.
11. ———. 2020. *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Maria Grazia Giammarinaro*. A/75/169. New York: UN General Assembly.
12. GRETA. 2012. *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom - First Evaluation Round*. GRETA(2012)6. Council of Europe. Accessed July 25, 2022, https://childhub.org/sites/default/files/library/attachments/1501_GRETA_2012_6_FGR_GBR_en_original.pdf.
13. ———. 2018. *7th General Report on GRETA's Activities Covering the Period from 1 January to 31 December 2017*. GRETA(2018)1. Council of Europe. Accessed July 25, 2022, https://rm.coe.int/greta-2018-1-7gr-en/16807af20e.
14. Home Office. 2014. *Modern Slavery Bill: European Convention on Human Rights: United Nations Convention on The Rights of The Child: Memorandum by The Home Office*. UK Government. Accessed July 25, 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/318618/ECHRmemoModernSlavery.pdf.
15. ———. 2019. *2019 UK Annual Report on Modern Slavery*. UK Government. Accessed July 25, 2022, https://www.gov.uk/government/publications/2019-uk-annual-report-on-modern-slavery.
16. ———. 2020. *2020 UK Annual Report on Modern Slavery*. UK Government. Accessed July 25, 2022, https://www.gov.uk/government/publications/2020-uk-annual-report-on-modern-slavery.
17. Home Office and Scottish Executive. 2007. *UK Action Plan on Tackling Human Trafficking*. UK Home Office; Scottish Executive. Accessed July 25, 2022, www.migrationscotland.org.uk/uploads/files/documents/03_2007_uk_action_plan.pdf.

18. ICAT. 2012. *The International Legal Framework Concerning Trafficking in Persons*. ICAT Paper Series. Vienna: Inter-Agency Coordination Group against Trafficking in Persons. Accessed July 25, 2022, www.unodc.org/documents/human-trafficking/ICAT/ICAT_Policy_Paper_1_The_International_Legal_Instruments.pdf.
19. Independent Anti-Slavery Commissioner. 2017. *Annual Report 2016-2017*. UK Government. Accessed July 25, 2022, www.gov.uk/government/publications/independent-anti-slavery-commissioners-annual-report-2016-to-2017.
20. Jarbussynova, Madina. 2015. *Commentary to the OSCE Action Plan to Combat Trafficking in Human Beings, the 2005 Addendum Addressing Special Needs of Child Victims of Trafficking for Protection and Assistance and the 2013 Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later*. Vienna: Organization for Security and Co-operation in Europe/Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings.
21. JCHR. 2014. *Legislative Scrutiny: (1) Modern Slavery Bill and (2) Social Action, Responsibility and Heroism Bill*. HL Paper 62 and HC 779. London: House of Lords and House of Commons Joint Committee on Human Rights.
22. Kelly, Elizabeth. 2002. *Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe*. International Organization for Migration. Accessed July 25, 2022, https://publications.iom.int/system/files/pdf/mrs_11_2002.pdf.
23. Mann, Lori J. 2011. *Trafficking in Human Beings and Smuggling of Migrants in ACP Countries: Key Challenges and Ways Forward*. International Organization for Migration. Accessed July 25, 2022, https://publications.iom.int/system/files/pdf/trafficking_in_human_beings.pdf.
24. NPCC. 2019. *Modern Slavery Police Transformation - Programme Annual Report to 31 March 2019*. The National Police Chiefs Council. Accessed July 25, 2022, www.npcc.police.uk/Publication/2019/Modern%20Slavery%20Annual%20Report.pdf.
25. OHCHR. 2002. *Recommended Principles and Guidelines on Human Rights and Human Trafficking*. E/2002/68/Add.1. New York: UN Economic and Social Council.
26. ———. 2010. *Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking*. HR/PUB/10/2. Geneva: United Nations.
27. ———. 2014. *First Decade of the Mandate of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*. United Nations. Accessed July 25, 2022, www.ohchr.org/Documents/Issues/Trafficking/FirsDecadeSRon_%20trafficking.pdf.
28. Pardo, Rosario. 2009. *Handbook for Parliamentarians - The Council of Europe Convention on Action against Trafficking in Human Beings*. Parliamentary Assembly of the Council of Europe. Accessed July 25, 2022, https://rm.coe.int/168008ebd9.
29. UN Secretary-General. 2003. *Integration of the Human Rights of Women and a Gender Perspective - Traffic in Women and Girls*. E/CN.4/2003/74. New York: UN Commission on Human Rights.
30. ———. 2016. *Report of the Secretary-General on the Implementation of Measures to Counter Trafficking in Persons before the UNSC*. S/2016/949. New York: UN Security Council.
31. UN.GIFT. 2008. "A Victim Centred Approach as a Key to Increasing the Effectiveness of Criminal Justice Responses to Human Trafficking." In *Background Paper - 007 Workshop: From Protection to Prosecution: A Strategic Approach*. Austria Center Vienna.
32. ———. n.d. "Homepage." Accessed July 5, 2020, www.ungift.org/. On File with Author.
33. Warzazi, Halima Embarek. 2000. *Report of the Working Group on Contemporary Forms of Slavery on Its Twenty-Fifth Session*. E/CN.4/Sub.2/2000/23. New York: UN Commission on Human Rights.

NGOs/civil society documents

1. Amnesty International. 2004. *Joint NGO Statement on the Draft European Convention against Trafficking*. Amnesty International. Accessed July 25, 2022, www.amnesty.org/download/Documents/96000/ior610202004en.pdf.
2. ———. 2008. *United Kingdom - Briefing to the Human Rights Committee*. Amnesty International. Accessed July 25, 2022, www.amnesty.org/en/documents/eur45/011/2008/en/.
3. Amnesty International and Anti-Slavery International. 2004. *Memorandum on the Draft European Convention on Action against Trafficking in Human Beings: Protection of the Rights of Trafficked Persons*. Amnesty International. Accessed July 25, 2022, www.amnesty.org/download/Documents/96000/ior610112004en.pdf.
4. Amnesty International UK. 2014. *JCHR Legislative Scrutiny Priorities for 2014-15: Modern Slavery Bill*. BILLS (14-15) 043. London: Joint Committee on Human Rights.

5. Annison, Rachel. 2013. *In the Dock - Examining the UK's Criminal Justice Response to Trafficking*. Anti-Trafficking Monitoring Group. Accessed July 25, 2022, www.antislavery.org/wp-content/uploads/2017/01/in_the_dock_final.pdf.
6. Anti-Slavery International. 2005. *Protocol for Identification and Assistance to Trafficked Persons and Training Kit*. Anti-Slavery International. Accessed July 25, 2022, www.antislavery.org/wp-content/uploads/2017/01/protocoltraffickedpersonskit2005.pdf.
7. Anti-Slavery International, KEDE, KOK, On the Road, STV, and Eaves Housing for Women. 2003. *NGOs Statement on Protection Measures for Trafficked Persons in Western Europe - Comment on the OSCE Action Plan to Combat Trafficking in Human Being*. Anti-Slavery International. Accessed July 25, 2022, www.antislavery.org/wp-content/uploads/2017/01/wetraffickingngostatement2003.pdf.
8. Blokhuis, Bregje. 2008. *Violation of Women's Rights: A Cause and Consequence of Trafficking in Women*. La Strada International. Accessed July 25, 2022, https://documentation.lastradainternational.org/lsidocs/431%20LSI-%20violation%20of%20womens%20rights.pdf.
9. Bokhari, Farhat. 2009. *Stolen Futures: Trafficking for Forced Child Marriage in the UK*. ECPAT UK. Accessed July 25, 2022, www.ecpat.org.uk/Handlers/Download.ashx?IDMF=ba38e884-5519-4d5a-b1ad-1e28c41a124a.
10. CATW. 2001. *Coalition Report 2001: The Coalition Against Trafficking in Women*. The Coalition Against Trafficking in Women. Accessed April 2, 2020, https://cdn.atria.nl/ezines/email/CoalitionReport/2001/No2001.pdf. On File with Author.
11. ———. 2006. *Third Session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime*. Coalition Against Trafficking in Women.
12. ———. 2010. *CATW Annual Report 2010*. The Coalition Against Trafficking in Women. Accessed July 25, 2022, https://catwinternational.org/wp-content/uploads/2018/10/CATW_2010_Annual_Report.pdf.
13. Cherti, Myriam, Jenny Pennington, and Eliza Galos. 2012. *The UK's Response to Human Trafficking: Fit for Purpose?* Institute for Public Policy Research. Accessed July 25, 2022, www.ippr.org/files/images/media/files/publication/2012/07/beyondirregularity-trafficking_July2012_9382.pdf.
14. CSJ. 2013. *It Happens Here: Equipping the United Kingdom to Fight Modern Slavery*. Centre for Social Justice. Accessed July 25, 2022, www.centreforsocialjustice.org.uk/library/happens-equipping-united-kingdom-fight-modern-slavery.
15. ECPAT International. 2014. *The Commercial Sexual Exploitation of Children in Europe: Developments, Progress, Challenges and Recommended Strategies for Civil Society*. ECPAT International. Accessed July 25, 2022, https://ecpat.org/wp-content/uploads/2021/05/Regional-CSEC-Overview_Europe.pdf.
16. Foundation Against Trafficking in Women, International Human Rights Law Group, and GAATW. 1999. *Human Rights Standards for the Treatment of Trafficked Persons*. Global Alliance Against Traffic in Women. Accessed July 25, 2022, https://www.gaatw.org/books_pdf/hrs_eng2.pdf.
17. GAATW. 2007. *Collateral Damage - The Impact of Anti-Trafficking Measures on Human Rights around the World*. Global Alliance Against Traffic in Women. Accessed July 25, 2022, https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/ensuring_protection_070909/collateral_damage_gaatw_2007.pdf.
18. ———. 2011. *Smuggling and Trafficking: Rights and Intersections*. GAATW Working Paper Series. Global Alliance Against Traffic in Women. Accessed July 25, 2022, www.gaatw.org/resources/working-papers/897-smuggling-and-trafficking-rights-and-intersections.
19. ———. 2018. *Sex Workers Organising for Change: Self-Representation, Community Mobilisation, and Working Conditions*. Global Alliance Against Traffic in Women. Accessed July 25, 2022, www.gaatw.org/publications/SWorganising/SWorganising-complete-web.pdf.
20. International Committee on the Rights of Sex Workers in Europe. 2021. *From Vulnerability to Resilience: Sex Workers Organising to End Exploitation*. International Committee on the Rights of Sex Workers in Europe. Accessed July 25, 2022, https://respect.international/wp-content/uploads/2021/08/Exploitation-paper-pdf.pdf.
21. Kaye, Mike. 2003. *The Migration-Trafficking Nexus: Combatting Trafficking through the Protection of Migrants' Human Rights*. Anti-Slavery International. Accessed July 25, 2022, http://www.antislavery.org/wp-content/uploads/2017/01/the_migration_trafficking_nexus_2003.pdf.
22. Lam, Janice. 2011. *Rights and Recourse: A Guide to Legal Remedies for Trafficked Persons in the UK*. Anti-Slavery International and the Poppy Project. Accessed July 25, 2022, www.antislavery.org/wp-content/uploads/2017/01/rights_and_recourse_report_final_pdf.pdf.

23. Pearson, Elaine. 2000. *Human Rights and Trafficking in Persons: A Handbook*. Bangkok, Thailand: Global Alliance Against Traffic in Women. Accessed July 25, 2022, www.gaatw.org/resources/publications/903-human-rights-and-trafficking-in-persons-a-handbook.
24. ———. 2002. *Human Traffic, Human Rights: Redefining Victim Protection*. Anti-Slavery International. Accessed July 25, 2022, www.antislavery.org/wp-content/uploads/2017/01/hum_traff_hum_rights_redef_vic_protec_final_full.pdf.
25. Raymond, Janice G. 2001. *Guide to the New UN Trafficking Protocol*. Coalition Against Trafficking in Women. Accessed July 25, 2022, www.resiland.org/files/guide_to_the_new_un_trafficking_protocol.pdf.

Academic publications

1. Adams, Cherish. 2011. "Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Re-Victimization of Sex Trafficking Victims." *George Washington International Law Review* 43: 201.
2. Ditmore, Melissa, and Majan Wijers. 2003. "The Negotiations on the UN Protocol on Trafficking in Persons." *Nemesis* 4: 79.
3. Farrior, Stephanie. 1997. "The International Law on Trafficking in Women and Children for Prostitution: Making It Live Up to Its Potential." *Harvard Human Rights Journal* 10: 213–156.
4. Fitzpatrick, Joan. 2003. "Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking." *Michigan Journal of International Law* 24 (4): 1143–67.
5. Gallagher, Anne T. 2009. "Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway." *Virginia Journal of International Law* 49 (4): 790–848.
6. ———. 2010. *The International Law of Human Trafficking*. Cambridge: Cambridge University Press.
7. Hathaway, James C. 2008. "The Human Rights Quagmire of 'Human Trafficking.'" *Virginia Journal of International Law* 49 (1): 1–59.
8. Kara, Siddharth. 2011. "Designing More Effective Laws against Human Trafficking." *Northwestern Journal of International Human Rights* 9 (2): 123.
9. Kaye, Julie, Hayli Millar, and Tamara O'Doherty. 2020. "Exploring Human Rights in the Context of Enforcement-Based Anti-Trafficking in Persons Responses." In *The Palgrave International Handbook of Human Trafficking*, edited by John A. Winterdyk and Jackie Jones, 601–21. Cham: Palgrave Macmillan.
10. Knust, Nandor, and Kerttuli Lingenfelter. 2020. "Individual Criminal Responsibility Beyond the State: Human Trafficking as Both a Transnational and an International Crime." In *The Palgrave International Handbook of Human Trafficking*, edited by John A. Winterdyk and Jackie Jones, 1765–84. Cham: Palgrave Macmillan.
11. Kotiswaran, Prabha, and Sam Okyere, eds. 2015. *State and the Law: Beyond Trafficking and Slavery*. Vol. 3. London: Beyond Trafficking and Slavery/openDemocracy.
12. Leidholdt, Dorchen. 1993. "Prostitution: A Violation of Women's Human Rights." *Cardozo Women's Law Journal* 1: 133.
13. Mantouvalou, Virginia. 2018. "The UK Modern Slavery Act 2015 Three Years On: The UK Modern Slavery Act 2015 Three Years On." *The Modern Law Review* 81 (6): 1017–45.
14. McQuade, Aidan. 2019. "Modern Slavery in Global Context: Ending the Political Economy of Forced Labour and Slavery." In *The Modern Slavery Agenda: Policy, Politics and Practice in the UK*, edited by Gary Craig, Alex Balch, Hannah Lewis, and Louise Waite, 29–46. Bristol, UK: Policy Press.
15. Obokata, Tom. 2006. *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach*. Leiden; Boston: Martinus Nijhoff Publishers.
16. Pati, Roza. 2011. "States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia." *Boston University International Law Journal* 79: 79–142.
17. Piotrowicz, Ryszard. 2012. "States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations." *International Journal of Refugee Law* 24 (2): 181–201.
18. Rassam, A Yasmine. 1999. "Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law." *Virginia Journal of International Law* 39 (2): 303–52.
19. Raymond, Janice G. 2002. "The New UN Trafficking Protocol." *Women's Studies International Forum* 5: 491.

20. Reanda, Laura. 1991. "Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action." *Human Rights Quarterly* 13: 202.
21. Rijken, Conny, and Eefie de Volder. 2009. "The European Union's Struggle to Realize a Human Rights-Based Approach to Trafficking in Human Beings - A Call on the EU to Take THB-Sensitive Action in Relevant Areas of Law." *Connecticut Journal of International Law* 25: 49–80.
22. Shamir, Hila. 2012. "A Labor Paradigm for Human Trafficking." *UCLA Law Review* 60: 76–136.
23. Stoyanova, Vladislava. 2017. *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law*. Cambridge: Cambridge University Press.
24. Van Dyke, Ruth. 2019. "The UK's Response to Modern Slavery: Law, Policy and Politics." In *The Modern Slavery Agenda: Policy, Politics and Practice in the UK*, edited by Gary Craig, Alex Balch, Hannah Lewis, and Louise Waite, 47–74. Bristol, UK: Policy Press.
25. Weatherburn, Amy. 2016. "Using an Integrated Human Rights-Based Approach to Address Modern Slavery: The UK Experience." *European Human Rights Law Review* 2: 184–94.

Chapter 4

Positive legal texts

1. Aliens Act. 1905. United Kingdom.
2. Aliens Order. 1920. United Kingdom.
3. Children (Employment Abroad) Act. 1913. United Kingdom.
4. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. 1950. 96 UNTS 271.
5. Convention on the Elimination of All Forms of Discrimination against Women. 1979. 1249 UNTS 13.
6. Convention on the Rights of the Child. 1989. 1577 UNTS 3.
7. Covenant of the League of Nations. 1919. 225 CTS 195.
8. Criminal Law (Amendment) Act. 1885. United Kingdom.
9. ———. 1912. United Kingdom.
10. ———. 1922. United Kingdom.
11. ———. 1951. United Kingdom.
12. Declaration on the Elimination of Discrimination Against Women. 1967. A/RES/22/2263.
13. ECOSOC DEC 16(LVI). 1974. E/DEC/16 (LVI). UN Economic and Social Council.
14. ECOSOC RES 1685(II). 1972. E/RES/1685 (LII). UN Economic and Social Council.
15. ECOSOC RES 1789(LIV). 1973. E/RES/1789 (LIV). UN Economic and Social Council.
16. ECOSOC RES 1981/40. 1981. E/RES/1981/40. UN Economic and Social Council.
17. ECOSOC RES 1982/20. 1982. E/RES/1982/20. UN Economic and Social Council.
18. ECOSOC RES 1983/30. 1983. E/RES/1983/30. UN Economic and Social Council.
19. ECOSOC RES 1990/46. 1990. E/RES/1990/46. UN Economic and Social Council.
20. International Agreement for the Suppression of the "White Slave Traffic." 1904. I LoNTS 83.
21. International Convention for the Suppression of the Traffic in Women and Children. 1921. 9 LoNTS 415.
22. International Convention for the Suppression of the Traffic in Women of Full Age. 1933. 150 LoNTS 431.
23. International Convention for the Suppression of the White Slave Traffic. 1910. Great Britain TS 20 (1912).
24. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. 1990. 2220 UNTS 3.
25. Prevention of Prostitution. 1983. A/RES/28/107. UN General Assembly.
26. ———. 1985. A/RES/40/103. UN General Assembly.
27. Recommendation 1065(1987), Traffic in Children and Other Forms of Child Exploitation. 1987. Rec 1065(1987). Council of Europe, Parliamentary Assembly.
28. Recommendation No R(91)11 of the Committee of Ministers to Member States Concerning Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults. 1991. Rec (91)11. Council of Europe, Committee of Ministers.
29. Resolution on the Exploitation of Prostitution and Traffic in Human Beings. 1989 OJ C 120. European Union, European Parliament.
30. Sexual Offences Act. 1956. United Kingdom.

31. ———. 1959. United Kingdom.
32. Vagrancy Act. 1898. United Kingdom.

Policymakers' documents

1. Advisory Commission for the Protection and Welfare of Children and Young People. 1933. *Report on the Work of the Commission in 1933*. C.247.M.129.1933.IV. Geneva: League of Nations.
2. ———. 1934. *Report on the Work of the Commission in 1934*. C.149.M.162.1934.IV. Geneva: League of Nations.
3. ———. 1935. *Report on the Work of the Commission in 1935*. C.187.M.104.1935.IV. Geneva: League of Nations.
4. Advisory Commission for the Protection and Welfare of Children and Young People, Traffic in Women and Children Committee. 1930. *Report on the Ninth Session*. C.216.M.104.1930.IV. Geneva: League of Nations.
5. Advisory Committee on Traffic in Women and Children. 1924. *Report on the Work of the Third Session*. C.184.M.73.124.IV. Geneva: League of Nations.
6. ———. 1925. *Report on the Fourth Session*. A.22.1925.IV. Geneva: League of Nations.
7. Bouhdiba, Abdelwahab. 1982. *Report by Mr. Abdelwahab Bouhdiba, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities - Exploitation of Child Labour*. E/CN.4/Sub.2/479/Rec.1. New York: UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Slavery.
8. Bullock, Frederick Shore. 1907. "Annex 1. Memorandum as to the Position of the 'Central Authority.'" In *Correspondence Respecting the International Conference on the White Slave Traffic Held in Paris, October 1906*, by UK Government, 10–12. Miscellaneous, 2(1907). London: Harrison and Sons.
9. Commission of Enquiry into Traffic in Women and Children in the East. 1932. *Report to the Council*. C.849.M.393.1932.IV. Geneva: League of Nations.
10. Departmental Committee on Homosexual Offences and Prostitution. 1957. *Report of the Committee on Homosexual Offences and Prostitution*. Cmnd. 247. London: Home Office and Scottish Home Department.
11. Economic and Social Council. 1948. *Observations Submitted by Governments and Non-Governmental Organizations with Respect to the Revision of the 1937 Draft Convention Suppressing the Exploitation of the Prostitution of Others: General Observations*. E/1072/Annex 2. New York: UN Economic and Social Council.
12. Fernand-Laurent, Jean. 1983. *Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*. E/1983/7. New York: UN Economic and Social Council.
13. Information Section of the League of Nations. 1938. *Traffic in Women in the East. Work of the Bandoeng Conference*. Geneva: League of Nations.
14. INTERPOL. 1973. "50th Anniversary 1923-1973." Accessed July 25, 2022, www.ojp.gov/pdffiles1/Digitization/40713NCJRS.pdf.
15. Ksentini, Fatma Zohra. 1991. *Report of the Working Group on Contemporary Forms of Slavery on Its Sixteenths Session: Mrs. F.Z. Ksentini*. E/CN.4/Sub.2/1991/41. New York: UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Contemporary Forms of Slavery.
16. Royal Commission on Alien Immigration. 1903. *Report of the Royal Commission on Alien Immigration, with Minutes of Evidence and Appendix - Vol. 1., Presented to Both Houses of Parliament by Command of His Majesty*. London: Royal Commission on Alien Immigration.
17. Select Committee of the House of Lords. 1882. *Report from the Select Committee of the House of Lords on the Law Relating to the Protection of Young Girls: Together with the Proceedings of the Committee, Minutes of Evidence, and Appendix*. London: House of Lords.
18. Snagge, Thomas W. 1881. "Appendix A. Report of T.W. Snagge, Esq., of the Middle Temple, Barrister-at-Law, on the Alleged Traffic in English Girls to Immoral Purposes in Foreign Towns." In *Report from the Select Committee of the House of Lords on the Law Relating to the Protection of Young Girls: Together with the Proceedings of the Committee, Minutes of Evidence, and Appendix*, by Select Committee of the House of Lords. London: House of Lords.
19. ———. 1907. "Annex 3. Memorandum on the Origin and Evolution of the Movement for the Suppression of the White Slave Traffic." In *Correspondence Respecting the International Conference on the White Slave Traffic Held in Paris, October 1906*, by UK Government, 14–17. Miscellaneous, 2(1907). London: Harrison and Sons.

20. Special Body of Experts on Traffic in Women and Children. 1927. *Report of the Special Body of Experts on Traffic in Women and Children: Part One*. C.52.M.52.1927.IV. Geneva: League of Nations & Special Body of Experts on Traffic in Women and Children. 1927. *Report of the Special Body of Experts on Traffic in Women and Children: Part Two*. C.52(2).M.52(1).1927.IV. Geneva: League of Nations.
21. Street Offences Committee. 1928. *Report of the Street Offences Committee*. Cmd. 3231. London: Secretary of State for the Home Department.
22. Sub-Commission on the Status of Women to the Commission on Human Rights. 1946. *Appendix I to the Report of the Commission on Human Rights to the Second Session of the Economic and Social Council: Report of the Sub-Commission on the Status of Women to the Commission on Human Rights*. E/38/Rev.1. New York: UN Commission on Human Rights.
23. Traffic in Women and Children Committee. 1926. *Report on the Work of the Fifth Session*. C.240.M.89.1926.IV. Geneva: League of Nations, Advisory Committee on the Protection and Welfare of Children and Young People.
24. ———. 1930. *Study of Laws and Regulations with a View to Protecting Public Order and Health in Countries Where the System of Licensed Houses Has Been Abolished*. C.380.M.164.130.IV. Geneva: League of Nations.
25. ———. 1931. *Report on the Work of the Tenth Session*. C.267-M.122.1931.IV. Geneva: League of Nations.
26. ———. 1931. *Concise Study of the Laws and Penalties Relating to Souteneurs - Part I*. C.441.M.188.1931.IV. Geneva: League of Nations.
27. ———. 1932. *Report on the Work of the Eleventh Session*. C.390.M.220.1932.IV. Geneva: League of Nations.
28. UK Government. 1907. *Correspondence Respecting the International Conference on the White Slave Traffic Held in Paris, October 1906*. Miscellaneous 2(1907). London: Harrison and Sons.
29. UN. 1975. *Report of the World Conference of the International Women's Year, Mexico City, 19 June- 12 July 1975*. E/CONF.66/34. New York; Geneva: United Nations.
30. ———. 1980. *Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace*. Copenhagen, 14-30 July 1980. A/CONF.94/35. New York; Geneva: United Nations.
31. ———. 1985. *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace. Nairobi, 15-26 July 1985*. A/CONF.116/28/Rev.1. New York; Geneva: United Nations.
32. UN Department of Economic and Social Affairs. 1959. *Study on Traffic in Persons and Prostitution (Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others)*. ST/SOA/SD/8. New York: United Nations.
33. UN Secretary-General. 1948. *Draft Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others: Note by the Secretary-General*. E/1072. New York: UN Economic and Social Council.
34. ———. 1949. *Draft Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others: Supplementary Note by the Secretary-General*. E/1072/Add.1. New York: UN Economic and Social Council.
35. ———. 1955. *Annotations on the Text of the Draft International Covenant on Human Rights*. A/2929. New York: United Nations.
36. ———. 1982. *Question of Slavery and the Slave Trade in All Their Practices and Manifestations, Including the Slavery-Like Practices of Apartheid and Colonialism, Inquiry on the Status of Combating of the Traffic in Persons and of the Exploitation of the Prostitution of Others: Report by the Secretary-General*. E/CN.4/Sub.2/AC.2/1982/13. New York: UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Slavery.
37. Whitaker, Benjamin. 1982. *Report by Mr. Benjamin Whitaker, Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities - Updating of the Report on Slavery*. E/CN.4/Sub.2/1982/20. New York: UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Slavery.
38. Working Group on the Declaration of Human Rights. 1947. *Summary Record of the Fourth Meeting*. E/CN.4/AC.2/SR.4. New York: UN Commission on Human Rights.

NGOs/civil society documents & academic publications

1. Archbishop of Canterbury. 1912. "The Archbishop of Canterbury's Charge to the Nation." In *The White Slaves of London*, by William Nicholas Willis, vii–ix. Boston: Richard G. Badger, The Gorham Press.
2. Barry, Kathleen. 1979. *Female Sexual Slavery*. Englewood Cliffs, NJ: Prentice-Hall.

3. ———. 1981. "Female Sexual Slavery: Understanding the International Dimensions of Women's Oppression." *Human Rights Quarterly* 3 (2): 44–52.
4. Barry, Kathleen, Charlotte Bunch, and Shirley Castley, eds. 1984. *International Feminism: Networking Against Female Sexual Slavery. Report of the Global Feminist Workshop to Organize Against Traffic in Women. Rotterdam, the Netherlands. April 6-15, 1983*. New York: The International Women's Tribune Centre, Inc.
5. Billington-Greig, Teresa. 1913. "The Truth About White Slavery." *The English Review*, June 1913.
6. Bishop of Birmingham. 1912. "Bishop of Birmingham's Appeal to the Nation's Conscience." In *The White Slaves of London*, by William Nicholas Willis, x–xiii. Boston: Richard G. Badger, The Gorham Press.
7. Bramwell-Booth, Catherine. 1912. "Passionate Appeal to the Nation's Manhood." In *The White Slaves of London*, by William Nicholas Willis, xiv–xvi. Boston: Richard G. Badger, The Gorham Press.
8. British Committee of the International Federation for the Abolition of State Regulation of Prostitution. 1899. *Memorandum Presented to the International Congress, 21st to 23rd June, 1899*. London: The British Committee of the International Federation for the Abolition of State Regulation of Prostitution.
9. Bunting, Percy W. 1899. "Report." In *The White Slave Trade - Transactions of the International Congress on the White Slave Trade, Held in London on the 21st, 22nd and 23rd of June, 1899, at the Invitation of the National Vigilance Association*, by NVA, 65–72. London: National Vigilance Association.
10. Butler, Josephine E. 1881. *Letter to the Mothers of England*. LSE Library, Reading Room microform, Drawer 4.
11. ———. 1888. "Letter to the International Council of Women at Washington." In *Report of the International Council of Women Assembled by the National Woman Suffrage Association*, 257–64. Washington, DC: National Woman Suffrage Association.
12. ———. 1899. "Which Are the Greatest Criminals?" *The Storm-Bell*, May 1899.
13. ———. 1910/1896. *Personal Reminiscences of a Great Crusade*. New Edition. London: Horace Harshall & Son.
14. Chant, Laura Ormiston. 1888. "The International Federation for the Abolition of State Regulation of Vice." In *Report of the International Council of Women Assembled by the National Woman Suffrage Association*, 264–71. Washington, DC: National Woman Suffrage Association.
15. Coote, William A. 1903. "Law and Morality." In *Public Morals*, edited by James Marchant, 43–74. London: Morgan and Scott.
16. ———. 1910. *A Vision and Its Fulfilment: Being the History of the Origin of the Work of the National Vigilance Association for the Suppression of the White Slave Traffic*. London: The National Vigilance Association.
17. Craies, William F. 1899. "Report." In *The White Slave Trade - Transactions of the International Congress on the White Slave Trade, Held in London on the 21st, 22nd and 23rd of June, 1899, at the Invitation of the National Vigilance Association*, by NVA, 60–65. London: National Vigilance Association.
18. Dyer, Alfred S. 1882. *The European Slave Trade in English Girls. A Narrative of Facts*. 6th ed. London: Dyer Brothers.
19. Fawcett, Henry. 1899. "Report." In *The White Slave Trade - Transactions of the International Congress on the White Slave Trade, Held in London on the 21st, 22nd and 23rd of June, 1899, at the Invitation of the National Vigilance Association*, by NVA, 139–47. London: National Vigilance Association.
20. Goldman, Emma. 1911. "The Traffic in Women." In *Anarchism and Other Essays*, Second Revisited Edition. New York; London: Mother Earth Publishing Association.
21. Harris, Wilson H. 1928. *Human Merchandise: A Study of the International Traffic in Women*. London: Ernest Benn Limited.
22. Johnson, David H.N. 1955. "The Draft Code of Offences against the Peace and Security of Mankind." *International and Comparative Law Quarterly* 4 (3): 445–68.
23. Jonet, Ahilemah. 1989. "International Baby Selling for Adoption, and the United Nations Convention on the Rights of the Child." *New York Law School Journal of Human Rights* 7 (1): 82–115.
24. Kaufman Hevener, Natalie. 1986. "An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective." *Human Rights Quarterly* 8 (1): 70–88.
25. Lassen, Nina. 1988. "Slavery and Slavery-Like Practices: United Nations Standards and Implementation." *Nordic Journal of International Law* 57 (2): 197–227.
26. London Committee for the Exposure and Suppression of the Traffic in English Girls. 1881. "Appendix. To the Right Honourable the Earl Grandville, K.G., Her Majesty's Principal Secretary of State for Foreign Affairs." In *Report of the London Committee for the Exposure and Suppression of the Traffic in English Girls for the Purposes of Continental Prostitution. 1881*. London: Dyer Brothers.
27. ———. 1881. *Report of the London Committee for the Exposure and Suppression of the Traffic in English Girls for the Purposes of Continental Prostitution*. 1881. London: Dyer Brothers.

28. Moacanin, Milan. 1951. "International Criminal Jurisdiction." *New York Law School Student Law Review* 1 (1): 35–49.
29. Moro, Arthur R. 1899. "Report." In *The White Slave Trade - Transactions of the International Congress on the White Slave Trade, Held in London on the 21st, 22nd and 23rd of June, 1899, at the Invitation of the National Vigilance Association*, by NVA, 147–49. London: National Vigilance Association.
30. Nadelmann, Ethan A. 1990. "Global Prohibition Regimes: The Evolution of Norms in International Society." *International Organization* 44 (4): 479–526.
31. Nanda, Ved P., and M. Cherif Bassiouni. 1972. "Slavery and Slave Trade: Steps toward Eradication." *Santa Clara Lawyer* 12 (2): 424–42.
32. Neil Lyons, Albert. 1912. *White Slaves and Nasty Nonsense*. London: Clarion Press.
33. Neilans, Alison. 1937. "The Effect of Regulated Prostitution." *The Shield*, July 1937.
34. Nepote, Jean. 1967. "International Crime." *Police Journal* 40 (1): 7–22.
35. NVA. 1899. *The White Slave Trade - Transactions of the International Congress on the White Slave Trade, Held in London on the 21st, 22nd and 23rd of June, 1899, at the Invitation of the National Vigilance Association*. London: National Vigilance Association.
36. O'Callaghan, Saen. 1965. *The White Slave Trade*. Robert Hale Ltd: London.
37. Pella, Vespasian V. 1950. "Towards an International Criminal Court." *American Journal of International Law* 44 (1): 37–68.
38. Powell, Anna Rice. 1888. "The International Federation for the Abolition of State Regulation of Vice." In *Report of the International Council of Women Assembled by the National Woman Suffrage Association*, 252–57. Washington, DC: National Woman Suffrage Association.
39. Raymond, Janice G. 1989. "The International Traffic in Women: Women Used in Systems of Surrogacy and Reproduction." *Reproductive and Genetic Engineering* 2 (1): 51–57.
40. Reanda, Laura. 1981. "Human Rights and Women's Rights: The United Nations Approach." *Human Rights Quarterly* 3 (2): 11–31.
41. Russell, Bertrand. 2004/1928. "The Recrudescence of Puritanism." In *Sceptical Essays*, 101-07. London; New York: Routledge.
42. Sandifer, Durward V. 1949. "The International Protection of Human Rights: The United Nations System." *American Society of International Law Proceedings* 43 (3): 59–64.
43. Schwelb, Egon. 1960. "International Conventions on Human Rights." *International and Comparative Law Quarterly* 9: 654–75.
44. Shaw, George Bernard. 1912. "The Root of the White Slave Traffic." *The "Awakener,"* November 1912.
45. Stead, William T. 1885. "Notice to Our Readers. A Frank Warning." *Pall Mall Gazette*, July 4, 1885; Stead, William T. 1885. "The Maiden Tribute of Modern Babylon – I." *Pall Mall Gazette*, July 6, 1885; Stead, William T. 1885. ""We Bid You Be of Hope"." *Pall Mall Gazette*, July 6, 1885; Stead, William T. 1885. "The Maiden Tribute of Modern Babylon – II." *Pall Mall Gazette*, July 7, 1885; Stead, William T. 1885. ""A Flame Which Shall Never Be Extinguished"." *Pall Mall Gazette*, July 8, 1885; Stead, William T. 1885. "The Maiden Tribute of Modern Babylon – III." *Pall Mall Gazette*, July 8, 1885; Stead, William T. 1885. "Of Good Cheer Indeed." *Pall Mall Gazette*, July 10, 1885; Stead, William T. 1885. "The Maiden Tribute of Modern Babylon – IV." *Pall Mall Gazette*, July 10, 1885.
46. Willcox, Richard R. 1958. "Prostitution and Venereal Disease." *International Review of Criminal Policy* 13: 67–98.
47. Willis, William Nicholas. 1912. *The White Slaves of London*. Boston: Richard G. Badger, The Gorham Press.
48. Wilson, Helen Mary. 1911. *Law and Administration in Regard to the Social Evil: An Outline of Existing Conditions and Projected Reforms in the Principal Civilised States*. London: The British Committee of the International Federation for the Abolition of State Regulation of Prostitution.
49. ———. 1916. "On Some Causes of Prostitution with Special Reference to Economic Conditions." Written for the *Eleventh Congress of the International Abolitionist Federation*. Paris, June 9-12, 1913. The Association for Moral and Social Hygiene.
50. ———. 1926. *Prostitution and the Law: Is Prostitution a Trade?* London: Association for Moral and Social Hygiene.

Chapter 5

Positive legal texts

1. *A v Home Secretary (No 2)*. 2005 [2005] UKHL 71. House of Lords.

2. *Cestaro v Italy*. 2014 App No 6884/11. European Court of Human Rights.
3. *Communication No 654/2015 (decision on Tunisia)*. 2017 CAT/C/61/D/654/2015. UN Committee against Torture.
4. Decision No 7/20: Prevention and Eradication of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment. 2020. Organization for Security and Co-operation in Europe.
5. *Gäfgen v Germany*. 2010 App No 22978/05. European Court of Human Rights, Grand Chamber.
6. International Criminal Court Act. 2001. United Kingdom.
7. *Jones and Others v United Kingdom*. 2014 App Nos 34356/06 and 40528/06. European Court of Human Rights.
8. *Jones v Saudi Arabia*. 2006 [2006] UKHL 26. House of Lords.
9. *Katwal v Nepal*. 2015 CCPR/C/113/D/2000/2012. UN Human Rights Committee.
10. *KL v Regina*. 2014 [2014] EWCA Civ 1386. UK Court of Appeal (Civil Division).
11. *Marguš v Croatia*. 2014 App No 4455/10. European Court of Human Rights, Grand Chamber.
12. *Mocanu and Others v Romania*. 2014 App Nos 10865/09, 45886/07 and 32431/08. European Court of Human Rights, Grand Chamber.
13. *Prosecutor v Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo. 2009 ICC-01/05-01/08. International Criminal Court, Pre-Trial Chamber II.
14. *Prosecutor v Furundžija*. 1998 IT-95-17/1-T. International Criminal Tribunal for the Former Yugoslavia.
15. *Prosecutor v Kunarac et al* 2002 IT-96-23 & IT-9623/1-A. International Criminal Tribunal for the Former Yugoslavia.
16. *Prosecutor v Mbarushimana*, Decision on the Confirmation of charges. 2011 ICC-01/04-01/10. International Criminal Court, Pre-Trial Chamber I.
17. *Public Committee v Government of Israel*. 1999 H.C. 5100/94. Israeli High Court of Justice.
18. *R v Bow Street Magistrate, ex p. Pinochet (No. 3)*. 1999 [2000] 1 AC 147. House of Lords.
19. *R v Reeves Taylor*. 2019 [2019] UKSC 51. UK Supreme Court.
20. *R v Zardad*. 2004 Case No T2203 7676. UK Crown Court.
21. ———. 2007 [2007] EWCA Crim 279. UK Court of Appeal (Criminal Division).
22. Resolution 16/23. 2011. A/HRC/RES/16/23. UN Human Rights Council.
23. Resolution on the Eradication of Torture in the World. 2014. 2013/2169(INI). European Union, European Parliament.
24. Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. 2001. A/RES/55/89. UN General Assembly.
25. ———. 2017. A/RES/72/163. UN General Assembly.
26. UNCAT. 2008. *General Comment No. 2 'Implementation of Article 2 by States Parties.'* CAT/C/GC/2. Geneva: UN Committee Against Torture.
27. ———. 2012. *General Comment No. 3 'Implementation of Article 14 by States Parties.'* CAT/C/GC/3. Geneva: UN Committee Against Torture.
28. ———. 2013. *Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, Adopted by the Committee at Its Fiftieth Session (6-13 May 2013)*. CAT/C/GBR/CO/5. Geneva: UN Committee Against Torture.
29. UNHRC. 1992. *Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*. CCPR/GC/20. Geneva: UN Human Rights Committee.
30. ———. 2015. *Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland*. CCPR/C/GBR/CO/7. Geneva: UN Human Rights Committee.
31. UNSC RES 2144. 2014. S/RES/2144. UN Security Council.

Policymakers' documents

1. Bernath, Barbara. 2010. *Preventing Torture: An Operational Guide for National Human Rights Institutions*. HR/PUB/10/1. OHCHR, APT and APF. Accessed July 25, 2022, www.ohchr.org/sites/default/files/Documents/Publications/PreventingTorture.pdf.
2. Boyle, Michael, and Jean-Claude Vullierme. 2018. *A Brief Introduction to Investigative Interviewing: A Practitioner's Guide*. Strasbourg: Council of Europe. Accessed July 25, 2022, https://rm.coe.int/guide-to-investigative-interviewing/16808ea8f9.
3. Council of the European Union. 2019. *Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 2019 Revision of the Guidelines*. 12107/19. Brussels: Council of the European Union.

4. CPT. 2002. *Report to the Government of 'the Former Yugoslav Republic of Macedonia' on the Visit to 'the Former Yugoslav Republic of Macedonia' Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 29 July 2002*. CPT/Inf (2003) 5. Strasbourg: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.
5. ———. 2002. *Report to the Government of the United Kingdom on the Visit to the United Kingdom Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 21 February 2002*. CPT/Inf (2003) 18. Strasbourg: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.
6. ———. 2004. *14th General Report on the CPT's Activities Covering the Period 1 August 2003 to 31 July 2004*. CPT/Inf (2004) 28. Strasbourg: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.
7. Gage, Sir William. 2011. *The Report of the Baha Mousa Inquiry, Vol. 1*. HC 1452–I. London: House of Commons.
8. ICC OTP. 2020. *Situation in Iraq/UK: Final Report*. The Hague: International Criminal Court, Office of the Prosecutor.
9. JCHR. 2009. *Allegations of UK Complicity in Torture*. HL Paper 152 HC 230. London: Joint Committee on Human Rights.
10. ———. 2009. *Closing the Impunity Gap: UK Law on Genocide (and Related Crimes) and Redress for Torture Victims*. HL Paper 153 HC 553. London: Joint Committee on Human Rights.
11. Melzer, Nils. 2018. *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. A/HRC/37/50. New York: UN General Assembly.
12. ———. 2020. "Communication of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer: OL GBR 6/2020." Accessed July 25, 2022, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25352.
13. ———. 2021. *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer*. A/76/168. New York: UN General Assembly.
14. Méndez, Juan E. 2011. *Report Submitted by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez*. A/HRC/16/52. Geneva: Human Rights Council.
15. ———. 2012. *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez*. A/HRC/19/61. New York: UN General Assembly.
16. Nowak, Manfred. 2010. *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. A/65/273. New York: UN General Assembly.
17. OHCHR. 2002. *Methods of Combating Torture*. Human Rights Fact Sheets Series No 4/Rev 1. Geneva: United Nations.
18. ———. 2004. *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Professional Training Series No. 8/Rev.1, HR/P/PT/8/Rev.1. New York; Geneva: United Nations.
19. Orentlicher, Diane F. 2005. *Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity*. 2005. E/CN.4/2005/102/Add.1. New York: UN Economic and Social Council.
20. OSCE. 2019. "Recommendations from Conference Participants." Written for the conference *Effective Multilateralism in the Fight Against Torture: Trends in the OSCE Region and the Way Forward*. Organization for Security and Co-operation in Europe. Accessed July 25, 2022, www.osce.org/files/f/documents/6/1/432173.pdf.
21. *Overseas Operations (Service Personnel and Veterans) Bill*. 2020. House of Commons, Commons Chamber. Vols. 608, 683. Hansard; *Overseas Operations (Service Personnel and Veterans) Bill*. 2020. House of Lords, Lords Chamber. Vols. 809, 810. Hansard; *Overseas Operations (Service Personnel and Veterans) Bill (Eight Sitting)*. 2020. House of Commons, Public Bill Committees. Hansard; *Overseas Operations (Service Personnel and Veterans) Bill (First Sitting)*. 2020. House of Commons, Public Bill Committees. Hansard; *Overseas Operations (Service Personnel and Veterans) Bill (Second Sitting)*. 2020. House of Commons, Public Bill Committees. Hansard; *Overseas Operations (Service Personnel and Veterans) Bill (Seventh Sitting)*. 2020. House of Commons, Public Bill Committees. Hansard; *Overseas Operations (Service Personnel and Veterans) Bill (Sixth Sitting)*. 2020. House of Commons, Public Bill Committees. Hansard; *Overseas Operations (Service Personnel and Veterans) Bill (Third Sitting)*. 2020. House of Commons, Public Bill Committees. Hansard.
22. Pillay, Navi. 2011. "'Torturers Will Be Brought to Justice Sooner or Later' – UN Human Rights Chief." Presented at the International Day in Support of Victims of Torture, June 24, 2011. Accessed July 25,

2022, https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11180&LangID=E.
23. Rodley, Nigel. 2001. *Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. A/56/156. New York: UN General Assembly.
24. ———. 2001. *Report of the Special Rapporteur, Sir Nigel Rodley, Submitted Pursuant to Commission on Human Rights Resolution 2001/62*. E/CN.4/2002/76. New York: UN Commission on Human Rights.
25. Svanidze, Erik. 2014. *Effective Investigation of Ill-Treatment: Guidelines on European Standards*. 2nd ed. Strasbourg: Council of Europe.
26. UK Foreign & Commonwealth Office. 2011. *FCO Strategy for the Prevention of Torture 2011-2015*. Human Rights and Democracy Department. Accessed July 25, 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/35449/fcostrategy-torturepreventionpdf.
27. UK Government. 2012. *Consideration of Reports Submitted by States Parties to the Human Rights Committee under Article 40 of the Convention - Seventh Periodic Reports of States Parties Due in July 2012 - United Kingdom, the British Overseas Territories, the Crown Dependencies*. CCPR/C/GBR/7. Geneva: UN Human Rights Committee.
28. ———. 2017. *Sixth Periodic Report to the Committee against Torture Submitted by the United Kingdom of Great Britain and Northern Ireland under Article 19 of the Convention Pursuant to the Optional Reporting Procedure, Due in 2017*. CAT/C/GBR/6. Geneva: UN Committee Against Torture.
29. ———. 2020. *Overseas Operations (Service Personnel and Veterans) Bill*. Bill 117 2019-21.
30. UK Ministry of Defence. 2020. *Overseas Operations (Service Personnel and Veterans) Bill: Explanatory Notes*. Bill 117–EN. House of Commons. Accessed July 25, 2022, https://publications.parliament.uk/pa/bills/cbill/58-01/0117/en/20117en.pdf.
31. UK Ministry of Justice. 2009. *The Government Response to the Joint Committee on Human Rights Report Closing the Impunity Gap: UK Law on Genocide (and Related Crimes) and Redress for Torture Victims*. Cm. 7704. London: Joint Committee on Human Rights.
32. UK Secretary of State for the Home Department and UK Secretary of State for Foreign and Commonwealth Affairs. 2009. *The Government Reply to the Twenty-Third Report from the Joint Committee on Human Rights Allegations of UK Complicity in Torture*. Cm. 7714. London: UK Government.
33. UNCAT. 2014. *Report of the Committee against Torture to the General Assembly*. A/69/44. Geneva: UN Committee Against Torture.

NGOs/civil society documents

1. Amnesty International. 2001. "Appendix 1 - Amnesty International's 12-Point Programme for the Prevention of Torture by Agents of the State." In *End Impunity: Justice for the Victims of Torture*. London: Amnesty International Publications & Amnesty International. 2001. *End Impunity: Justice for the Victims of Torture*. London: Amnesty International Publications.
2. ———. 2001. *Justice for Torture Victims, No Impunity for Torturers*. London: Amnesty International Publications.
3. ———. 2009. *Ending Impunity: Developing and Implementing a Global Action Plan Using Universal Jurisdiction*. London: Amnesty International Publications.
4. ———. 2014. "'No Safe Haven for Torturers' – The Rocky Road to the Convention against Torture." Amnesty International. November 19, 2014. Accessed July 25, 2022, www.amnesty.org/en/latest/news/2014/11/no-safe-haven-torturers-rocky-road-convention-against-torture/.
5. Amnesty International UK. 2020. "5 Things You Need to Know about the Overseas Operations Bill." November 18, 2020. Accessed July 25, 2022, www.amnesty.org.uk/blogs/campaigns-blog/5-things-you-need-know-about-overseas-operations-bill & Amnesty International UK. 2021. "25,000 People Called on the UK to Stop the Overseas Operations Bill." February 8, 2021. Accessed July 25, 2022, www.amnesty.org.uk/25000-people-called-uk-stop-overseas-operations-bill.
6. APT. 2013. *Key Issues in Drafting Anti-Torture Legislation, Expert Meeting, 2-3 November 2012, Report: Experience, Advice and Good Practices*. Association for the Prevention of Torture. Accessed July 25, 2022, www.apt.ch/en/resources/publications/key-issues-drafting-anti-torture-legislation-2013.
7. Bachelet, Michelle. 2017. "Inaugural Address of H.E President Michelle Bachelet Jeria, at the Opening Ceremony of the Convention against Torture Initiative (CTI) Regional Seminar for the Universal Ratification of the Convention against Torture." Presented at the Convention against Torture Initiative (CTI) Regional Seminar for the Universal Ratification of the Convention against Torture, Santiago

(Chile), April 5, 2017. Accessed July 25, 2022, https://cti2024.org/wp-content/uploads/2021/02/Discurso-Bachelet_ENG_final.pdf.

8. Bergman-Sapir, Efrat. 2016. *Documenting Torture While Providing Legal Aid: A Handbook for Lawyers*. PCATI and DIGNITY. Accessed July 25, 2022, www.dignity.dk/wp-content/uploads/Documenting-torture-while-providing-legail-aid-A-handbook-for-lawyers-2016.pdf.
9. CTI. 2019. *UNCAT Implementation Tool 6/2019: Cooperation on Extradition*. Convention Against Torture Initiative (CTI). Accessed July 25, 2022, https://cti2024.org/resource/cti-uncat-implementation-6-2019-cooperation-on-extradition/.
10. Ekins, Richard, and John Larkin. 2021. *Ten Ways to Improve the Overseas Operations Bill*. Policy Exchange. Accessed July 25, 2022, https://policyexchange.org.uk/publication/ten-ways-to-improve-the-overseas-operations-bill/.
11. Human Rights Watch. 2009. *Accountability for Torture: Questions and Answer*. Human Rights Watch. Accessed July 25, 2022, www.hrw.org/sites/default/files/related_material/2009_CT_AccountabilityQA.pdf.
12. ———. 2009. *Cruel Britannia: British Complicity in the Torture and Ill-Treatment of Terror Suspects in Pakistan*. New York: Human Rights Watch.
13. ———. 2015. *No More Excuses: A Roadmap to Justice for CIA Torture*. Human Rights Watch. Accessed July 25, 2022, www.hrw.org/sites/default/files/report_pdf/us1215web.pdf.
14. IRCT. 2014. *Global Report on the UN International Day in Support of Victims of Torture 26 June 2014. Fighting Impunity*. Copenhagen: International Rehabilitation Council for Torture Victims.
15. ———. 2014. "Fighting Impunity: IRCT Statement on the Occasion of the International Day in Support of Victims of Torture." International Rehabilitation Council for Torture Victims, June 26, 2014. Accessed July 25, 2022, https://irct.org/media-and-resources/latest-news/article/823.
16. ———. 2017. *Data in the Fight against Impunity: Capturing Torture Survivors' Information about Torture, Impunity and Rehabilitation*. International Rehabilitation Council for Torture Victims. Accessed July 25, 2022, https://irct.org/assets/uploads/pdf_20170906092356.pdf.
17. Lardy, Anne. 2016. *Guide on Anti-Torture Legislation*. Association for the Prevention of Torture. Accessed July 25, 2022, www.apt.ch/en/resources/publications/guide-anti-torture-legislation-2016.
18. Larkin, John. 2020. *Overseas Operations Bill: A Policy Exchange Research Note*. Policy Exchange. Accessed July 25, 2022, https://policyexchange.org.uk/wp-content/uploads/Overseas-Operations-Bill.pdf.
19. Liberty. 2010. *A Parliamentarian's Guide to the Human Rights Act*. London: The National Council for Civil Liberties.
20. ———. 2019. "UK U-Turn on Torture Inquiry 'Disgraceful.'" Liberty. July 8, 2019. Accessed July 25, 2022, www.libertyhumanrights.org.uk/issue/2069/.
21. Malcolm, Noel. 2017. *Human Rights and Human Wrongs: A New Approach to Human Rights Law*. Policy Exchange. Accessed July 25, 2022, https://policyexchange.org.uk/publication/human-rights-and-political-wrongs-a-new-approach-to-human-rights-law/.
22. OMCT. 2020. "George Floyd Killing: Urgent Measures Are Needed to Prevent Lasting…." OMCT. June 5, 2020. Accessed July 25, 2022, www.omct.org/en/resources/statements/was-george-floyd-tortured-to-death-urgent-measures-are-needed-to-prevent-lasting-damage-to-human-rights-and-democracy.
23. OMCT, WLW, Amnesty International and GJC. 2018. *Briefing Report - Thematic Briefing: Protecting Women from Violence through the UN Convention Against Torture*. World Organisation Against Torture, Women's Link Worldwide, Amnesty International and Global Justice Center. Accessed July 25, 2022, https://www.omct.org/site-resources/legacy/briefing_report__protecting_women_from_violence_through_the_un_convention_against_torture_2020-12-11-144516.pdf.
24. Pinto-Duschinsky, Michael. 2011. *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK*. Policy Exchange. Accessed July 25, 2022, https://policyexchange.org.uk/publication/bringing-rights-back-home-making-human-rights-compatible-with-parliamentary-democracy-in-the-uk/.
25. Redress. 2000. *Challenging Impunity for Torture: A Manual for Bringing Criminal and Civil Proceedings in England and Wales for Torture Committed Abroad*. Mitcham, UK: The REDRESS Trust.
26. ———. 2011. *UK Extradition Policy: Submission to the Joint Committee on Human Rights (JCHR)*. Redress. Accessed July 25, 2022, https://redress.org/wp-content/uploads/2018/01/JCHR-Submission-27-January-2011.pdf.
27. ———. 2018. *A World Without Torture*. Redress. Accessed July 25, 2022, https://redress.org/publication/a-world-without-torture/.

28. ———. 2021. *Upholding the Convention against Torture: Briefing Paper on the Overseas Operations Bill, House of Lords Briefing Paper: Overseas Operations Bill*. Redress. Accessed July 25, 2022, https://redress.org/wp-content/uploads/2021/01/Overseas-Operations-Bill-Briefing-January-2021-2.pdf.
29. ———. n.d. "About Us." Accessed July 25, 2022. https://redress.org/about-us/ & Redress. n.d. "Our Work." Accessed July 25, 2022. https://redress.org/our-work/.
30. Tugendhat, Thomas, and Laura Croft. 2013. *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power*. Policy Exchange. Accessed July 25, 2022, https://policyexchange.org.uk/publication/the-fog-of-law-an-introduction-to-the-legal-erosion-of-british-fighting-power/.
31. We Charge Genocide. 2014. *Police Violence against Chicago's Youth of Color: A Report Prepared for the United Nations Committee Against Torture on the Occasion of Its Review of the United States of America's Third Periodic Report to the Committee Against Torture*. We Charge Genocide. Accessed July 25, 2022, http://report.wechargegenocide.org/.

Academic publications

1. Ambos, Kai. 2008. "May a State Torture Suspects to Save the Life of Innocents?" *Journal of International Criminal Justice* 6 (2): 261–87.
2. Bagaric, Mirko, and Julie Clarke. 2007. *When the Unthinkable Is Morally Permissible*. Albany, NY: State University of New York Press.
3. Bianchi, Andrea. 1999. "Immunity versus Human Rights: The Pinochet Case." *European Journal of International Law* 10 (2): 237–77.
4. Cryer, Robert. 2020. "International Law, Crime and Torture." In *Research Handbook on Torture Legal and Medical Perspectives on Prohibition and Prevention*, edited by Malcolm D. Evans and Jens Modvig, 288–313. Cheltenham; Northampton, MA: Edward Elgar Publishing.
5. Davis, Angela Y. 2005. *Abolition Democracy: Beyond Empire, Prisons, and Torture*. New York: Seven Stories Press.
6. Dershowitz, Alan. 2004. "Tortured Reasoning." In *Torture: A Collection*, edited by Sanford Levinson, 257–80. Oxford; New York: Oxford University Press.
7. Dorfman, Ariel. 2004. "Foreword: The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?" In *Torture: A Collection*, edited by Sanford Levinson, 3–18. Oxford; New York: Oxford University Press.
8. Gaeta, Paola. 2004. "May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?" *Journal of International Criminal Justice* 2 (3): 785–94.
9. ———. 2008. "When Is the Involvement of State Officials a Requirement for the Crime of Torture?" *Journal of International Criminal Justice* 6 (2): 183–93.
10. Greer, Steven. 2011. "Should Police Threats to Torture Suspects Always Be Severely Punished? Reflections on the Gafgen Case." *Human Rights Law Review* 11 (1): 67–89.
11. Gross, Oren. 2004. "The Prohibition on Torture and the Limits of the Law." In *Torture: A Collection*, edited by Sanford Levinson, 229–55. Oxford; New York: Oxford University Press.
12. Gur-Arye, Miriam. 2004. "Can the War against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience." In *Torture: A Collection*, edited by Sanford Levinson, 183–98. Oxford; New York: Oxford University Press.
13. Ignatieff, Michael. 2004. *Lesser Evil: Political Ethics in an Age of Terror*. Princeton: Princeton University Press.
14. Jackson, Miles. 2018. "Amnesties in Strasbourg." *Oxford Journal of Legal Studies* 38 (3): 451–74.
15. Kaleck, Wolfgang, and Patrick Kroker. 2018. "Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?" *Journal of International Criminal Justice* 16 (1): 165–91.
16. Kelly, Tobias. 2013. *This Side of Silence: Human Rights, Torture, and the Recognition of Cruelty*. Philadelphia: University of Pennsylvania Press.
17. Levinson, Sanford. 2004. "Contemplating Torture: An Introduction." In *Torture: A Collection*, edited by Sanford Levinson, 23–45. Oxford; New York: Oxford University Press.
18. Mavronicola, Natasa. 2021. *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs*. Oxford: Hart Publishing.
19. Osiel, Mark. 2004. "The Mental State of Torturers: Argentina's Dirty War." In *Torture: A Collection*, edited by Sanford Levinson, 129–44. Oxford; New York: Oxford University Press.
20. Parry, John T. 2004. "Escalation and Necessity: Defining Torture at Home and Abroad." In *Torture: A Collection*, edited by Sanford Levinson, 145–64. Oxford; New York: Oxford University Press.

21. Parry, John T., and Welsh S. White. 2002. "Interrogating Suspected Terrorists: Should Torture Be an Option." *University of Pittsburgh Law Review* 63 (4): 743–66.
22. Paust, Jordan J. 2009. "The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions." *Valparaiso University Law Review* 43 (4): 1535–76.
23. Posner, Richard A. 2004. "Torture, Terrorism, and Interrogation." In *Torture: A Collection*, edited by Sanford Levinson, 291–98. Oxford; New York: Oxford University Press.
24. Rodley, Nigel, and Matt Pollard. 2006. "Criminalisation of Torture: State Obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." *European Human Rights Law Review* 2: 115–41.
25. Roth, Broad R. 2008. "Just Short of Torture: Abusive Treatment and the Limits of International Criminal Justice." *Journal of International Criminal Justice* 6: 215–39.

Chapter 6

Positive legal texts

1. Act No. XXIV (Originally, The Madras District Police Act. Now, The Tamil Nadu District Police Act). 1859. India.
2. Code of Conduct for Law Enforcement Officials. 1979. A/RES/34/169. UN General Assembly.
3. Common Article 3 in Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. 1949. 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. 1949. 75 UNTS 85; Geneva Convention Relative to the Protection of Civilian Persons in Times of War. 1949. 75 UNTS 297; Geneva Convention Relative to the Treatment of Prisoners of War. 1949. 75 UNTS 135.
4. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 1984. 1465 UNTS 85.
5. Criminal Justice Act. 1988. United Kingdom.
6. Criminal Law of Tuscany (Codice Leopoldino). 1786. Grand Duchy of Tuscany (now Italy).
7. Declaration of King Louis XVI. 1788. France.
8. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 1975. A/RES/3452(XXX). UN General Assembly.
9. Decree of the French Constituent Assembly of 8 and 9 October 1789. 1789. France.
10. Decree of King Louis XVI, Abolishing the Question Préparatoire. 1780. France.
11. Decree of Maria Theresa of Austria (Vienna). 1776. Austria-Hungary.
12. Decrees of Fredrick II. 1754. Prussia. Accessed July 25, 2022, http://www.friedrich.uni-trier.de/de/roedenbeck/1/text/.
13. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. 1987. ETS No 126.
14. European Convention on Human Rights. 1950. ETS No 5.
15. French Code Pénal. 1810. France.
16. *Greece v United Kingdom*. 1958 App No. 176/56. European Commission of Human Rights.
17. Indian Penal Code. 1860. India.
18. Indian Police Act. 1861. India.
19. International Convention on the Suppression and Punishment of the Crime of Apartheid. 1973. 1015 UNTS 243.
20. International Covenant on Civil and Political Rights. 1966. 999 UNTS 171.
21. *Ireland v United Kingdom*. 1976 App No. 5310/71. European Commission of Human Rights.
22. ———. 1978 App No. 5310/71. European Court of Human Rights, Plenary.
23. Northern Ireland (Emergency Provisions) Act. 1973. United Kingdom.
24. Nuremberg Military Tribunals. 1946. Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume II: "*The Medical Case*" "*The Milch Case*." Nuremberg Military Tribunals.
25. Law of the Realm. 1734. Sweden. Cited in Pihlajamäki, Heikki. 2007. "The Painful Question: The Fate of Judicial Torture in Early Modern Sweden." *Law and History Review* 25 (3): 557–92.
26. Order of Fredrick II. 1740. Prussia. Accessed July 25, 2022, http://www.friedrich.uni-trier.de/de/roedenbeck/1/text/.

27. Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 1982. A/RES/37/194. UN General Assembly.
28. Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 1973. A/RES/3059(XXVIII). UN General Assembly.
29. Regulation of Poland. 1776. Poland.
30. *The Greek Case*. 1969 App No. 3321/67, 3322/67, 3323/67, 3344/67. European Commission of Human Rights.
31. Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment. 1974. A/RES/3059(XXIX). UN General Assembly; Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment. 1975. A/RES/3453(XXX). UN General Assembly; Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 1976. A/RES/31/85. UN General Assembly.
32. Treason Act. 1708. United Kingdom.
33. UNHRC. 1982. *General Comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment)*. A/37/40 at 94. Geneva: UN Human Rights Committee.
34. Universal Declaration of Human Rights. 1948. A/RES/217(III). UN General Assembly.

Policymakers' documents

1. *Alleged Police Torture (Punjab)*. 1909. House of Commons, Commons Chamber. Vol. 11. Hansard; *Torture of Political Prisoners (Morocco)*. 1909. House of Commons, Commons Chamber. Vol. 11. Hansard; *Alleged Torture of Prisoners (India)*. 1909. House of Commons, Commons Chamber. Vol. 11. Hansard; *Ghulam Mohammed (Alleged Torture by Police)*. 1909. House of Commons, Commons Chamber. Vol. 11. Hansard; *Bengal Police (Alleged Torture of Prisoners)*. 1911. House of Commons, Commons Chamber. Vol. 23. Hansard; *Punjab (Torture Cases)*. 1911. House of Commons, Commons Chamber. Vol. 23. Hansard; *Alleged Torture of Prisoners, India*. 1911. House of Commons, Commons Chamber. Vol. 32. Hansard; *Indian Police (Convictions for Torture)*. 1911. House of Commons, Commons Chamber. Vol. 32. Hansard.
2. Bennett, Harry Graham. 1979. *Report of The Committee of Inquiry into Police Interrogation Procedures in Northern Ireland*. Cmnd. 7497. London: Secretary of State for Northern Ireland.
3. *Bill 155 Second Reading*. 1875. House of Commons, Commons Chambers. Vol. 224. Hansard.
4. Bowen, Roderic. 1966. *Report by Mr. Roderic Bowen, Q.C., on Procedures for the Arrest, Interrogation and Detention of Suspected Terrorists in Aden*. Cmnd. 3165. London: UK Secretary of State for Foreign Affairs.
5. Buckland, CT. 1861. *Police Torture and Murder in Bengal. Reports of Two Trials of the Police of the District of Burdwan, in August and September 1860, Confirmed by the Sudder Nizamut*. Calcutta: Saville & Cranenburg, Printers, Bengal Printing Company Limited.
6. Catharine II. 1769. *Instruction Donnée Par Catherine II, Impératrice de Toutes Les Russies … Traduite En François*. Lausanne: François Grasset & Comp.
7. Compton, Sir Edmund. 1971. *Report of the Enquiry into Allegations against the Security Forces of Physical Brutality in Northern Ireland Arising out of Events on the 9th August, 1971*. Cmnd. 4823. London: Home Office.
8. Corfield, Frank Derek. 1960. *Historical Survey of the Origins and Growth of Mau Mau*. Cmnd. 1030. London: Colonial Office.
9. *Criminal Law (India)-Use of Torture-Question*. 1879. House of Commons, Commons Sitting. Vol. 245. Hansard.
10. ECommHR. 1956. *Preparatory Work on Article 3 of the European Convention of Human Rights*. DH(56)5. Strasbourg: Council of Europe.
11. *Egypt—Torture, &C In Egyptian Prisons*. 1884. House of Commons, Commons Chamber. Vol. 290. Hansard.
12. Fredrich II. 1913/1749. "Über Die Gründe, Gesetze Einzuführen Oder Abzuschaffen." In *Die Werke Friedrichs des Großen: In Deutscher*, edited by Gustav Berthold Volz. Berlin: Reimar Hobbing. Accessed July 25, 2022, http://friedrich.uni-trier.de/de/volz/8/34/text/.
13. *India - Tenure of Land in Madras*. 1854. House of Commons, Commons Sitting. Vol. 135. Hansard.
14. *Italy—Torture in Sicily*. 1860. House of Commons, Commons Sitting. Vol. 158. Hansard.
15. Kooijmans, Pieter H. 1986. *Report by the Special Rapporteur, Mr. P. Kooijmans, Appointed Pursuant to Commission on Human Rights Resolution 1985/33*. E/CN.4/1986/15. New York: UN Commission on Human Rights.

16. Lewin, Malcolm. 1857. "Report of the Second Judge of the Sudder Court of Madras (Chittoor, 28 September 1840)." In *Torture in Madras*, by Malcolm Lewin. London: James Ridgway.
17. Lieber, Francis. 1863. *Instructions for the Government of Armies of the United States in the Field, General Order No. 100*. Washington, DC: US Adjutant General's Office.
18. Lord Diplock. 1972. *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland*. Cmnd. 5185. London: Secretary of State for Northern Ireland.
19. Lord Gardiner. 1972. *Minority Report of the Committee of Privy Counsellors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism*. Cmnd. 4901. London: UK Prime Minister.
20. Lord Parker of Waddington. 1972. *Report of the Committee of Privy Counsellors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism*. Cmnd. 4901. London: UK Prime Minister.
21. Madras Commission. 1855. *Report of the Commissioners for the Investigation of Alleged Cases of Torture, in the Madras Presidency - Submitted to the Right Honorable the Governor in Council of Fort Saint George, on the 16th April 1855 (H. Smith, at the Fort St. George Gazette Press 1855)*. London: House of Commons.
22. Percy, T.R. 1963. *Report of an Inquiry Held by the Visiting Committee into Allegations of Ill-Treatment of Prisoners in Her Majesty's Prison, Durham*. Cmnd. 2068. London: UK Secretary of State for the Home Department.
23. *Torture In India*. 1856. House of Lords, Lords Chamber. Vols. 140, 141. Hansard; *East India Company's Revenue Ac Counts—Statement on Indian Affairs*. 1956. House of Lords, Lords Chamber. Vol. 143. Hansard; *Torture in India—Question*. 1856. Vol. 145. House of Lords, Lords Chamber. Hansard.
24. UK Secretary of State for the Colonies. 1949. *British Dependencies in the Far East 1945-1949*. Cmd. 7709. London: UK Secretary of State for the Colonies.
25. UN. 1975. *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*. A/CONF.56/10. Geneva: United Nations.
26. UN Commission on Human Rights - Drafting Committee. 1948. *Second Session, Twenty-Third Meeting*. E/CN.4/AC.1/SR.23. New York: UN Economic and Social Council.
27. UN Drafting Committee on an International Bill of Human Rights. 1947. *First Session, Report of the Drafting Committee to the Commission on Human Rights*. E/CN.4/21. New York: UN Commission on Human Rights.
28. UN Secretary-General. 1955. *Draft International Covenants on Human Rights - Annotation*. A/2929. New York: UN General Assembly.
29. UNGA. 1974. *General Assembly, 29th Session, 3rd Committee, 2064th Meeting*. A/C.3/SR.2064. New York: UN General Assembly; UNGA. 1974. *General Assembly, 29th Session, 3rd Committee, 2065th Meeting*. A/C.3/SR.2065. New York: UN General Assembly; UNGA. 1974. *General Assembly, 29th Session, 3rd Committee, 2071st Meeting*. A/C.3/SR.2071. New York: UN General Assembly.
30. ———. 1975. *General Assembly, 30th Session, 3rd Committee, 2160th Meeting*. A/C.3/SR.2160. New York: UN General Assembly.

NGOs/civil society documents & academic publications

1. Amnesty International. 1968. *Situation in Greece*. London: Amnesty International.
2. ———. 1968. *Torture of Political Prisoners in Greece: Second Report by Amnesty International*. London: Amnesty International.
3. ———. 1972. *Report of an Enquiry into Allegations of Ill-Treatment in Northern Ireland*. London: Amnesty International.
4. ———. 1973. *Report on Torture*. London: Dukworth and Amnesty International Publications.
5. ———. 1977. *Torture in Greece: The First Torturers' Trial 1975*. London: Amnesty International Publications.
6. ———. 1978. *Report of an Amnesty International Mission to Northern Ireland (28 Nov - 6 Dec 1977)*. London: Amnesty International Publications.
7. ———. 1984. "12-Point Programme for the Prevention of Torture." In *Torture in the Eighties*. London: Amnesty International Publications.
8. ———. 1984. *Torture in the Eighties*. London: Amnesty International Publications.
9. Anonymous. 1776. "Osservazioni Sopra l'uso Della Tortura." In *Su l'abolizione Della Tortura Del Sig. Di Sonnenfels, Consigliere Nella Reggenza d'Austria Di S.M: E Professore Di Politica, Tradotto Dal Tedesco Con Alcune Osservazioni Sul Medesimo Argomento*, by Joseph Sonnenfels. Milano: Galeazzi.
10. ———. 1857. "Report of the Commissioners of the Investigation of Alleged Cases of Torture at Madras." *Calcutta Review*, 439–66.

11. Barrows, Samuel J. 1907. *Report of Proceedings of the Seventh International Prison Congress Held at Budapest, Hungary, in September 1905*. Washington, DC: Government Printing Office.
12. Barton, Tony. 1968. *VI International Assembly of Amnesty International at Stockholm 24/25 August 68 - Conference on Torture and Inhuman Treatment*. Amnesty International. LSE Library Archives special FOLIO FHV/F97.
13. Beccaria, Cesare. 1973/1764. *Dei Delitti e Delle Pene*. Milano: Mursia.
14. Becket, James. 1970. "The Greek Case Before the European Human Rights Commission." *Human Rights* 1 (1): 91–117.
15. Benenson, Peter. 1966. *A Report by Amnesty International: Aden 1963-1966*. London: Amnesty International.
16. Bentham, Jeremy. 1777. "Of Compulsion and herein of Torture." Cited in Twining, William Lawrence, and Penelope Elizabeth Twining. 1973. "Bentham on Torture." *Northern Ireland Legal Quarterly* 24 (3): 305–56.
17. ———. 1778-1780. "C – Of Torture." Cited in Twining, William Lawrence, and Penelope Elizabeth Twining. 1973. "Bentham on Torture." *Northern Ireland Legal Quarterly* 24 (3): 305–56.
18. Blackstone, William. 1795/1770. *Commentaries on the Laws of England*. Vol. 4. London: Srahan and W. Woodfall.
19. Botterud, Karen F. 1984. "International Protection of Fundamental Freedoms and Human Rights: The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." *ASILS International Law Journal* 8: 67–102.
20. Brownlie, Ian. 1972. "Interrogation in Depth: The Compton and Parker Reports." *Modern Law Review* 35 (5): 501–7.
21. Coursier, Henri. 1971. "The Prohibition of Torture." *International Review of the Red Cross* 126: 475-489.
22. De Fierlant, Goswin. 1771. "Observations sur la torture."Cited in Hubert, Eugène. 1894. "Un Chapitre de l'histoire Du Droit Criminel Dans Les Pays-Bas Autrichiens Au XVIIIe Siècle: Les Mémoires de Goswin de Fierlant." *Compte Rendu Des Séances de La Commission Royale d'histoire* 4: 154–253.
23. Dickens, Charles. 1842. *American Notes for General Circulation - Volume 1*. London: Chapman and Hall.
24. Fifth International Prison Congress. 1896. *Report of the Delegates of the United States to the Fifth International Prison Congress Held at Paris, France, in July 1895*. Washington, DC: Government Printing Office.
25. Filangieri, Gaetano. 1872/1780. *La Scienza Della Legislazione, Preceduta Da Un Discorso Di Paquale Villari. Volume Secondo*. Firenze: Successori Le Monnier.
26. Hume, David. 1797. *Commentaries on the Law of Scotland, Respecting the Description and Punishment of Crimes*. Vol. II. Edinburg: Bell & Bradfute.
27. International Commission of Jurists. 1976. *Review No. 16*. London: International Commission of Jurists.
28. ———. 1987. *The Prevention of Torture in the Americas: Visits to Persons Deprived of Their Liberty - Report of the Meeting of Experts, Montevideo 6-9 April 1987*. Geneva: International Commission of Jurists.
29. International Commission of Jurists and Swiss Committee Against Torture. 1979. *Torture: How to Make the International Convention Effective - A Draft Optional Protocol*. Geneva: International Commission of Jurists.
30. Jardine, David. 1837. *A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth*. London: Baldwin and Cradock.
31. Klayman, Barry M. 1978. "Definition of Torture in International Law." *Temple Law Quarterly* 51 (3): 449–517.
32. Lea, Henry Charles. 1866. *Superstition and Force: Essays on the Wager of Law, the Wager of Battle, the Ordeal, Torture*. Philadelphia: Collins.
33. Levie, Howard S. 1962. "Penal Sanctions for Maltreatment of Prisoners of War." *American Journal of International Law* 56 (2): 433–68.
34. Lewin, Malcolm. 1856. *Is the Practice of Torture in Madras, with the Sanction of the Authorities of Leadenhall Street?* Westminster: T. Brettell.
35. Lopez-Rey, Manuel. 1978. "Crime and Human Rights." *Federal Probation* 42 (1): 10–15.
36. Lowell, Abbott Lawrence. 1897. "The Judicial Use of Torture. Part I." *Harvard Law Review* 11 (4): 220–33 & Lowell, Abbott Lawrence. 1897. "The Judicial Use of Torture. Part II." *Harvard Law Review* 11 (5): 290–300.
37. Lowry, David. 1973. "Ill-Treatment, Brutality, and Torture: Some Thoughts upon the Treatment of Irish Political Prisoners." *DePaul Law Review* 22 (3): 553–629.
38. Marx, Karl. 1857. "Investigation of Tortures in India." *New-York Daily Tribune*, September 17, 1857.

39. Montesquieu, Charles Louis de Secondat, Baron de. 1777/1750. "The Spirit of the Laws, Book VI, Chapter XVII (Of the Rack)." In *The Complete Works of M. de Montesquieu*. Vol. 1. London: T. Evans.
40. O'Boyle, Michael. 1978. "Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom." *American Journal of International Law* 71 (4): 674–706.
41. Rastgeldi, S. 1966. *Aden Report*. London: Amnesty International.
42. Shue, Henry. 1978. "Torture." *Philosophy & Public Affairs* 7 (2): 124–43.
43. Smollett, Patrick B. 1858. *Madras: Its Civil Administration; Being Rough Notes from Personal Observation, Written in 1855 & 1856*. London: Richardson Brothers.
44. Sonnenfels, Joseph. 1776. *Su l'abolizione Della Tortura Del Sig. Di Sonnenfels, Consigliere Nella Reggenza d'Austria Di S.M: E Professore Di Politica, Tradotto Dal Tedesco Con Alcune Osservazioni Sul Medesimo Argomento*. Milano: Galeazzi.
45. Spanish Atrocities Committee. 1897. *Revival of the Inquisition. Details of the Tortures Inflicted on Spanish Political Prisoners*. London: J. Perry for the Spanish Atrocities Committee.
46. Tallack, William. 1889. *Penological and Preventive Principles. With Special Reference to Europe and America, and to the Diminution of Crime, Pauperism, and Intemperance, to Prisons and Their Substitutes, Habitual Offenders, Sentences, Neglected Youth, Education, Police, Statistics, Etc*. London: Lea Wertheimer & Co.
47. ———. 1890. "Prisons and Criminal Treatment." In *Summary of a Lecture Delivered at the London Institution*. Accessed July 25, 2022, www.jstor.org/stable/10.2307/60222733.
48. ———. 1897. "Spain and the Torture." *The Times*, June 7, 1897.
49. The Howard Association. 1870. *Pamphlet Dated 1870*. Accessed July 25, 2022, https://www.google.co.uk/books/edition/_/3Z5LAAAAcAAJ?hl=en&gbpv=0.
50. Thomasius, Christian. 2004/1705. "Über Die Folter." In *The Witchcraft Sourcebook*, edited by Brian P. Levack, 168–70. New York; London: Routledge.
51. Verri, Pietro. 1843/1777. "Osservazioni Sulla Tortura, e Singolarmente Sugli Effetti Che Produsse All'occasione Delle Unzioni Malefiche, Alle Quali Si Attribuì La Pestilenza Che Devastò Milano l'anno 1630." In *Storia Della Colonna Infame*, by Alessandro Manzoni. Parigi: Baudry, Libreria Europea.
52. Voltaire. 1901/1764. "Torture." In *The Works of Voltaire, A Contemporary Version, Vol. VII (Philosophical Dictionary, Part 5)*, edited by John Morley and Tobias Smollett, translated by William F. Fleming. New York: E.R. DuMont. Accessed July 25, 2022, https://oll.libertyfund.org/title/fleming-the-works-of-voltaire-vol-vii-philosophical-dictionary-part-5#Voltaire_0060-07_1597.
53. ———. 2012/1766. "Commentario Su Dei Delitti e Delle Pene." In *Dei Delitti e Delle Pene, Con Il Commento Di Voltaire*, by Cesare Beccaria. Roma: Newton Comton Editori.
54. Walzer, Michael. 1973. "Political Action: The Problem of Dirty Hands." *Philosophy & Political Affairs* 2 (2): 160–80.
55. Williams, James. 1911. "Torture." In *Encyclopædia Britannica*. Vol. 27.
56. Wines, Enoch Cobb. 1873. *Report on the International Penitentiary Congress of London, Held July 3-13, 1872*. Washington, DC: Government Printing Office.

References

Adams, Cherish. 2011. "Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Re-Victimization of Sex Trafficking Victims." *George Washington International Law Review* 43 (1): 201–234.

Adelman, Sam. 2011. "Cosmopolitan Sovereignty." In *Cosmopolitan Justice and Its Discontents*, edited by Cecilia Bailliet and Katja Franko, 11–28. Abingdon: Routledge.

Adler-Nissen, Rebecca. 2014. "Stigma Management in International Relations: Transgressive Identities, Norms, and Order in International Society." *International Organization* 68 (1): 143–76.

Advisory Commission for the Protection and Welfare of Children and Young People. 1934. *Report on the Work of the Commission in 1934*. C.149.M.162.1934.IV. Geneva: League of Nations.

———. 1935. *Report on the Work of the Commission in 1935*. C.187.M.104.1935.IV. Geneva: League of Nations.

Advisory Committee on Social Questions. 1937. *Report of the Sub-Committee Entrusted with the Drawing up of the Second Draft of a Convention for Suppressing the Exploitation of the Prostitution of Others*. C.331.M.223.1937.IV. Geneva: League of Nations.

Aertsen, Ivo. 2012. "Punitivity from a Victim's Perspective." In *Resisting punitiveness in Europe: Welfare, Human Rights, and Democracy*, edited by Sonja Snacken and Els Dumortier, 202–24. Abingdon: Routledge.

Agamben, Giorgio. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Stanford: Stanford University Press.

Aitchison, Guy. 2018. "Are Human Rights Moralistic?" *Human Rights Review* 19 (1): 23–43.

Akbar, Amna A. 2020. "An Abolitionist Horizon for (Police) Reform." *California Law Review* 108: 1781–1846.

Akhavan, Payam. 2003. "The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability." *American Journal of International Law* 97 (3): 712.

Aldana-Pindell, Raquel. 2004. "An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes." *Human Rights Quarterly* 26 (3): 605–85.

Alejandro, Audrey, Marion Laurence, and Lucile Maertens. forthcoming. "Discourse Analysis." In *Introduction to International Organization Research Methods*, edited by Fanny Badache, Leah R. Kimber, and Lucile Maertens. Ann Arbor: Michigan University Press.

Allain, Jean. 2017a. "White Slave Traffic in International Law." *Journal of Trafficking and Human Exploitation* 1 (1): 1–40.

———. 2017b. "Genealogies of Human Trafficking and Slavery." In *Routledge Handbook of Human Trafficking*, edited by Ryszard Piotrowicz, Conny Rijken, and Baerbel Heide Uhl, 3–12. New York: Routledge.

Alleg, Henri. 1958. *The Question*. Translated by John Calder. London: John Calder.

Alston, Philip. 2017. "The Populist Challenge to Human Rights." *Journal of Human Rights Practice* 9: 1–15.

Ambos, Kai. 2008. "May a State Torture Suspects to Save the Life of Innocents?" *Journal of International Criminal Justice* 6 (2): 261–87.

———. 2013. "Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law." *Oxford Journal of Legal Studies* 33 (2): 293–315.

Amnesty International. 1968a. *Situation in Greece*. London: Amnesty International.

———. 1968b. *Torture of Political Prisoners in Greece: Second Report by Amnesty International*. London: Amnesty International.

———. 1972. *Report of an Enquiry into Allegations of Ill-Treatment in Northern Ireland*. London: Amnesty International.

———. 1973. *Report on Torture*. London: Dukworth and Amnesty International Publications.

———. 1976. *Amnesty International, A Chronology: 1961–1976*. London: Amnesty International.

———. 1977. *Torture in Greece: The First Torturers' Trial 1975*. London: Amnesty International Publications.

———. 1984. *Torture in the Eighties*. London: Amnesty International Publications.

———. 2001a. "Appendix 1 - Amnesty International's 12-Point Programme for the Prevention of Torture by Agents of the State." In *End Impunity: Justice for the Victims of Torture*. London: Amnesty International Publications.

———. 2001b. *End Impunity: Justice for the Victims of Torture*. London: Amnesty International Publications.

———. 2001c. *Justice for Torture Victims, No Impunity for Torturers*. London: Amnesty International Publications.

———. 2008. *United Kingdom - Briefing to the Human Rights Committee*. Amnesty International. Accessed July 25, 2022, www.amnesty.org/en/documents/eur45/011/2008/en/.

———. 2009. *Ending Impunity: Developing and Implementing a Global Action Plan Using Universal Jurisdiction*. London: Amnesty International Publications.

Amnesty International and Anti-Slavery International. 2004. *Memorandum on the Draft European Convention on Action against Trafficking in Human Beings: Protection of the Rights of Trafficked Persons*. Amnesty International. Accessed July 25, 2022, www.amnesty.org/download/Documents/96000/ior610112004en.pdf.

Amnesty International UK. 2020. "5 Things You Need to Know about the Overseas Operations Bill." November 18, 2020. Accessed July 25, 2022, www.amnesty.org.uk/blogs/campaigns-blog/5-things-you-need-know-about-overseas-operations-bill.

———. 2021. "25,000 People Called on the UK to Stop the Overseas Operations Bill." February 8, 2021. Accessed July 25, 2022, www.amnesty.org.uk/25000-people-called-uk-stop-overseas-operations-bill.

Andorno, Roberto. 2014. "Human Dignity and Human Rights." In *Handbook of Global Bioethics*, edited by Henk A.M.J. ten Have and Bert Gordijn, 45–57. Dordrecht: Springer.

Andrijasevic, Rutvica. 2007. "Beautiful Dead Bodies: Gender, Migration and Representation in Anti-Trafficking Campaigns." *Feminist Review* 86: 24–44.

———. 2014. "The Figure of the Trafficked Victim: Gender, Rights and Representation." In *The SAGE Handbook of Feminist Theory*, edited by Mary Evans, Clare Hemmings, Marsha Henry, Hazel Johnstone, Sumi Madhok, Ania Plomien, and Sadie Wearing, 359–73. Los Angeles: SAGE Publications.

Anghie, Antony. 2005. *Imperialism, Sovereignty and the Making of International Law*. Cambridge: Cambridge University Press.

Annan, Kofi. 1998. "Secretary-General Says Establishment of International Criminal Court Is Gift of Hope to Future Generations." July 20, 1998. Accessed July 25, 2022, www.un.org/press/en/1998/19980720.sgsm6643.html.

Annison, Rachel. 2013. *In the Dock - Examining the UK's Criminal Justice Response to Trafficking*. Anti-Trafficking Monitoring Group. Accessed July 25, 2022, www.antislavery.org/wp-content/uploads/2017/01/in_the_dock_final.pdf.

Anonymous. 1776. "Osservazioni Sopra l'uso Della Tortura." In *Su l'abolizione Della Tortura Del Sig. Di Sonnenfels, Consigliere Nella Reggenza d'Austria Di S.M: E Professore Di Politica, Tradotto Dal Tedesco Con Alcune Osservazioni Sul Medesimo Argomento*, by Joseph Sonnenfels, 113–128. Milano: Galeazzi.

———. 1857. "Report of the Commissioners of the Investigation of Alleged Cases of Torture at Madras." *Calcutta Review*, 439–66.

Anti-Slavery International. 2005. *Protocol for Identification and Assistance to Trafficked Persons and Training Kit*. Anti-Slavery International. Accessed July 25, 2022, www.antislavery.org/wp-content/uploads/2017/01/protocoltraffickedpersonskit2005.pdf.

Anti-Slavery International, KEDE, KOK, On the Road, STV, and Eaves Housing for Women. 2003. *NGOs Statement on Protection Measures for Trafficked Persons in Western Europe: Comment on the OSCE Action Plan to Combat Trafficking in Human Being*. Anti-Slavery International. Accessed July 25, 2022, www.antislavery.org/wp-content/uploads/2017/01/wetraffickingngostatement2003.pdf.

Aradau, Claudia. 2004. "The Perverse Politics of Four-Letter Words: Risk and Pity in the Securitisation of Human Trafficking." *Millennium: Journal of International Studies* 33 (2): 251–77.

———. 2008. *Rethinking Trafficking in Women: Politics out of Security*. Basingstoke, UK; New York: Palgrave Macmillan.

Archbishop of Canterbury. 1912. "The Archbishop of Canterbury's Charge to the Nation." In *The White Slaves of London*, by William Nicholas Willis, vii–ix. Boston: Richard G. Badger, The Gorham Press.

Arendt, Hannah. 1958. *The Human Condition*. Chicago: University of Chicago Press.

———. 1966/1951. *The Origins of Totalitarianism*. New York: Harcourt, Brace & World.

———. 1970. *On Violence*. San Diego; New York: Harcourt Brace Jovanovich.

———. 2006/1963. *Eichmann in Jerusalem: A Report on the Banality of Evil*. New York; London: Penguin.

Armstrong, Sarah. 2018. "Securing Prison through Human Rights: Unanticipated Implications of Rights-Based Penal Governance" *Howard Journal of Crime and Justice* 57 (3): 401–21.

Arthur, Paige. 2009. "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice." *Human Rights Quarterly* 31 (2): 321–67.

Asad, Talal. 1996. "On Torture, or Cruel, Inhuman, and Degrading Treatment." *Social Research* 63 (4): 1081–1109.

———. 2003. *Formations of the Secular: Christianity, Islam, Modernity*. Stanford: Stanford University Press.

Ashworth, Andrew. 2000. "Victim's Rights, Defendants' Rights and Criminal Procedure." In *Integrating a Victim Perspective with Criminal Justice: International Debates*, edited by Adam Crawford and Jo Goodey, 185–204. Brookfield, VT: Ashgate.

———. 2013. *Positive Obligations in Criminal Law*. Oxford; Portland, OR: Hart Publishing.

Askola, Heli. 2021. "The History of the Global Anti-Human Trafficking Agenda, with a Focus on Prostitution and Sexual Exploitation." In *Histories of Transnational Criminal Law*, edited by Neil Boister, Sabine Gless, and Florian Jeßberger, 151–161. Oxford: Oxford University Press.

Attwood, Rachael. 2012. "Vice Beyond the Pale: Representing 'White Slavery' in Britain c.1880 – 1912." Doctor of Philosophy (PhD) thesis, Brighton: UCL. Accessed July 25, 2022, https://discovery.ucl.ac.uk/id/eprint/1395417/1/Attwood%20THESIS%20TO%20PRINT.pdf.

———. 2015. "Lock up Your Daughters! Male Activists, Patriotic Domesticity, and the Fight against Sex Trafficking in England, 1880–1912." *Gender & History* 23 (3): 611–27.

———. 2016. "Looking Beyond 'White Slavery': Trafficking, the Jewish Association, and the Dangerous Politics of Migration Control in England, 1890-1910." *Anti-Trafficking Review* 7: 115–38.

———. 2021. "A Very Un-English Predicament: 'The White Slave Traffic' and the Construction of National Identity in the Suffragist and Socialist Movements' Coverage of the 1912 Criminal Law Amendment Bill." *National Identities* 24 (3): 217–246.

Aukerman, Miriam J. 2002. "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice." *Harvard Human Rights Journal* 15: 39–97.

Ausserer, Caroline. 2008. "'Control in the Name of Protection': A Critical Analysis of the Discourse of International Human Trafficking as a Form of Forced Migration." *St Antony's International Review* 4 (1): 96–114.

Ávila Santamaría, Ramiro. 2015. "Citizen Insecurity and Human Rights: Toward the Deconstruction of the Security Discourse and a New Criminal Law." In *Law and Society in Latin America: A New Map*, edited by César A. Rodríguez Garavito, 251–278. Abingdon: Routledge.

Aviram, Hadar. 2020. "Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends." *Buffalo Law Review* 68 (1): 199–245.

Bachelet, Michelle. 2017. "Inaugural Address of H.E President Michelle Bachelet Jeria, at the Opening Ceremony of the Convention against Torture Initiative (CTI) Regional Seminar for the Universal Ratification of the Convention against Torture." Santiago (Chile), April 5, 2017. Accessed July 25, 2022, https://cti2024.org/wp-content/uploads/2021/02/Discurso-Bachelet_ENG_final.pdf.

Bagaric, Mirko, and Julie Clarke. 2007. *When the Unthinkable Is Morally Permissible*. Albany, NY: State University of New York Press.

Ban Ki-moon. 2010. "At ICC Review Conference, Ban Declares End to 'Era of Impunity.'" UN News. May 31, 2010. Accessed July 25, 2022, https://news.un.org/en/story/2010/05/340252.

Banakar, Reza, and Max Travers. 2005a. "Introduction." In *Theory and Method in Socio-Legal Research*, edited by Reza Banakar and Max Travers, ix–xvi. Oxford: Hart Publishing.

———. 2005b. "Law, Sociology and Method." In *Theory and Method in Socio-Legal Research*, edited by Reza Banakar and Max Travers, 1–25. Oxford: Hart Publishing.

———. 2005c. "Studying Legal Texts." In *Theory and Method in Socio-Legal Research*, edited by Reza Banakar and Max Travers, 133–138. Oxford: Hart Publishing.

Baratta, Alessandro. 1985. "Principi Del Diritto Penale Minimo. Per Una Teoria Dei Diritti Umani Come Oggetti e Limiti Della Legge Penale." *Dei Delitti e Delle Pene* 3 (3): 442–73.

Barker, Vanessa. 2017. "Penal Power at the Border: Realigning State and Nation." *Theoretical Criminology* 21 (4): 441–57.

Barlay, Stephen. 1968. *Sex Slavery: A Documentary Report on the International Scene Today*. London: Heinemann.

Barnes, Jamal. 2017. *A Genealogy of the Torture Taboo*. London; New York: Routledge.

Baroness Buscombe. 2021. *Overseas Operations (Service Personnel and Veterans) Bill*. House of Lords, Lords Chamber. Vol. 809. Hansard.

Baroness D'Souza. 2021. *Overseas Operations (Service Personnel and Veterans) Bill*. House of Lords, Lords Chamber. Vol. 809. Hansard.

Baroness Goldie. 2021a. *Overseas Operations (Service Personnel and Veterans) Bill*. House of Lords, Lords Chamber. Vol. 809. Hansard.

———. 2021b. *Overseas Operations (Service Personnel and Veterans) Bill*. House of Lords, Lords Chamber. Vol. 810. Hansard.

Baroness Jones of Moulsecoomb. 2021. *Overseas Operations (Service Personnel and Veterans) Bill*. House of Lords, Lords Chamber. Vol. 809. Hansard.

Baroness Warsi. 2021. *Overseas Operations (Service Personnel and Veterans) Bill*. House of Lords, Lords Chamber. Vol. 809. Hansard.

Barrows, Samuel J. 1907. *Report of Proceedings of the Seventh International Prison Congress Held at Budapest, Hungary, in September 1905*. Washington, DC: Government Printing Office.

Barry, Kathleen. 1979. *Female Sexual Slavery*. Englewood Cliffs, NJ: Prentice-Hall.

———. 1981. "Female Sexual Slavery: Understanding the International Dimensions of Women's Oppression." *Human Rights Quarterly* 3 (2): 44–52.

———. 1984. "The Network Defines Its Issues: Theory, Evidence and Analysis of Female Sexual Slavery." In *International Feminism: Networking Against Female Sexual Slavery. Report of the Global Feminist Workshop to Organize Against Traffic in Women. Rotterdam, the Netherlands. April 6-15, 1983*, edited by Kathleen Barry, Charlotte Bunch, and Shirley Castley, 32–48. New York: The International Women's Tribune Centre, Inc.

Barry, Kathleen, Charlotte Bunch, and Shirley Castley, eds. 1984. *International Feminism: Networking Against Female Sexual Slavery. Report of the Global Feminist Workshop to Organize Against Traffic in Women. Rotterdam, the Netherlands. April 6-15, 1983*. New York: The International Women's Tribune Centre, Inc.

Bartelson, Jens. 1995. *A Genealogy of Sovereignty*. Cambridge: Cambridge University Press.

Barton, Tony. 1968. *VI International Assembly of Amnesty International at Stockholm 24/25 August 68 - Conference on Torture and Inhuman Treatment*. Amnesty International. LSE Library Archives special FOLIO FHV/F97.

Basch, Fernando Felipe. 2007. "The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers." *American University International Law Review* 23: 195–229.

Bass, Gary Jonathan. 2000. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton; Oxford: Princeton University Press.

Bassiouni, M. Cherif. 1987. *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*. Dordrecht: Martinus Nijhoff Publishers.

Bassiouni, M. Cherif, and Edward M. Wise. 1995. *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*. Dordrecht: Martinus Nijhoff Publishers.

Bauer, Martin, and George Gaskell. 2000. *Qualitative Researching with Text, Image and Sound*. London: SAGE Publications.

Beauvoir, Simone De. 1962. *Djamila Boupacha: The Story of the Torture of a Young Algerian Girl Which Shocked Liberal French Opinion*. Translated by Peter Green. New York: André Deutsch, Weidenfeld, and Nicolson.

Beccaria, Cesare. 1973/1764. *Dei Delitti e Delle Pene*. Milano: Mursia.

Becket, James. 1970. "The Greek Case Before the European Human Rights Commission." *Human Rights* 1 (1): 91–117.

Bell, Stuart. 1988. *Torture*. 1988. House of Commons, Commons Chamber. Vol. 135. Hansard.

Bengoetxea, Joxerramon, and Heike Jung. 1991. "Towards a European Criminal Jurisprudence? The Justification of Criminal Law by the Strasbourg Court." *Legal Studies* 11 (3): 239–80.

Beresford, Stuart. 2001. "Unshackling the Paper Tiger - the Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda." *International Criminal Law Review* 1 (1–2): 33–90.

Bergman-Sapir, Efrat. 2016. *Documenting Torture While Providing Legal Aid: A Handbook for Lawyers*. PCATI and DIGNITY. Accessed July 25, 2022, www.dignity.dk/wp-content/uploads/Documenting-torture-while-providing-legail-aid-A-handbook-for-lawyers-2016.pdf.

Berman, Jacqueline. 2003. "(Un)Popular Strangers and Crises (Un)Bounded: Discourses of Sex-Trafficking, the European Political Community and the Panicked State of the Modern State." *European Journal of International Relations* 9 (1): 37–86.

Bernath, Barbara. 2010. *Preventing Torture: An Operational Guide for National Human Rights Institutions*. HR/PUB/10/1. OHCHR, APT and APF. Accessed July 25, 2022, www.ohchr.org/sites/default/files/Documents/Publications/PreventingTorture.pdf.

Bernstein, Elizabeth. 2007. "The Sexual Politics of the 'New Abolitionism.'" *Differences* 18 (3): 128–51.

———. 2010. "Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns." *Signs* 36 (1): 45–71.

———. 2012. "Carceral Politics as Gender Justice? The 'Traffic in Women' and Neoliberal Circuits of Crime, Sex, and Rights." *Theory and Society* 41 (3): 233–59.

———. 2017. "Brokered Subjects and Sexual Investability." In *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery*, edited by Prabha Kotiswaran, 329–56. Cambridge: Cambridge University Press.

———. 2018. *Brokered Subjects: Sex, Trafficking, and the Politics of Freedom*. Chicago; London: The University of Chicago Press.

Bhuwania, Anuja. 2009. "'Very Wicked Children': 'Indian Torture' and the Madras Torture Commission Report of 1855." *Sur - International Journal on Human Rights* 6 (10): 6–27.

Bianchi, Andrea. 1999. "Immunity versus Human Rights: The Pinochet Case." *European Journal of International Law* 10 (2): 237–77.

Billington-Greig, Teresa. 1913. "The Truth About White Slavery." *The English Review*, June 1913.

Binder, Christina. 2011. "The Prohibition of Amnesties by the Inter-American Court of Human Rights." *German Law Journal* 12 (5): 1203–29.

Bishop of Birmingham. 1912. "Bishop of Birmingham's Appeal to the Nation's Conscience." In *The White Slaves of London*, by William Nicholas Willis, x–xiii. Boston: Richard G. Badger, The Gorham Press.

Blackstone, William. 1795/1770. *Commentaries on the Laws of England*. Vol. 4. London: Srahan and W. Woodfall.

Blakeley, Ruth, and Sam Raphael. 2020. "Accountability, Denial and the Future-Proofing of British Torture." *International Affairs* 96 (3): 691–709.

Blau, Judith, and Alberto Moncada. 2007. "It Ought to Be a Crime: Criminalizing Human Rights Violations." *Sociological Forum* 22 (3): 364–71.

Borneman, John. 1997. *Settling Accounts Violence, Justice, and Accountability in Postsocialist Europe*. Princeton, NJ: Princeton University Press.

Bosworth, Mary. 2017. "Penal Humanitarianism? Sovereign Power in an Era of Mass Migration." *New Criminal Law Review* 20 (1): 39–65.

Bottoms, Anthony. 1995. "The Philosophy and Politics of Punishment and Sentencing." In *The Politics of Sentencing Reform*, edited by Christopher M. V. Clarkson and Rod Morgan, 17–49. Oxford: Clarendon Press.

Bouhdiba, Abdelwahab. 1982. *Report by Mr. Abdelwahab Bouhdiba, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities - Exploitation of Child Labour*. E/CN.4/Sub.2/479/Rec.1. New York: UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Slavery.

Boukli, Paraskevi. 2012. "Imaginary Penalities: Reconsidering Anti-Trafficking Discourses and Technologies." Doctor of Philosophy (PhD) thesis, London: London School of

Economics and Political Science (LSE). Accessed July 25, 2022. http://etheses.lse.ac.uk/435/.

Bourdieu, Pierre. 1987. "The Force of Law: Toward a Sociology of the Juridical Field." Translated by Richard Terdiman. *The Hastings Law Journal* 38: 805–53.

———. 1998. *Acts of Resistance: Against the Tyranny of the Market*. New York: New Press.

Bowden, Brett. 2009. *The Empire of Civilization: The Evolution of an Imperial Idea*. Chicago; London: The University of Chicago Press.

Boyle, Michael, and Jean-Claude Vullierme. 2018. *A Brief Introduction to Investigative Interviewing: A Practitioner's Guide*. Strasbourg: Council of Europe. Accessed July 25, 2022, https://rm.coe.int/guide-to-investigative-interviewing/16808ea8f9.

Branch, Adam. 2011. *Displacing Human Rights: War and Intervention in Northern Uganda*. New York: Oxford University Press.

Brand, Megan C. 2010. "International Cooperation and the Anti-Trafficking Regime." *Refugee Studies Centre Working Paper Series*, no. 71: 1–37.

Brinkerhoff, Roeliff. 1896. "British and Continental Prisons." In *Report of the Delegates of the United States to the Fifth International Prison Congress Held at Paris, France, in July 1895*. Washington, DC: Government Printing Office.

Broad, Rose, and Nick Turnbull. 2019. "From Human Trafficking to Modern Slavery: The Development of Anti-Trafficking Policy in the UK." *European Journal on Criminal Policy and Research* 25 (2): 119–33.

Bronsther, Jacob. 2019. "Torture and Respect." *Journal of Criminal Law and Criminology* 109 (3): 423–90.

———. 2020. "Long-Term Incarceration and the Moral Limits of Punishment." *Cardozo Law Review* 41: 2369–2433.

Brown, Wendy. 1995. *States of Injury: Power and Freedom in Late Modernity*. Princeton, NJ: Princeton University Press.

———. 2001. *Politics Out of History*. Princeton, NJ: Princeton University Press.

———. 2004. "'The Most We Can Hope For...': Human Rights and the Politics of Fatalism." *South Atlantic Quarterly* 103 (2/3): 451–63.

Brown, Widney. 2018. "Remarks by Widney Brown." *Proceedings of the ASIL Annual Meeting* 112: 86–87.

———. 2019. "Reflection of a Human Rights Activist." In *Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law*, edited by Alice M. Miller and Mindy Jane Roseman, 75–90. Philadelphia: University of Pennsylvania Press.

Brussa, Lucia. 1991. "Conclusions of the General Rapporteur." In *Seminar on Action against Traffic in Women and Forced Prostitution as Violations of Human Rights and Human Dignity*

- *EG/PROST (91)13*. September 25-27, 1991. Strasbourg: Council of Europe - European Committee for Equality between Women and Men.

Buchanan, Ian. 2010. "Ressentiment." In *A Dictionary of Critical Theory*. Oxford: Oxford University Press.

Bueger, Christian, and Frank Gadinger. 2018. *International Practice Theory*. 2nd ed. Cham: Palgrave Macmillan.

Bullock, Frederick Shore. 1907. "Annex 1. Memorandum as to the Position of the 'Central Authority.'" In *Correspondence Respecting the International Conference on the White Slave Traffic Held in Paris, October 1906*, by UK Government, 10–12. Miscellaneous, 2(1907). London: Harrison and Sons.

Bumiller, Kristin. 2008. *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence*. Durham, NC: Duke University Press.

Bunch, Charlotte. 1984. "Network Strategies and Organizing against Female Sexual Slavery." In *International Feminism: Networking Against Female Sexual Slavery. Report of the Global Feminist Workshop to Organize Against Traffic in Women. Rotterdam, the Netherlands. April 6-15, 1983*, edited by Kathleen Barry, Charlotte Bunch, and Shirley Castley, 32–48. New York: The International Women's Tribune Centre, Inc.

Bunch, Charlotte, and Shirley Castley. 1984. "Introduction." In *International Feminism: Networking Against Female Sexual Slavery. Report of the Global Feminist Workshop to Organize Against Traffic in Women. Rotterdam, the Netherlands. April 6-15, 1983*, edited by Kathleen Barry, Charlotte Bunch, and Shirley Castley, 8–14. New York: The International Women's Tribune Centre, Inc.

Bunting, Percy W. 1899. "Report." In *The White Slave Trade - Transactions of the International Congress on the White Slave Trade, Held in London on the 21st, 22nd and 23rd of June, 1899, at the Invitation of the National Vigilance Association*, by NVA, 65–72. London: National Vigilance Association.

Burchard, Christoph. 2021a. "Criminal Law Exceptionalism as an Affirmative Ideology, and Its Expansionist Discontents." *Criminal Law and Philosophy*.

———. 2021b. "Of Forging into Swords on the Dialectic of Rights and the New Liberal Desire for Criminal Law." In *The Quest for Core Values in the Application of Legal Norms: Essays in Honor of Mordechai Kremnitzer*, edited by Khalid Ghanayim and Yuval Shany, 37–59. Cham: Springer.

Burgers, J. Herman, and Hans Danelius. 1988. *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*. Vol. 9. Dordrecht: Martinus Nijhoff Publishers.

Burke-White, William W. 2001. "Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation." *Harvard International Law Journal* 42 (2): 567–533.

Butler, Josephine E. 1881. *Letter to the Mothers of England*. LSE Library, Reading Room microform, Drawer 4.

———. 1888. "Letter to the International Council of Women at Washington." In *Report of the International Council of Women Assembled by the National Woman Suffrage Association*, 257–64. Washington, DC: National Woman Suffrage Association.

———. 1899. "Which Are the Greatest Criminals?" *The Storm-Bell*, May 1899.

———. 1910/1896. *Personal Reminiscences of a Great Crusade*. New Edition. London: Horace Harshall & Son.

Butler, Paul. 2011. "Stop and Frisk: Sex, Torture, Control." In *Law as Punishment / Law as Regulation*, edited by Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, 155–77. Stanford: Stanford University Press.

Calhoun, Calhoun. 2002. "Civil Society." In *Dictionary of the Social Sciences*. Oxford: Oxford University Press.

Carmichael, Alistair. 2020. *Overseas Operations (Service Personnel and Veterans) Bill*. House of Commons, Commons Chamber. Vol. 608. Hansard.

Carolei, Domenico. 2017. "Cestaro v. Italy: The European Court of Human Rights on the Duty to Criminalise Torture and Italy's Structural Problem." *International Criminal Law Review* 17 (3): 567–85.

Carpenter, Mary. 1873. "On the Treatment of Long-Sentenced and Life-Sentenced Prisoners." In *Report on the International Penitentiary Congress of London, Held July 3-13, 1872*, by Enoch Cobb Wines, 348–354. Washington, DC: Government Printing Office.

Cartuyvels, Yves, Hugues Dumont, François Ost, Michel Van de Kerchove, and Sébastien Van Drooghenbroeck, eds. 2007. *Les Droits de l'Homme: Épée Ou Bouclier Du Droit Pénal?* Brussels: FUSL.

Carvalho, Henrique, and Anastasia Chamberlen. 2018. "Why Punishment Pleases: Punitive Feelings in a World of Hostile Solidarity." *Punishment & Society* 20 (2): 217–34.

Carver, Richard, and Lisa Handley, eds. 2016a. *Does Torture Prevention Work?* Liverpool: Liverpool University Press.

———. 2016b. "Identifying What Preventive Mechanisms Work." In *Does Torture Prevention Work?*, edited by Richard Carver and Lisa Handley, 45–102. Liverpool University Press.

Cassese, Antonio. 2011. "Reflections on International Criminal Justice." *Journal of International Criminal Justice* 9 (1): 271–75.

Castle, Barbara. 1949. *General Assembly, 4th Session, 3rd Committee, 269th Meeting*. A/C.3/SR.269. New York: UN General Assembly.

Catharine II. 1769. *Instruction Donnée Par Catherine II, Impératrice de Toutes Les Russies … Traduite En François*. Lausanne: François Grasset & Comp.

CATW. 2010. *CATW Annual Report 2010*. The Coalition Against Trafficking in Women. Accessed July 25, 2022, https://catwinternational.org/wp-content/uploads/2018/10/CATW_2010_Annual_Report.pdf.

Celermajer, Danielle. 2018. *The Prevention of Torture: An Ecological Approach*. Cambridge: Cambridge University Press.

Chacón, Jennifer M. 2010. "Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement." *University of Pennsylvania Law Review* 158: 1609–53.

Chakrabarti, Shami. 2010. "Preface." In *A Parliamentarian's Guide to the Human Rights Act*, by Liberty. London: The National Council for Civil Liberties.

Chamberlain, John Martyn. 2013. *Understanding Criminological Research: A Guide to Data Analysis*. London: SAGE Publications.

Chamberlen, Anastasia, and Henrique Carvalho. 2022. "Feeling the Absence of Justice: Notes on Our Pathological Reliance on Punitive Justice." *Howard Journal of Crime and Justice* 61: 87–102.

Cheek, Julianne. 2008. "Foucauldian Discourse Analysis." In *The SAGE Encyclopedia of Qualitative Research Methods*, edited by Lisa M Given. Thousand Oaks, CA: SAGE Publications.

Chehtman, Alejandro. 2010. *The Philosophical Foundations of Extraterritorial Punishment*. Oxford: Oxford University Press.

Chew, Lin. 2005. "Reflections by an Anti-Trafficking Activist." In *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*, edited by Kamala Kempadoo, Jyoti Sanghera, and Bandana Pattanaik, 65–82. Boulder, CO. Paradigm Publishers.

Chirwa, Danwood Mzikenge. 2004. "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights." *Melbourne Journal of International Law* 5: 1–36.

Christie, Nils. 1982. *Limits to Pain*. Oxford: Robertson.

———. 1986. "The Ideal Victim." In *From Crime Policy to Victim Policy: Reorienting the Justice System*, edited by Ezzat A. Fattah, 17–30. London: Palgrave Macmillan UK.

Christman, John. 2014. "Human Rights and Global Wrongs." In *Poverty, Agency, and Human Rights*, edited by Diana Tietjens Meyers, 321–45. Oxford: Oxford University Press.

Chuang, Janie A. 2010. "Rescuing Trafficking from Ideological Capture: Prostitution Reform And Anti-Trafficking Law And Policy." *University of Pennsylvania Law Review* 158: 1655–1728.

———. 2012. "Article 6." In *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, edited by Marsha A. Freeman, Christine Chinkin, and Beate Rudolf, 169–96. Oxford: Oxford University Press.

———. 2014. "Exploitation Creep and the Unmaking of Human Trafficking Law." *American Journal of International Law* 108 (4): 609–49.

Clapham, Andrew. 2006. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press.

———. 2016. "Human Rights and International Criminal Law." In *The Cambridge Companion to International Criminal Law*, edited by William A. Schabas, 11–33. Cambridge: Cambridge University Press.

Clark, Ann Marie. 2001. *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*. Princeton, NJ: Princeton University Press.

Clarke, Kamari Maxine. 2009. *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*. Cambridge: Cambridge University Press.

———. 2019. *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback*. Durham, NC; London: Duke University Press.

Cobain, Ian. 2012. *Cruel Britannia: A Secret History of Torture*. London: Portobello.

Cochrane, Alasdair. 2017. "Prison on Appeal: The Idea of Communicative Incarceration." *Criminal Law and Philosophy* 11 (2): 295–312.

Cohen, Stanley. 2001. *States of Denial: Knowing about Atrocities and Suffering*. Cambridge: Polity Press.

Commission of Enquiry into Traffic in Women and Children in the East. 1932. *Report to the Council*. C.849.M.393.1932.IV. Geneva: League of Nations.

Compton, Sir Edmund. 1971. *Report of the Enquiry into Allegations against the Security Forces of Physical Brutality in Northern Ireland Arising out of Events on the 9th August, 1971*. Cmnd. 4823. London: Home Office.

Coomaraswamy, Radhika. 2000. "Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, on Trafficking in Women, Women's Migration and Violence against Women." E/CN.4/2000/68. New York: UN Commission on Human Rights.

Coote, William A. 1903. "Law and Morality." In *Public Morals*, edited by James Marchant, 43–74. London: Morgan and Scott.

———. 1910. *A Vision and Its Fulfilment: Being the History of the Origin of the Work of the National Vigilance Association for the Suppression of the White Slave Traffic*. London: The National Vigilance Association.

Corfield, Frank Derek. 1960. *Historical Survey of the Origins and Growth of Mau Mau*. Cmnd. 1030. London: Colonial Office.

Cormacain, Ronan. 2021. *Overseas Operations (Service Personnel and Veterans) Bill: A Rule of Law Analysis*. Bingham Centre for the Rule of Law. Accessed on July 25, 2022, https://binghamcentre.biicl.org/documents/102_overseas_operations_bill_v.pdf.

Corrêa, Sonia, and Maria Lucia Karam. 2019. "Brazilian Sex Laws: Continuities, Ruptures, and Paradoxes." In *Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law*,

edited by Alice M. Miller and Mindy Jane Roseman, 114–33. Philadelphia: University of Pennsylvania Press.

Corrias, Luigi D. A., and Geoffrey M. Gordon. 2015. "Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public." *Journal of International Criminal Justice* 13 (1): 97–112.

Cotterrell, Roger. 1998. "Why Must Legal Ideas Be Interpreted Sociologically?" *Journal of Law and Society* 25 (2): 171–92.

———. 2015. "The Concept of Crime and Transnational Networks of Community." In *Globalisation, Criminal Law and Criminal Justice: Theoretical, Comparative and Transnational Perspectives*, edited by Valsamis Mitsilegas, Peter Alldridge, and Leonidas Cheliotis, 7–24. Oxford: Hart Publishing.

Council of Europe. 2011. *Eradicating Impunity for Serious Human Rights Violations*. H/Inf (2011) 7. Strasbourg: Council of Europe.

Coursier, Henri. 1971. "The Prohibition of Torture." *International Review of the Red Cross* 126: 475–89.

CPT. 2004. *14th General Report on the CPT's Activities Covering the Period 1 August 2003 to 31 July 2004*. CPT/Inf (2004) 28. Strasbourg: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

Craven, Matthew. 2005. "What Happened to Unequal Treaties? The Continuities of Informal Empire." *Nordic Journal of International Law* 74: 335–82.

Crawford, Adam. 2000. "Introduction." In *Integrating a Victim Perspective with Criminal Justice: International Debates*, edited by Adam Crawford and Jo Goodey, 1–11. Brookfield, VT: Ashgate.

Crawford, Adam, and Jo Goodey, eds. 2000. *Integrating a Victim Perspective Within Criminal Justice: International Debates*. Brookfield, VT: Ashgate.

Cryer, Robert. 2020. "International Law, Crime and Torture." In *Research Handbook on Torture Legal and Medical Perspectives on Prohibition and Prevention*, edited by Malcolm D. Evans and Jens Modvig, 288–313. Cheltenham; Northampton, MA: Edward Elgar Publishing.

CSJ. 2013. *It Happens Here: Equipping the United Kingdom to Fight Modern Slavery*. Centre for Social Justice. Accessed July 25, 2022, www.centreforsocialjustice.org.uk/library/happens-equipping-united-kingdom-fight-modern-slavery.

CTI. 2019. *UNCAT Implementation Tool 6/2019: Cooperation on Extradition*. Convention Against Torture Initiative (CTI). Accessed July 25, 2022, https://cti2024.org/resource/cti-uncat-implementation-6-2019-cooperation-on-extradition/.

CTJM. n.d. "About | Chicago Torture Justice Memorials." Accessed July 25, 2022. https://chicagotorture.org/about/.

Çubukçu, Ayça. 2018. *For the Love of Humanity: The World Tribunal on Iraq*. Philadelphia: University of Pennsylvania Press.

Curtis, Mark. 2003. *Web of Deceit: Britain's Real Role in the World*. London: Vintage Books.

Damaška, Mirjan. 1978. "The Death of Legal Torture." *The Yale Law Journal* 87: 860–84.

Daulatzai, Sohail. 2007. "Protect Ya Neck: Muslims and the Carceral Imagination in the Age of Guantánamo." *Souls* 9 (2): 132–47.

Dauvergne, Catherine. 2008. *Making People Illegal: What Globalization Means for Migration and Law*. Cambridge; New York: Cambridge University Press.

Davids, Joseph William. 2012. "From Crimes against Humanity to Human Rights Crimes." *New English Journal of International and Comparative Law* 18 (1): 225–42.

Davidson, Natalie R. 2019. "The Feminist Expansion of the Prohibition of Torture: Towards a Post-Liberal International Human Rights Law?" *Cornell International Law Journal* 52: 109–35.

Davis, Angela Y. 2005. *Abolition Democracy: Beyond Empire, Prisons, and Torture*. New York: Seven Stories Press.

Davis, Angela Y, Gina Dent, Erica Meiners, and Beth Richie. 2022. *Abolition. Feminism. Now.* London: Hamish Hamilton.

Delmas-Marty, Mireille. 1996. "Le Paradoxe Pénal." In *Libertés et Droits Fondamentaux*, edited by Mireille Delmas-Marty and Claude Lucas de Leyssac, 368–92. Paris: Seuil.

———. 2007. "The Paradigm of the War on Crime: Legitimating Inhuman Treatment?" *Journal of International Criminal Justice* 5 (3): 584–98.

Demleitner, Nora V. 1994. "Forced Prostitution: Naming an International Offense." *Fordham International Law Journal* 18 (1): 163–97.

Dent, Chris, and Ian Cook. 2007. "Stare Decisis, Repetition and Understanding Common Law." *Griffith Law Review* 16 (1): 131–50.

Departmental Committee on Homosexual Offences and Prostitution. 1957. *Report of the Committee on Homosexual Offences and Prostitution*. Cmnd. 247. London: Home Office and Scottish Home Department.

Dershowitz, Alan. 2004. "Tortured Reasoning." In *Torture: A Collection*, edited by Sanford Levinson, 257–80. Oxford; New York: Oxford University Press.

Devlin, Patrick Arthur. 1965/1959. *The Enforcement of Morals*. London: Oxford University Press.

Dickens, Charles. 1842. *American Notes for General Circulation - Volume 1*. London: Chapman and Hall.

Dickson, Brice. 2010. *The European Convention on Human Rights and the Conflict in Northern Ireland*. Oxford: Oxford University Press.

Dickson White, Andrew. 1896. *A History of the Warfare of Science with Theology in Christendom*. New York: D. Appleton & Company.

Ditmore, Melissa, and Majan Wijers. 2003. "The Negotiations on the UN Protocol on Trafficking in Persons." *Nemesis* 4: 79.

Doak, Jonathan. 2008. *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*. Oxford; Portland, OR: Hart Publishing.

Doezema, Jo. 2010. *Sex Slaves and Discourse Masters: The Construction of Trafficking*. London; New York: Zed Books.

Dolinsek, Sonja. 2022. "Tensions of Abolitionism during the Negotiation of the 1949 'Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.'" *European Review of History: Revue Européenne d'histoire* 29 (2): 223–48.

Dolinsek, Sonja, and Philippa Hetherington. 2019. "Socialist Internationalism and Decolonizing Moralities in the UN Anti-Trafficking Regime, 1947–1954." *Journal of the History of International Law* 21: 212–38.

Donini, Massimo. 2015. *Il Diritto Penale Come Etica Pubblica: Considerazioni Sul Politico Quale "Tipo d'Autore."* Modena, Italy: Mucchi Editore.

Dorfman, Ariel. 2004. "Foreword: The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?" In *Torture: A Collection*, edited by Sanford Levinson, 3–18. Oxford; New York: Oxford University Press.

Dottridge, Mike. 2007. "Introduction." In *Collateral Damage - The Impact of Anti-Trafficking Measures on Human Rights around the World*, by GAATW. Global Alliance Against Traffic in Women. Accessed July 25, 2022, https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/ensuring_protection_070909/collateral_damage_gaatw_2007.pdf.

———. 2021. "The Palermo Protocols at 20: A Missed Opportunity for Ending Trafficking." In *Palermo Protocol 20th Anniversary Special: Are We Better off on the Inside?*, edited by Joel Quirk, Neil Howard, and Cameron Thibos, 24–26. London: Beyond Trafficking and Slavery/openDemocracy.

Drumbl, Mark A. 2007. *Atrocity, Punishment, and International Law*. Cambridge: Cambridge University Press.

———. 2020. "Impunities." In *The Oxford Handbook of International Criminal Law*, edited by Kevin Jon Heller, Jens David Ohlin, Sarah M.H. Nouwen, Frédéric Mégret, and Darryl Robinson, 238–60. Oxford: Oxford University Press.

Dubber, Markus D. 2002. *Victims in the War on Crime: The Use and Abuse of Victims' Rights*. New York: New York University Press.

———. 2004. "Toward a Constitutional Law of Crime and Punishment." *Hastings Law Journal* 55 (3): 509–70.

———. 2011. "Common Civility: The Culture of Alegality in International Criminal Law." *Leiden Journal of International Law* 24 (4): 923–36.

Dubler, Joshua, and Vincent Lloyd. 2020. *Break Every Yoke: Religion, Justice, and the Abolition of Prisons*. New York: Oxford University Press.

Duff, Antony. 2001. *Punishment, Communication and Community: Studies in Crime and Public Policy*. Oxford: Oxford University Press.

Duffy, Aoife. 2019. *Torture and Human Rights in Northern Ireland: Interrogation in Depth*. London: Routledge.

Dugard, John. 1999. "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" *Leiden Journal of International Law* 12 (4): 1001–15.

Dumortier, Els, Serge Gutwirth, Sonja Snacken, and Paul De Hert. 2012. "The Rise of the Penal State: What Can Human Rights Do About It?" In *Resisting punitiveness in Europe: Welfare, Human Rights, and Democracy*, edited by Sonja Snacken and Els Dumortier, 107–130. Abingdon: Routledge.

Dunn, Kevin C., and Iver B. Neumann. 2016. *Undertaking Discourse Analysis for Social Research*. Ann Arbor: University of Michigan Press.

Durkheim, Émile. 1933/1893. *The Division of Labor in Society*. Translated by George Simpson. New York: Macmillan.

———. 1983/1901. "The Evolution of Punishment." In *Durkheim and the Law*, edited by Steven Lukes and Andrew Scull. Oxford: Martin Robertson.

Dyer, Alfred S. 1882. *The European Slave Trade in English Girls. A Narrative of Facts*. 6th ed. London: Dyer Brothers.

Eckel, Jan, and Samuel Moyn. 2014. *The Breakthrough: Human Rights in the 1970s*. Philadelphia: University of Pennsylvania Press.

ECommHR. 1956. *Preparatory Work on Article 3 of the European Convention of Human Rights*. DH(56)5. Strasbourg: Council of Europe.

Edwards, Alice. 2007. "Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor." *Denver Journal of International Law and Policy* 36 (1): 9–53.

Edwards, James. 2017. "Criminalization without Punishment." *Legal Theory* 23 (2): 69–95.

Eight UN Congress on the Prevention of Crime and the Treatment of Offenders. 1990. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*. A/CONF.144/28/Rev.1. Havana: United Nations.

Einolf, Christopher J. 2007. "The Fall and Rise of Torture: A Comparative and Historical Analysis." *Sociological Theory* 25 (2): 101–21.

Elias, Robert. 1986. *The Politics of Victimization: Victims, Victimology, and Human Rights*. Oxford: Oxford University Press.

———. 1993. *Victims Still: The Political Manipulation of Crime Victims*. Newbury Park, CA: SAGE Publications.

Elkins, Caroline. 2005. *Britain's Gulag: The Brutal End of Empire in Kenya*. London: Cape.

Engle, Karen. 2012. "Self-Critique, (Anti) Politics and Criminalization: Reflections on the History and Trajectory of the Human Rights Movement." In *New Approaches to International Law*, edited by José María Beneyto and David Kennedy, 41–73. The Hague, The Netherlands: T. M. C. Asser Press.

———. 2015. "Anti-Impunity and the Turn to Criminal Law in Human Rights." *Cornell Law Review* 100: 1069–1128.

———. 2016. "A Genealogy of the Criminal Turn in Human Rights." In *Anti-Impunity and the Human Rights Agenda*, edited by Karen Engle, Zinaida Miller, and Dennis M. Davis, 15–67. Cambridge: Cambridge University Press.

———. 2019. "Human Rights Consciousness and Critique." In *A Time for Critique*, edited by Didier Fassin and Bernard E. Harcourt, 91–113. New York: Columbia University Press.

———. 2020. *The Grip of Sexual Violence in Conflict: Feminist Interventions in International Law*. Stanford: Stanford University Press.

———. 2021. "Human Rights or a Different Register: Taking Seriously Other Emancipatory Discourses." *OpenGlobalRights*. March 31, 2021. Accessed July 25, 2022, www.openglobalrights.org/human-rights-or-a-different-register-taking-seriously-other-emancipatory-discourses/.

———. 2022. "Abolitionist Human Rights." Presented at the Workshop *Human Rights Penality: The Next Decade*. Birmingham, UK, March 25, 2022. On File with Author.

Engle, Karen, Zinaida Miller, and Dennis M. Davis, eds. 2016a. *Anti-Impunity and the Human Rights Agenda*. Cambridge: Cambridge University Press.

———. 2016b. "Introduction." In *Anti-Impunity and the Human Rights Agenda*, edited by Karen Engle, Zinaida Miller, and Dennis M. Davis, 1–12. Cambridge: Cambridge University Press.

Epstein, Daniel. 2022. "The Chicago Torture Justice Movement and an Abolitionist Theory of Law." Presented at the *WPSA Conference 2022*. Portland, Oregon (US), March 10-12, 2022. Accessed July 25, 2022, www.wpsanet.org/papers/docs/Epstein%20WPSA%20Paper%202022.pdf.

Epstein, James. 2012. *Scandal of Colonial Rule: Power and Subversion in the British Atlantic during the Age of Revolution*. Critical Perspectives on Empire. Cambridge: Cambridge University Press.

Eriksson, Maria. 2013. "The Prevention of Human Trafficking: Regulating Domestic Criminal Legislation through the European Convention on Human Rights." *Nordic Journal of International Law* 82 (3): 339–68.

Ertürk, Yakin. 2009. *Addendum: 15 Years of the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences (1994-2009): A Critical Review*. A/HRC/11/6/Add.5. Geneva: Human Rights Council.

Ervo, Laura. 2016. "The Hidden Meanings in the Case Law of the European Court for Human Rights." *Semiotica* 2016 (209): 209–30.

European Commission. 2012. *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016*. COM(2012)-286 final. Brussels: European Commission.

———. 2017. *Reporting on the Follow-up to the EU Strategy towards the Eradication of Trafficking in Human Beings and Identifying Further Concrete Actions*. COM(2017) 728 final. Brussels: European Union.

———. 2019. *EU Anti-Trafficking Action 2017-2019 - At a Glance*. European Union. Accessed July 25, 2022, https://anitp.mai.gov.ro/ro/docs/Publicatii%20internationale/EU%20anti-trafficking%20action%202017-2019%20At%20a%20glance.pdf.

———. 2021. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025*. COM(2021) 171 final. Brussels: European Commission.

Evans, Malcolm D. 2014. "The Criminalisation of Torture as a Part of the Human Right Framework." *Crimen (V)* 2: 136–44.

Ezeilo, Joy Ngozi. 2012. *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo*. A/HRC/20/18. Geneva: Human Rights Council.

Fanon, Franz. 1963. *The Wretched of the Earth*. Translated by Constance Farrington. New York: Grove Press.

Farmer, Lindsay. 2019. "Trafficking, the Anti-Slavery Project and the Making of the Modern Criminal Law." In *What Is Wrong with Human Trafficking? - Critical Perspectives on the Law*, edited by Rita Haverkamp, Ester Herlin-Karnell, and Claes Lernestedt, 13–36. Oxford: Hart Publishing.

Farrell, Michelle. 2013. *The Prohibition of Torture in Exceptional Circumstances*. Cambridge: Cambridge University Press.

———. 2021. "Legalising Torture." *Tribune*, February 8, 2021. Accessed July 25, 2022, https://tribunemag.co.uk/2021/02/legalising-torture.

———. 2022. "The Marks of Civilisation: The Special Stigma of Torture." *Human Rights Law Review* 22 (1): 1–26.

Fassin, Didier. 2018. *The Will to Punish*. New York: Oxford University Press.

Fattah, Ezzat A. 2007. "Is Punishment the Appropriate Response to Gross Human Rights Violations? Is a Non-Punitive Justice System Feasible?" Presented at the Conference *The Politics of Restorative Justice In Post-Conflict South Africa and Beyond*. Cape Town, South Africa, November 2007. Accessed July 25, 2022, www.csvr.org.za/docs/crime/fatahreport.pdf.

Fawcett, Henry. 1899. "Report." In *The White Slave Trade - Transactions of the International Congress on the White Slave Trade, Held in London on the 21st, 22nd and 23rd of June, 1899, at*

the Invitation of the National Vigilance Association, by NVA, 139–47. London: National Vigilance Association.

Feinberg, Joel. 1965. "The Expressive Function of Punishment." *The Monist* 49: 397–423.

Ferguson, Ann. 1984. "Sex War: The Debate Between Radical and Libertarian Feminists." *Signs* 10 (1): 106–12.

Fernand-Laurent, Jean. 1983. *Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*. E/1983/7. New York: UN Economic and Social Council.

Fleetwood, Jennifer, and John Lea. 2022. "Defunding the Police in the UK: Critical Questions and Practical Suggestions." *Howard Journal of Crime and Justice* 61 (2): 167–84.

Fletcher, George P., and Jens David Ohlin. 2005. "Reclaiming Fundamental Principles of Criminal Law in the Darfur Case." *Journal of International Criminal Justice* 3 (3): 539–61.

Flyvbjerg, Bent. 2006. "Five Misunderstandings About Case-Study Research." *Qualitative Inquiry* 12 (2): 219–45.

Foley, Frank. 2021. "The (De)Legitimation of Torture: Rhetoric, Shaming and Narrative Contestation in Two British Cases." *European Journal of International Relations* 27 (1): 102–26.

Fortescue, Dudley. 1860. *Italy—Torture in Sicily*. House of Commons, Commons Chamber. Vol. 158. Hansard.

Foucault, Michel. 1970/1966. *The Order of Things: An Archaeology of the Human Sciences*. London: Tavistock.

———. 1972a/1969. *The Archaeology of Knowledge*. Translated by Alan Sheridan. New York: Pantheon Books.

———. 1972b/1970. "The Discourse on Language." In *The Archaeology of Knowledge*, translated by Alan Sheridan, 215–37. New York: Pantheon Books.

———. 1973/1963. *The Birth of the Clinic: An Archaeology of Medical Perception*. Translated by Alan Sheridan. London: Tavistock Publications.

———. 1978/1976. *The History of Sexuality - Volume I: An Introduction*. Translated by Robert Hurley. New York: Pantheon Books.

———. 1980/1976. "Two Lectures." In *POWER/KNOWLEDGE: Selected Interviews and Other Writings 1972-1977 by Michel Foucault*, edited by Colin Gordon, 78–108. Pantheon Books.

———. 1984a/1971. "Nietzsche, Genealogy, History." In *Foucault Reader*, edited by Paul Rabinow. New York: Pantheon Books.

———. 1984b. "On the Genealogy of Ethics: An Overview of Work in Progress." In *Foucault Reader*, edited by Paul Rabinow, 340–72. New York: Pantheon Books.

———. 1984c/1979. "What Is an Author?" In *Foucault Reader*, edited by Paul Rabinow, 101–20. New York: Pantheon Books.

———. 1988/1961. *Madness and Civilisation: A History of Insanity in the Age of Reason*. Translated by Richard Howard. New York: Vintage Books.

———. 1991a/1975. *Discipline and Punish: The Birth of the Prison*. Translated by Alan Sheridan. London: Penguin Books Ltd.

———. 1991b/1968. "Politics and the Study of Discourse." In *The Foucault Effect: Studies in Governmentality: With Two Lectures by and an Interview with Michel Foucault*, edited by Graham Burchell, Colin Gordon, and Peter Miller, 53–72. Chicago: University of Chicago Press.

———. 2000/1981. "So Is It Important to Think?" In *Essential Works of Foucault 1945-1984, Vol. 3: Power*, edited by James D. Faubion, 454–58. New York: New Press.

———. 2005/1970. "Foreword to the English Edition." In *The Order of Things - An Archaeology of the Human Sciences*. London and New York: Routledge.

———. 2007/1978. *Security, Territory, Population - Lectures at the Collège de France, 1977-1978*. Edited by Michel Senellart. Translated by Graham Burchell. Houndmills, Basingstoke, Hampshire: Palgrave Macmillan.

Foundation Against Trafficking in Women, International Human Rights Law Group, and GAATW. 1999. *Human Rights Standards for the Treatment of Trafficked Person*s. Global Alliance Against Traffic in Women. Accessed July 25, 2022, https://www.gaatw.org/books_pdf/hrs_eng2.pdf.

Fraser, John. 1968. *Greek Political Prisoners*. House of Commons, Commons Chamber. Vol. 762. Hansard.

Fredman, Sandra. 2008. *Human Rights Transformed: Positive Rights and Positive Duties*. Oxford: Oxford University Press.

Fredrich II. 1913/1749. "Über Die Gründe, Gesetze Einzuführen Oder Abzuschaffen." In *Die Werke Friedrichs des Großen: In Deutscher*, edited by Gustav Berthold Volz. Berlin: Reimar Hobbing. Accessed July 25, 2022, http://friedrich.uni-trier.de/de/volz/8/34/text/.

Freeman, Mark, and Max Pensky. 2012. "The Amnesty Controversy in International Law." In *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, edited by Francesca Lessa and Leigh A. Payne, 42–66. Cambridge; New York: Cambridge University Press.

Friedman, Lucy N., and Minna Shulman. 1990. "Domestic Violence: The Criminal Justice Response." In *Victims of Crime: Problems, Policies, and Programs*, edited by Arthur J. Lurigio, Wesley G. Skogan, and Robert C. Davis. Newbury Park, CA: SAGE Publications.

Fudge, Judy. 2015. "The Dangerous Appeal of the Modern Slavery Paradigm." In *State and the Law: Beyond Trafficking and Slavery Short Course*, edited by Prabha Kotiswaran and Sam Okyere. Vol. 3. London: Beyond Trafficking and Slavery/openDemocracy.

Fudge, Judy, and Kendra Strauss. 2017. "Migrants, Unfree Labour, and the Legal Construction of Domestic Servitude: Migrant Domestic Workers in the United Kingdom." In *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery*, edited by Prabha Kotiswaran, 524–55. Cambridge: Cambridge University Press.

Furedi, Frank. 1997. *Culture of Fear: Risk-Taking and the Morality of Low Expectation*. London; Washington, DC: Cassell.

GAATW. 2007. *Collateral Damage - The Impact of Anti-Trafficking Measures on Human Rights around the World*. Global Alliance Against Traffic in Women. Accessed July 25, 2022, https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/ensuring_protection_070909/collateral_damage_gaatw_2007.pdf.

———. 2011. "Smuggling and Trafficking: Rights and Intersections." GAATW Working Paper Series. Global Alliance Against Traffic in Women. Accessed July 25, 2022, https://www.gaatw.org/resources/working-papers/897-smuggling-and-trafficking-rights-and-intersections.

———. 2018. *Sex Workers Organising for Change: Self-Representation, Community Mobilisation, and Working Conditions*. Global Alliance Against Traffic in Women. Accessed July 25, 2022, https://www.gaatw.org/publications/SWorganising/SWorganising-complete-web.pdf.

Gaeta, Paola. 2008. "When Is the Involvement of State Officials a Requirement for the Crime of Torture?" *Journal of International Criminal Justice* 6 (2): 183–93.

Gainer, Bernard. 1972. *The Alien Invasion: The Origins of the Aliens Act of 1905*. New York: Crane, Russak & Co.

Gallagher, Anne T. 2009. "Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway." *Virginia Journal of International Law* 49 (4): 790–848.

———. 2010. *The International Law of Human Trafficking*. Cambridge: Cambridge University Press.

Gargarella, Roberto. 2013. "No Place for Popular Sovereignty? Democracy, Rights, and Punishment in Gelman v. Uruguay." *SELA (Seminario En Latinoamérica de Teoría Constitucional y Política) Papers*, 1–30.

Garland, David. 1985. *Punishment and Welfare: A History of Penal Strategies*. Aldershot: Gower.

———. 1990a. *Punishment and Modern Society: A Study in Social Theory*. Chicago: University of Chicago Press.

———. 1990b. "Frameworks of Inquiry in the Sociology of Punishment." *The British Journal of Sociology* 41 (1): 1–15.

———. 1991. "Sociological Perspectives on Punishment." *Crime and Justice* 14: 115–65.

———. 2001. *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Clarendon.

———. 2004. "Beyond the Culture of Control." *Critical Review of International Social and Political Philosophy* 7 (2): 160–89.

———. 2012. "Punishment and Social Solidarity." In *The SAGE Handbook of Punishment and Society*, edited by Jonathan Simon and Richard Sparks, 23–39. London: SAGE Publications.

———. 2013. "Penality and the Penal State." *Criminology* 51 (3): 475–517.

———. 2014. "What Is a 'History of the Present'? On Foucault's Genealogies and Their Critical Preconditions." *Punishment & Society* 16 (4): 365–84.

Gearty, Conor. 2005. "With a Little Help from Our Friends." *Index on Censorship* 34 (1): 46–53.

———. 2020. "The Overseas Operations Bill: A Licence for Atrocity." *Prospect Magazine*, September 25, 2020. Accessed July 25, 2022, www.prospectmagazine.co.uk/politics/overseas-operations-bill-armed-forces-military-human-rights-law-labour-party.

———. 2021. "British Torture, Then and Now: The Role of the Judges." *Modern Law Review* 84 (1): 118–154.

Geis, Gilbert. 1990. "Crime Victims: Practices and Prospects." In *Victims of Crime: Problems, Policies, and Programs*, edited by Arthur J. Lurigio, Wesley G. Skogan, and Robert C. Davis, 251–68. Newbury Park, CA: SAGE Publications.

Gerasimov, Borislav. 2019. "Human Trafficking: From a Criminal Justice to Social Justice Approach." Presented at the Conference *Disrupting Traffick?* University of Chicago Delhi Centre, New Delhi, India, May 17, 2019. Accessed July 25, 2022. https://gaatw.org/events-and-news/68-gaatw-news/991-human-trafficking-from-a-criminal-justice-to-social-justice-approach.

Gerring, John. 2004. "What Is a Case Study and What Is It Good For?" *American Political Science Review* 98 (2): 341–54.

Giammarinaro, Maria Grazia. 2015. *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*. A/70/260. New York: UN General Assembly.

———. 2020. *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Maria Grazia Giammarinaro*. A/75/169. New York: UN General Assembly.

Gilmore, Ruth Wilson. 2007. *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California*. Berkeley: University of California Press.

Ginbar, Yuval. 2008. *Why Not Torture Terrorists?: Moral, Practical, and Legal Aspects of the "Ticking Bomb" Justification for Torture*. Oxford: Oxford University Press.

Glasius, Marlies. 2006. *The International Criminal Court: A Global Civil Society Achievement*. London: Routledge.

Golder, Ben. 2014. "Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought." *London Review of International Law* 2 (1): 77–114.

Goldman, Emma. 1911. "The Traffic in Women." In *Anarchism and Other Essays*, Second Revisited Edition. New York; London: Mother Earth Publishing Association.

Goodey, Jo. 2000. "An Overview of Key Themes." In *Integrating a Victim Perspective with Criminal Justice: International Debates*, edited by Adam Crawford and Jo Goodey, 13–34. Brookfield, VT: Ashgate.

Gorman, D. 2007. "Empire, Internationalism, and the Campaign against the Traffic in Women and Children in the 1920s." *Twentieth Century British History* 19 (2): 186–216.

Gottschalk, Marie. 2006. *The Prison and the Gallows: The Politics of Mass Incarceration in America*. New York; Cambridge: Cambridge University Press.

Grady, Kate. 2021. "Towards a Carceral Geography of International Law." In *Routledge Handbook of International Law and the Humanities*, edited by Shane Chalmers and Sundhya Pahuja, 357–68. London; New York: Routledge.

Graf, Sinja. 2021. *The Humanity of Universal Crime: Inclusion, Inequality, and Intervention in International Political Thought*. New York: Oxford University Press.

Gready, Paul. 2003. "The Politics of Human Rights." *Third World Quarterly* 24 (4): 745–57.

———. 2019. "Reflections on a Human Rights Decade, Near and Far." *Journal of Human Rights Practice* 11 (2): 422–37.

Greer, Herb. 1978. "Amnesty Investigations." *The Times*, June 20, 1978.

Greer, Steven. 2011. "Should Police Threats to Torture Suspects Always Be Severely Punished? Reflections on the Gäfgen Case." *Human Rights Law Review* 11 (1): 67–89.

GRETA. 2012. *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom - First Evaluation Round*. GRETA(2012)6. Council of Europe. Accessed July 25, 2022, https://childhub.org/sites/default/files/library/attachments/1501_GRETA_2012_6_FGR_GBR_en_original.pdf.

———. 2018. *7th General Report on GRETA's Activities Covering the Period from 1 January to 31 December 2017*. GRETA(2018)1. Council of Europe. Accessed July 25, 2022, https://rm.coe.int/greta-2018-1-7gr-en/16807af20e.

Gross, Oren. 2004. "The Prohibition on Torture and the Limits of the Law." In *Torture: A Collection*, edited by Sanford Levinson, 229–55. Oxford; New York: Oxford University Press.

Gruber, Aya. 2007. "The Feminist War on Crime." *Iowa Law Review* 92 (3): 741–833.

———. 2020. *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration*. Oakland, CA: University of California Press.

Gruber, Aya, Amy J. Cohen, and Kate Mogulescu. 2016. "Penal Welfare and the New Human Trafficking Intervention Courts." *Florida Law Review* 68: 1333–1402.

Guissé, El Hadji. 1997. *Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights), prepared by Mr. El Hadji Guissé, Special Rapporteur, pursuant to Sub-Commission resolution 1996/24*. E/CN.4/Sub2/1997/8. New York: UN Commission on Human Rights.

Gur-Arye, Miriam. 2004. "Can the War against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience." In *Torture: A Collection*, edited by Sanford Levinson, 183–98. Oxford; New York: Oxford University Press.

Hagan, John, and Ron Levi. 2007. "Justiciability as Field Effect: When Sociology Meets Human Rights." *Sociological Forum* 22 (3): 372–80.

Haldemann, Frank, and Thomas Unger. 2018. "Introduction." In *The United Nations Principles to Combat Impunity: A Commentary*, edited by Frank Haldemann and Thomas Unger, 4–25. Oxford: Oxford University Press.

Hall, Stuart. 2001. "Foucault: Power, Knowledge and Discourse." In *Discourse Theory and Practice - A Reader*, edited by Margaret Wetherell, Stephanie Taylor, and Simeon J Yates. London; Thousand Oaks, CA: SAGE Publications.

Halley, Janet. 2008. "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law." *Michigan Journal of International Law* 30 (1): 1–123.

Halley, Janet, Prabha Kotiswaran, Rachel Rebouché, and Hila Shamir, eds. 2018. *Governance Feminism: An Introduction*. Minneapolis; London: University of Minnesota Press.

———, eds. 2019. *Governance Feminism: Notes from the Field*. Minneapolis; London: University of Minnesota Press.

Halley, Janet, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas. 2006. "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism." *Harvard Journal of Law and Gender* 29: 335–423.

Halliday, Terence C, and Gregory Shaffer. 2015. "Transnational Legal Orders." In *Transnational Legal Orders*, edited by Terence C Halliday and Gregory Shaffer. Cambridge: Cambridge University Press.

Hannum, Hurst. 2006. "Peace versus Justice: Creating Rights as Well as Order out of Chaos." *International Peacekeeping* 13 (4): 582–95.

———. 2019. *Rescuing Human Rights: A Radically Moderate Approach*. Cambridge: Cambridge University Press.

Hansen, Lene. 2006. *Security as Practice: Discourse Analysis and the Bosnian War*. London; New York: Routledge.

Hanson, Elizabeth. 1991. "Torture and Truth in Renaissance England." *Representations* 34: 53–84.

Harris, Anne. 1972. "Northern Ireland." *The Times*, March 18, 1972.

Harris, Wilson H. 1928. *Human Merchandise: A Study of the International Traffic in Women*. London: Ernest Benn Limited.

Hart, Herbert Lionel Adolphus. 1963. *Law, Liberty, and Morality*. New York: Vintage Books.

Hathaway, James C. 2008. "The Human Rights Quagmire of 'Human Trafficking.'" *Virginia Journal of International Law* 49 (1): 1–59.

Haverkamp, Rita. 2019. "Victims of Human Trafficking: Considerations from a Crime Prevention Perspective." In *What Is Wrong with Human Trafficking? - Critical Perspectives on the Law*, edited by Rita Haverkamp, Ester Herlin-Karnell, and Claes Lernestedt, 53–76. Oxford: Hart Publishing.

Haynes, Jason. 2016. "The Modern Slavery Act (2015): A Legislative Commentary." *Statute Law Review* 37 (1): 33–56.

Heaney, Carmel. 1974. *General Assembly, 29th Session, 3rd Committee, 2065th Meeting*. A/C.3/SR.2065. New York: UN General Assembly.

Hearty, Kevin. 2020. "Misrecognising the Victim of State Violence: Denial, 'Deep' Imperialism and Defending 'Our Boys.'" *Crime, Law and Social Change* 73 (2): 217–35.

Heath, Deana. 2021. *Colonial Terror: Torture and State Violence in Colonial India*. Oxford: Oxford University Press.

Hess, David. 2017. "Business, Corruption, and Human Rights: Towards a New Responsibility for Corporations to Combat Corruption." *Wisconsin Law Review* 2017 (4): 641–94.

Higgins, Polly, Damien Short, and Nigel South. 2013. "Protecting the Planet: A Proposal for a Law of Ecocide." *Crime, Law and Social Change* 59 (3): 251–66.

Hobbes, Thomas. 1995/1651. *Leviathan*. Charlottesville, VA: InteLex Corporation.

Hoffmann, Stefan-Ludwig. 2010. "Introduction: Genealogies of Human Rights." In *Human Rights in the Twentieth Century*, edited by Stefan-Ludwig Hoffmann, 1–26. Cambridge, UK: Cambridge University Press.

Holder, Robyn. 2017. "Seeing the State: Human Rights Violations of Victims of Crime and Abuse of Power." In *The Routledge International Handbook of Criminology and Human Rights*, edited by Leanne Weber, Elaine Fishwick, and Marinella Marmo, 419–28. London; New York: Routledge.

Home Office. 2014. *Modern Slavery Bill: European Convention on Human Rights: United Nations Convention on The Rights of The Child: Memorandum by The Home Office*. UK Government. Accessed July 25, 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/318618/ECHRmemoModernSlavery.pdf.

———. 2019. *2019 UK Annual Report on Modern Slavery*. UK Government. Accessed July 25, 2022, https://www.gov.uk/government/publications/2019-uk-annual-report-on-modern-slavery.

Home Office and Scottish Executive. 2007. *UK Action Plan on Tackling Human Trafficking*. UK Home Office; Scottish Executive. Accessed July 25, 2022, https://www.migrationscotland.org.uk/uploads/files/documents/03_2007_uk_action_plan.pdf.

Hope, David. 2004. "Torture." *International and Comparative Law Quarterly* 53: 807–32.

Hopgood, Stephen. 2013. *The Endtimes of Human Rights*. Ithaca: Cornell University Press.

Horder, Jeremy. 2016. *Ashworth's Principles of Criminal Law*. 8th ed. Oxford: Oxford University Press.

Hörnle, Tatjana. 2014. "'Rights of Others' in Criminalisation Theory." In *Liberal Criminal Theory: Essays for Andreas von Hirsch*, edited by Andrew P. Simster, Antje du Bois-Pedain, and Ulfrid Neumann. Oxford: Hart Publishing.

Hörnqvist, Magnus. 2021. *The Pleasure of Punishment*. London; New York: Routledge.

Houge, Anette Bringedal, and Kjersti Lohne. 2017. "End Impunity! Reducing Conflict-Related Sexual Violence to a Problem of Law: End Impunity!" *Law & Society Review* 51 (4): 755–89.

Hubert, Eugène. 1894. "Un Chapitre de l'histoire Du Droit Criminel Dans Les Pays-Bas Autrichiens Au XVIIIe Siècle: Les Mémoires de Goswin de Fierlant." *Compte Rendu Des Séances de La Commission Royale d'histoire* 4: 154–253.

Hulsman, Louk HC. 1986. "Critical Criminology and the Concept of Crime." *Contemporary Crises* 10: 63–80.

Human Rights Watch. 2018. "G20: Argentine Probe of Saudi Crown Prince Advances." Human Rights Watch. November 28, 2018. Accessed July 25, 2022, https://www.hrw.org/news/2018/11/28/g20-argentine-probe-saudi-crown-prince-advances.

Hume, David. 1797. *Commentaries on the Law of Scotland, Respecting the Description and Punishment of Crimes*. Vol. II. Edinburg: Bell & Bradfute.

Huneeus, Alexandra. 2013. "International Criminal Law by Other Means the Quasi-Criminal Jurisdiction of the Human Rights Courts." *American Journal of International Law* 7: 1–44.

Huntington, Samuel P. 1991. *The Third Wave: Democratization in the Late Twentieth Century*. Norman, AK: University of Oklahoma Press.

Hyland, Ken, and Brian Paltridge. 2011. "Introduction." In *Continuum Companion to Discourse Analysis*, edited by Ken Hyland and Brian Paltridge, 1–5. London; New York: Continuum.

ICAT. 2012. *The International Legal Framework Concerning Trafficking in Persons*. ICAT Paper Series. Vienna: Inter-Agency Coordination Group against Trafficking in Persons. Accessed July 25, 2022, https://www.unodc.org/documents/human-trafficking/ICAT/ICAT_Policy_Paper_1_The_International_Legal_Instruments.pdf.

ICC. n.d. "Victims." Accessed July 25, 2022. https://www.icc-cpi.int/about/victims.

ICC Assembly of States Parties. 2010. *Report of the Bureau on Stocktaking: Complementarity. Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap*. ICC-ASP/8/51. New York: International Criminal Court. Accessed July 25, 2022, https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf.

ICC OTP. 2020. *Situation in Iraq/UK: Final Report*. The Hague: International Criminal Court, Office of the Prosecutor.

Ignatieff, Michael. 2001. *Human Rights as Politics and Idolatry*. Princeton: Princeton University Press.

———. 2004. *Lesser Evil: Political Ethics in an Age of Terror*. Princeton: Princeton University Press.

Independent Anti-Slavery Commissioner. 2017. *Annual Report 2016-2017*. UK Government. Accessed July 25, 2022, https://www.gov.uk/government/publications/independent-anti-slavery-commissioners-annual-report-2016-to-2017.

International Committee on the Rights of Sex Workers in Europe. 2021a. *From Vulnerability to Resilience: Sex Workers Organising to End Exploitation*. International Committee on the Rights of Sex Workers in Europe. Accessed July 25, 2022, https://respect.international/wp-content/uploads/2021/08/Exploitation-paper-pdf.pdf.

———. 2021b. "Missed Opportunities and Exclusion: Sex Workers Reflect on Two Decades of Anti-Trafficking." In *Palermo Protocol 20th Anniversary Special: Are We Better off on the Inside?*, edited by Joel Quirk, Neil Howard, and Cameron Thibos, 27–30. London: Beyond Trafficking and Slavery/openDemocracy.

IRCT. 2014. *Global Report on the UN International Day in Support of Victims of Torture 26 June 2014. Fighting Impunity*. Copenhagen: International Rehabilitation Council for Torture Victims.

———. 2017. *Data in the Fight against Impunity: Capturing Torture Survivors' Information about Torture, Impunity and Rehabilitation*. International Rehabilitation Council for Torture Victims. Accessed July 25, 2022, https://irct.org/assets/uploads/pdf_20170906092356.pdf.

Irwin, Mary Ann. 1996. "'White Slavery' As Metaphor Anatomy of a Moral Panic." *Ex Post Facto: The History Journal* 5.

Jackson, Miles. 2018. "Amnesties in Strasbourg." *Oxford Journal of Legal Studies* 38 (3): 451–74.

Jackson, Patrick Thaddeus. 2006. *Civilizing the Enemy: German Reconstruction and the Invention of the West*. Ann Arbor: University of Michigan Press.

Jackson, Richard. 2005. *Writing the War on Terrorism: Language, Politics and Counter-Terrorism*. Manchester: University Press.

Jarbussynova, Madina. 2015. *Commentary to the OSCE Action Plan to Combat Trafficking in Human Beings, the 2005 Addendum Addressing Special Needs of Child Victims of Trafficking for Protection and Assistance and the 2013 Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later*. Vienna: Organization for Security and Co-

operation in Europe/Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings.

Jardine, David. 1837. *A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth*. London: Baldwin and Cradock.

JCHR. 2009a. *Allegations of UK Complicity in Torture*. HL Paper 152 HC 230. London: Joint Committee on Human Rights.

———. 2009b. *Closing the Impunity Gap: UK Law on Genocide (and Related Crimes) and Redress for Torture Victims*. HL Paper 153 HC 553. London: Joint Committee on Human Rights.

Jensen, Steffen, Tobias Kelly, Morten Koch Andersen, Catrine Christiansen, and Jeevan Raj Sharma. 2017. "Torture and Ill-Treatment Under Perceived: Human Rights Documentation and the Poor." *Human Rights Quarterly* 39 (2): 393–415.

Johnson, David H.N. 1955. "The Draft Code of Offences against the Peace and Security of Mankind." *International and Comparative Law Quarterly* 4 (3): 445–68.

Johnston, David, and Charlie Savage. 2009. "Obama Reluctant to Look into Bush Programs." *The New York Times*, January 12, 2009. Accessed July 25, 2022, https://www.nytimes.com/2009/01/12/us/politics/12inquire.html.

Joinet, Louis. 1997. *Question of the impunity of perpetrators of human rights violations (civil and political): Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*. E/CN.4/Sub.2/1997/20/Rev.1. New York: UN Commission on Human Rights.

Jones, Kevan. 2020. *Overseas Operations (Service Personnel and Veterans) Bill (Sixth sitting)*. House of Commons, Public Bill Committees. Hansard.

Jouet, Mugambi. 2022. "Foucault, Prison, and Human Rights: A Dialectic of Theory and Criminal Justice Reform." *Theoretical Criminology* 26 (2): 202–23.

Khan, Karim A.A. 2022. "ICC Prosecutor Karim A.A. Khan QC Announces Deployment of Forensics and Investigative Team to Ukraine, Welcomes Strong Cooperation with the Government of the Netherlands." International Criminal Court. May 17, 2022. Accessed July 25, 2022, http://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine.

Kahn, Paul W. 2008. *Sacred Violence: Torture, Terror, and Sovereignty*. Ann Arbor: University of Michigan Press.

Kamber, Krešimir. 2017. *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law*. Leiden; Boston: Brill Nijhoff.

Kang, Hyo Yoon, and Sara Kendall. 2019. "Legal Materiality." In *The Oxford Handbook of Law and Humanities*, edited by Simon Stern, Maksymilian Del Mar, and Bernadette Meyler, 21–38. New York: Oxford University Press.

Kapur, Ratna. 2007. "'Faith' and the 'Good' Liberal: The Construction of Female Sexual Subjectivity in Anti-Trafficking Legal Discourse." In *Sexuality and the Law: Feminist Engagements*, edited by Vanessa Munro and Carl Stychin, 223–58. London; New York: Routledge.

———. 2018. *Gender, Alterity and Human Rights: Freedom in a Fishbowl*. Cheltenham; Northampton, MA: Edward Elgar Publishing.

Kapur, Ratna, and Brenda Cossman. 2018. "Subversive Sites 20 Years Later: Rethinking Feminist Engagements with Law." *Australian Feminist Law Journal* 44 (2): 265–87.

Kara, Siddharth. 2011. "Designing More Effective Laws against Human Trafficking." *Northwestern Journal of International Human Rights* 9 (2): 123.

Katona, Nóra. 2019. "Article 4: Obligation to Criminalize Torture." In *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary*, edited by Manfred Nowak, Moritz Birk, and Giuliana Monina, 2nd ed., 176–93. Oxford: Oxford University Press.

Kaufmann, Walter. 1974. *Nietzsche: Philosopher, Psychologist, Antichrist*. 4th ed. Princeton: Princeton University Press.

Kaye, Julie, Hayli Millar, and Tamara O'Doherty. 2020. "Exploring Human Rights in the Context of Enforcement-Based Anti-Trafficking in Persons Responses." In *The Palgrave International Handbook of Human Trafficking*, edited by John A. Winterdyk and Jackie Jones, 601–21. Cham: Palgrave Macmillan.

Kaye, Mike. 2003. *The Migration-Trafficking Nexus: Combatting Trafficking through the Protection of Migrants' Human Rights*. Anti-Slavery International. Accessed July 25, 2022, http://www.antislavery.org/wp-content/uploads/2017/01/the_migration_trafficking_nexus_2003.pdf.

Kelly, Tobias. 2011. "What We Talk about When We Talk about Torture." *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 2 (2): 327–43.

———. 2013. *This Side of Silence: Human Rights, Torture, and the Recognition of Cruelty*. Philadelphia: University of Pennsylvania Press.

———. 2019. "The Struggle Against Torture: Challenges, Assumptions and New Directions." *Journal of Human Rights Practice* 11: 324–33.

Kempadoo, Kamala. 2015. "The Modern-Day White (Wo)Man's Burden: Trends in Anti-Trafficking and Anti-Slavery Campaigns." *Journal of Human Trafficking* 1 (1): 8–20.

Kendall, Sara. 2014. "Critical Orientations: A Critique of International Criminal Court Practice." In *Critical Approaches to International Criminal Law: An Introduction*, edited by Christine E. J. Schwöbel, 54–70. London and New York: Routledge.

———. 2015. "Beyond the Restorative Turn: The Limits of Legal Humanitarianism." In *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, edited by Christian De Vos, Sara Kendall, and Carsten Stahn, 352–76. Cambridge: Cambridge University Press.

Kendall, Sara, and Sarah M.H. Nouwen. 2013. "Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood." *Law and Contemporary Problems* 76 (3 & 4): 235–62.

———. 2020. "International Criminal Justice and Humanitarianism." In *The Oxford Handbook of International Criminal Law*, edited by Kevin Jon Heller, Jens David Ohlin, Sarah M.H. Nouwen, Frédéric Mégret, and Darryl Robinson. Oxford: Oxford University Press.

Kennedy, David. 1985. "Spring Break." *Texas Law Review* 63: 1377–1423.

———. 2002. "The International Human Rights Movement: Part of the Problem?" *Harvard Human Rights Journal* 15: 101–25.

———. 2005. *The Dark Sides of Virtue: Reassessing International Humanitarianism*. Princeton: Princeton University Press.

———. 2006. "Reassessing International Humanitarianism: The Dark Sides." In *International Law and Its Others*, edited by Anne Orford, 131–55. Cambridge, UK: Cambridge University Press.

———. 2012. "The International Human Rights Regime: Still Part of the Problem?" In *Examining Critical Perspectives on Human Rights*, edited by Rob Dickinson, Elena Katselli, Colin Murray, and Ole W. Pedersen, 19–34. Cambridge: Cambridge University Press.

Kerr, Michael C. 1873. "Mr. Kerr's Address." In *Report on the International Penitentiary Congress of London, Held July 3-13, 1872*, by Enoch Cobb Wines. Washington, DC: Government Printing Office.

Keys, Barbara. 2012. "Anti-Torture Politics: Amnesty International, the Greek Junta, and the Origins of the Human Rights 'Boom' in the United States." In *The Human Rights Revolution: An International History*, edited by Akira Iriye, Petra Goedde, and William I. Hitchcock, 201–21. Oxford: Oxford University Press.

Khan, Borhan Uddin, and Md Jahid Hossain Bhuiyan, eds. 2022. *Human Rights and International Criminal Law*. Leiden: Brill Nijhoff.

Kilfedder, James. 1972. *Northern Ireland (IRA Activities)*. House of Commons, Commons Chamber. Vol. 837. Hansard.

Kim, Hunjoon, and Kathryn Sikkink. 2010. "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries." *International Studies Quarterly* 54: 939–63.

Kirk McDonald, Gabrielle. 1999. "The International Criminal Tribunal for the Former Yugoslavia: Making a Difference or Making Excuses?" New York, May 12, 1999. Accessed July 25, 2022, www.icty.org/en/press/international-criminal-tribunal-former-yugoslavia-making-difference-or-making-excuses.

Klayman, Barry M. 1978. "Definition of Torture in International Law." *Temple Law Quarterly* 51 (3): 449–517.

Knepper, Paul. 2010. *The Invention of International Crime: A Global Issue in the Making, 1881-1914*. Basingstoke, UK: Palgrave Macmillan.

———. 2016. "The Investigation into the Traffic in Women by the League of Nations: Sociological Jurisprudence as an International Social Project." *Law and History Review* 34 (1): 45–73.

Knust, Nandor, and Kerttuli Lingenfelter. 2020. "Individual Criminal Responsibility Beyond the State: Human Trafficking as Both a Transnational and an International Crime." In *The Palgrave International Handbook of Human Trafficking*, edited by John A. Winterdyk and Jackie Jones, 1765–84. Cham: Palgrave Macmillan.

Koller, David S. 2008. "The Faith of the International Criminal Lawyer." *International Law and Politics* 40: 1019–69.

Kolm, Josh. 2016. "Handcuffing Tyrants." *Stimulant*. April 7, 2016. Accessed July 25, 2022, https://stimulantonline.ca/2016/04/07/handcuffing-tyrants/.

Kooijmans, Pieter H. 1986. *Report by the Special Rapporteur, Mr. P. Kooijmans, Appointed Pursuant to Commission on Human Rights Resolution 1985/33*. E/CN.4/1986/15. New York: UN Commission on Human Rights.

Koskenniemi, Martti. 2002. "Between Impunity and Show Trials." *Max Planck Yearbook of United Nations Law* 6: 1–35.

———. 2006. *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge: Cambridge University Press.

———. 2011. *The Politics of International Law*. Oxford; Portland, OR: Hart Publishing.

Kotiswaran, Prabha. 2019a. "Transnational Criminal Law in a Globalised World: The Case of Trafficking." *UC Irvine Journal of International, Transnational, and Comparative Law* 4: 52–77.

———. 2019b. "Trafficking: A Development Approach." *Current Legal Problems* 72 (1): 375–416.

———. 2021. "The Sexual Politics of Anti-Trafficking Discourse." *Feminist Legal Studies* 29 (1): 43–65.

Kotiswaran, Prabha, and Nicola Palmer. 2015. "Rethinking the 'International Law of Crime': Provocations from Transnational Legal Studies." *Transnational Legal Theory* 6 (1): 55–88.

Krever, Tor. 2015. "Ending Impunity? Eliding Political Economy in International Criminal Law." In *Research Handbook on Political Economy and Law*, edited by Ugo Mattei and John Haskell, 298–314. Cheltenham; Northampton, MA: Edward Elgar Publishing.

Ksentini, Fatma Zohra. 1991. *Report of the Working Group on Contemporary Forms of Slavery on Its Sixteenths Session: Mrs. F.Z. Ksentini*. E/CN.4/Sub.2/1991/41. New York: UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Contemporary Forms of Slavery.

Lacey, Nicola. 2008. *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies*. Cambridge: Cambridge University Press.

Laite, Julia. 2012. *Common Prostitutes and Ordinary Citizens: Commercial Sex in London, 1885-1960*. Basingstoke, UK: Palgrave Macmillan.

———. 2017. "Between Scylla and Charybdis: Women's Labour Migration and Sex Trafficking in the Early Twentieth Century." *International Review of Social History* 62 (1): 37–65.

Lammasniemi, Laura. 2017. "Anti-White Slavery Legislation and Its Legacies in England." *Anti-Trafficking Review*, 9: 64–76.

———. 2020. "International Legislation on White Slavery and Anti-Trafficking in the Early Twentieth Century." In *The Palgrave International Handbook of Human Trafficking*, edited by John A. Winterdyk and Jackie Jones, 67–78. Cham: Springer.

Langbein, John H. 2004. "The Legal History of Torture." In *Torture: A Collection*, edited by Sanford Levinson, 93–104. Oxford; New York: Oxford University Press.

———. 2006/1977. *Torture and the Law of Proof: Europe and England in the Ancien Régime*. 3rd ed. Chicago; London: The University of Chicago Press.

Langer, Máximo, and Mackenzie Eason. 2019. "The Quiet Expansion of Universal Jurisdiction." *European Journal of International Law* 30 (2): 779–817.

Laplante, Lisa J. 2009. "Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes." *Virginia Journal of International Law* 49 (4): 915–84.

Larkin, John. 2020. *Overseas Operations Bill: A Policy Exchange Research Note*. Policy Exchange. Accessed July 25, 2022, https://policyexchange.org.uk/wp-content/uploads/Overseas-Operations-Bill.pdf.

Lassen, Nina. 1988. "Slavery and Slavery-Like Practices: United Nations Standards and Implementation." *Nordic Journal of International Law* 57 (2): 197–227.

Latcham, Anne Marie. 1989. "Duty to Punish: International Law and the Human Rights Policy of Argentina." *Boston University International Law Journal* 7: 355–78.

Lavrysen, Laurens. 2016. *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*. Cambridge: Intersentia.

Lavrysen, Laurens, and Natasa Mavronicola, eds. 2020. *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR*. Oxford; New York: Hart Publishing.

Lazarus, Liora. 2012. "Positive Obligations and Criminal Justice: Duties to Protect or Coerce?" In *Principles and Values in Criminal Law and Criminal Justice*, edited by Lucia Zedner and Julian V. Roberts, 135–56. Oxford: Oxford University Press.

Lazreg, Marnia. 2008. *Torture and the Twilight of Empire*. Princeton; Oxford: Princeton University Press.

Lea, Henry Charles. 1866. *Superstition and Force: Essays on the Wager of Law, the Wager of Battle, the Ordeal, Torture*. Philadelphia: Collins.

Lee, Roy S. K., ed. 1999. *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results*. The Hague: Kluwer Law International.

Lefranc, Sandrine. 2021. "A Tale of Many Jurisdictions: How Universal Jurisdiction Is Creating a Transnational Judicial Space." *Journal of Law and Society* 48: 573–94.

Legg, Stephen. 2012. "'The Life of Individuals as Well as of Nations': International Law and the League of Nations' Anti-Trafficking Governmentalities." *Leiden Journal of International Law* 25: 647–64.

Leidholdt, Dorchen. 1993. "Prostitution: A Violation of Women's Human Rights." *Cardozo Women's Law Journal* 1: 133.

Leigh, Carol. 2015. "Anti-Trafficking Campaigns, Sex Workers and the Roots of Damage." In *State and the Law: Beyond Trafficking and Slavery Short Course*, edited by Prabha Kotiswaran and Sam Okyere. Vol. 3. London: Beyond Trafficking and Slavery/openDemocracy.

Leighton, Stanley. 1884. *Egypt—Torture, &C In Egyptian Prisons*. House of Commons, Commons Chamber. Vol. 290. Hansard.

Lessa, Francesca, and Leigh A. Payne, eds. 2012a. *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*. Cambridge; New York: Cambridge University Press.

———. 2012b. "Introduction." In *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, edited by Francesca Lessa and Leigh A. Payne, 1–16. Cambridge; New York: Cambridge University Press.

Levie, Howard S. 1962. "Penal Sanctions for Maltreatment of Prisoners of War." *American Journal of International Law* 56 (2): 433–68.

Levine, Kate. 2021. "Police Prosecutions and Punitive Instincts." *Washington University Law Review* 98 (4): 997–1057.

Levinson, Sanford. 2004. "Contemplating Torture: An Introduction." In *Torture: A Collection*, edited by Sanford Levinson, 23–45. Oxford; New York: Oxford University Press.

Lewin, Malcolm. 1856. *Is the Practice of Torture in Madras, with the Sanction of the Authorities of Leadenhall Street?* Westminister: T. Brettell.

———. 1857. "Report of the Second Judge of the Sudder Court of Madras (Chittoor, 28 September 1840)." In *Torture in Madras*, by Malcolm Lewin, 9–24. London: James Ridgway.

Lewis, Hannah, and Louise Waite. 2019. "Migrant Illegality, Slavery and Exploitative Work." In *The Modern Slavery Agenda: Policy, Politics and Practice in the UK*, edited by Gary Craig, Alex Balch, Hannah Lewis, and Louise Waite, 219–42. Bristol, UK: Policy Press.

Ligue des Droits de l'Homme, Comité Maurice Audin, Comité de Résistance Spirituelle, Comité de Vigilance Universitaire, and Centre d'Information et de Coordination pour la Défense des Libertés et de la Paix. 1958. *Dossier Sur La Torture et La Répression En Algérie. Nous Accusons...* Paris: La Ligue des droits de l'homme. Accessed July 25,

2022, https://pandor.u-bourgogne.fr/archives-en-ligne/ark:/62246/r4064zrf477cbk/f1.

Limoncelli, Stephanie A. 2010. *The Politics of Trafficking: The First International Movement to Combat the Sexual Exploitation of Women*. Stanford: Stanford University Press.

Lippert, Randy K. 2017. "Governmentality analytics and human rights in criminology." In *The Routledge International Handbook of Criminology and Human Rights*, edited by Leanne Weber, Elaine Fishwick, and Marinella Marmo, 80–90. London; New York: Routledge.

Lippert, Randy K, and Claire Hamilton. 2020. "Editors' Introduction to the Special Issue, 'Governing Through Human Rights and Critical Criminology.'" *Critical Criminology* 28: 5–11.

Lohne, Kjersti. 2017. "Global Civil Society, the ICC, and Legitimacy in International Criminal Justice." In *The Legitimacy of International Criminal Tribunals*, edited by Nobuo Hayashi and Cecilia M. Bailliet, 449–72. Cambridge: Cambridge University Press.

———. 2018. "NGOs for International Justice - Criminal or Victims' Justice?" In *The Judicialization of International Law: A Mixed Blessing?*, edited by Andreas Follesdal and Geir Ulfstein, 109–27. Oxford: Oxford University Press.

———. 2019. *Advocates of Humanity: Human Rights NGOs in International Criminal Justice*. Oxford: Oxford University Press.

———. 2020. "Penal Humanitarianism beyond the Nation State: An Analysis of International Criminal Justice." *Theoretical Criminology* 24 (2): 145–62.

———. 2021. "Penal Welfarism 'Gone Global'? Comparing International Criminal Justice to The Culture of Control." *Punishment & Society* 23 (1): 3–23.

London Committee for the Exposure and Suppression of the Traffic in English Girls. 1881. "Appendix. To the Right Honourable the Earl Grandville, K.G., Her Majesty's Principal Secretary of State for Foreign Affairs." In *Report of the London Committee for the Exposure and Suppression of the Traffic in English Girls for the Purposes of Continental Prostitution. 1881*. London: Dyer Brothers.

Lord Browne of Ladyton. 2021. *Overseas Operations (Service Personnel and Veterans) Bill*. House of Lords, Lords Chamber. Vol. 810. Hansard.

Lord Diplock. 1972. *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland*. Cmnd. 5185. London: Secretary of State for Northern Ireland.

Lord Gardiner. 1972. *Minority Report of the Committee of Privy Counsellors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism*. Cmnd. 4901. London: UK Prime Minister.

Lord Monteagle. 1856. *Torture in India*. House of Lords, Lords Chamber. Vol. 141. Hansard.

Lord Parker of Waddington. 1972. *Report of the Committee of Privy Counsellors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism*. Cmnd. 4901. London: UK Prime Minister.

Losier, Toussaint. 2018. "A Human Right to Reparations: Black People against Police Torture and the Roots of the 2015 Chicago Reparations Ordinance." *Souls* 20 (4): 399–419.

Luban, David. 2004. "A Theory of Crimes Against Humanity." *Yale Journal of International Law* 29: 85–167.

———. 2005. "Liberalism, Torture, and the Ticking Bomb." *Virginia Law Review* 91: 1425–61.

———. 2014. *Torture, Power, and Law*. Cambridge: Cambridge University Press.

Lukes, Steven, and Devyani Prabhat. 2012. "Durkheim on Law and Morality: The Disintegration Thesis." *Journal of Classical Sociology* 12 (3–4): 363–383.

Madras Commission. 1855. *Report of the Commissioners for the Investigation of Alleged Cases of Torture, in the Madras Presidency - Submitted to the Right Honorable the Governor in Council of Fort Saint George, on the 16th April 1855 (H. Smith, at the Fort St. George Gazette Press 1855)*. London: House of Commons.

"Making Ecocide a Crime." n.d. Stop Ecocide International. Accessed July 25, 2022. https://www.stopecocide.earth/making-ecocide-a-crime.

Malarino, Ezequiel. 2012. "Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights." *International Criminal Law Review* 12 (4): 665–95.

Malby, Steven. 2019. *Criminal Theory and International Human Rights Law*. London: Routledge.

———. 2022. "Human Rights and the Criminal Law: An Orderly Future?" Presented at the Workshop *Human Rights Penality: The Next Decade*. Birmingham, UK, March 25, 2022. On File with Author.

Malcolm, Noel. 2017. *Human Rights and Human Wrongs: A New Approach to Human Rights Law*. Policy Exchange. Accessed July 25, 2022, https://policyexchange.org.uk/publication/human-rights-and-political-wrongs-a-new-approach-to-human-rights-law/.

Mallinder, Louise. 2012. "Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment." In *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, edited by Francesca Lessa and Leigh A. Payne, 69–96. Cambridge; New York: Cambridge University Press.

Mallory, Conall. 2022. "Rights-Restricting Rhetoric: The Overseas Operations (Service Personnel and Veterans) Act 2021." *Modern Law Review* 85 (2): 461–87.

Mamdani, Mahmood. 2000. "The Politics of Memory: Truth, Healing and Social Justice." In *The Politics of Memory: Truth, Healing and Social Justice*, edited by Ifi Amadiume and Abdullah An-Na'im, 176–83. New York: Zed Books.

Manacorda, Stefano. 2014. "'Dovere Di Punire'? Gli Obblighi Di Tutela Penale Nell'era Della Internazionalizzazione Del Diritto." In *Il Lato Oscuro Dei Diritti Umani: Esigenze Emancipatorie e Logiche Di Dominio Nella Tutela Giuridica Dell'individuo*, edited by Massimo Meccarelli, Paolo Palchetti, and Carlo Sotis. Madrid: Universidad Carlos III De Madrid.

Mann, Itamar. 2021. "Border Violence as Crime." *University of Pennsylvania Journal of International Law* 42 (3): 675–736.

Mann, Lori J. 2011. *Trafficking in Human Beings and Smuggling of Migrants in ACP Countries: Key Challenges and Ways Forward*. International Organization for Migration. Accessed July 25, 2022, https://publications.iom.int/system/files/pdf/trafficking_in_human_beings.pdf.

Mantouvalou, Virginia. 2018. "The UK Modern Slavery Act 2015 Three Years On: The UK Modern Slavery Act 2015 Three Years On." *Modern Law Review* 81 (6): 1017–45.

———. 2020. "Human Rights, Labour Rights, and Criminal Wrongs." In *Criminality at Work*, edited by Alan Bogg, Jennifer Collins, Mark Freedland, and Jonathan Herring, 210–28. Oxford: Oxford University Press.

Marks, Susan. 2004. "Apologising for Torture." *Nordic Journal of International Law* 73 (3): 365–85.

———. 2008. "Exploitation as an International Legal Concept." In *International Law on the Left: Re-Examining Marxist Legacies*, edited by Susan Marks, 281–308. Cambridge: Cambridge University Press.

———. 2009. "False Contingency." *Current Legal Problems* 62 (1): 1–21.

———. 2011. "Human Rights and Root Causes." *Modern Law Review* 74 (1): 57–78.

———. 2012. "Human Rights in Disastrous Times." In *The Cambridge Companion to International Law*, edited by James Crawford, Martti Koskenniemi, and Surabhi Ranganathan, 309–26. Cambridge: Cambridge University Press.

———. 2013. "Four Human Rights Myths." In *Human Rights: Old Problems, New Possibilities*, edited by David Kinley, Wojciech Sadurski, and Kevin Walton. Cheltenham; Northampton, MA: Edward Elgar Publishing.

Martin, Dianne L. 1998. "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies." *Osgoode Hall Law Journal* 36 (1): 151–88.

Marx, Karl. 1857. "Investigation of Tortures in India." *New-York Daily Tribune*, September 17, 1857.

Matsuda, Mari J. 1989. "Public Response to Racist Speech: Considering the Victim's Story." *Michigan Law Review* 87 (8): 2320–81.

Mavronicola, Natasa. 2017. "Taking Life and Liberty Seriously: Reconsidering Criminal Liability Under Article 2 of the ECHR: Taking Life and Liberty Seriously." *Modern Law Review* 80 (6): 1026–51.

———. 2020. "Redistributing Punishment: The Limited Vision of Coercive Human Rights." *EJIL: Talk!*. October 23, 2020. Accessed July 25, 2022, https://www.ejiltalk.org/redistributing-punishment-the-limited-vision-of-coercive-human-rights/.

———. 2021. *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs*. Oxford: Hart Publishing.

———. 2022. "Reasons to Rethink Human Rights Penality." Presented at the Workshop *Human Rights Penality: The Next Decade*. Birmingham, UK, March 25, 2022. On File with Author.

Mavronicola, Natasa, and Laurens Lavrysen. 2020. "Coercive Human Rights: Introducing the Sharp Edge of the European Convention on Human Rights." In *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR*, edited by Laurens Lavrysen and Natasa Mavronicola, 1–26. Oxford; New York: Hart Publishing.

Maxim, Ioan. 1993. *Report of the Working Group on Contemporary Forms of Slavery on Its Eighteenth Session: Mr. Ioan Maxim*. E/CN.4/Sub.2/1993/30. New York: UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Contemporary Forms of Slavery.

Mbaye, Keba. 1979. "No Longer Content to Condemn." In *Torture: How to Make the International Convention Effective - A Draft Optional Protocol*, by International Commission of Jurists and Swiss Committee Against Torture, 17. Geneva: International Commission of Jurists.

McAdam, Marika. 2021. "Putting The 'Justice' (Back?) Into The 'Criminal Justice Approach' To Anti-Trafficking." *Border Criminologies*. November 22, 2021. Accessed July 25, 2022, https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/11/putting-justice.

McAuliffe, Padraig. 2011. "From Molehills to Mountains (and Myths?): A Critical History of Transnational Justice Advocacy." *Finnish Yearbook of International Law* 22: 85–166.

McEvoy, Kieran. 2007. "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice." *Journal of Law and Society* 34 (3): 411–40.

McEvoy, Kieran, and Louise Mallinder. 2012. "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy." *Journal of Law and Society* 39 (3): 410–40.

McGlynn, Clare. 2009. "Rape, Torture and the European Convention on Human Rights." *International and Comparative Law Quarterly* 58 (3): 565–95.

McLeod, Allegra M. 2019. "Envisioning Abolition Democracy." *Harvard Law Review* 132: 1613–49.

McMillan, Nesam. 2016. "Imagining the International: The Constitution of the International as a Site of Crime, Justice and Community." *Social & Legal Studies* 25 (2): 163–80.

McQuade, Aidan. 2019. "Modern Slavery in Global Context: Ending the Political Economy of Forced Labour and Slavery." In *The Modern Slavery Agenda: Policy, Politics and Practice in the UK*, edited by Gary Craig, Alex Balch, Hannah Lewis, and Louise Waite, 29–46. Bristol, UK: Policy Press.

Mégret, Frédéric. 2001. "Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project." *Finnish Yearbook of International Law* 7: 193–247.

———. 2005. "In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice." *Cornell International Law Journal* 38 (3): 725–51.

———. 2014. "Practices of Stigmatization." *Law and Contemporary Problems* 76: 287–318.

———. 2016. "The Anxieties of International Criminal Justice." *Leiden Journal of International Law* 29 (1): 197–221.

———. 2018a. "The Strange Case of the Victim Who Did Not Want Justice." *International Journal of Transitional Justice* 12 (3): 444–63.

———. 2018b. "International Criminal Justice as a Peace Project." *European Journal of International Law* 29 (3): 835–58.

———. 2019. "'Do Not Do Abroad What You Would Not Do at Home?': An Exploration of the Rationales for Extraterritorial Criminal Jurisdiction over a State's Nationals." *The Canadian Yearbook of International Law* 57: 1–40.

Mégret, Frédéric, and Jean-Paul Calderón. 2015. "The Move Towards a Victim-Centred Concept of Criminal Law and the 'Criminalization' of Inter-American Human Rights Law: A Case of Human Rights Law Devouring Itself." In *The Inter-American Court of Human Rights Theory and Practice, Present and Future*, edited by Yves Haeck, Oswaldo Ruiz-Chiriboga, and Clara Burbano-Herrera, 419–41. Cambridge: Intersentia.

Meister, Robert. 2011. *After Evil: A Politics of Human Rights*. New York: Columbia University Press.

Mellor, Alec. 1949. *La Torture*. Paris: Les Horizons Littéraires.

Melzer, Nils. 2020a. "Communication of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer: OL GBR 6/2020." Accessed July 25, 2022, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25352.

———. 2020b. *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer: Biopsychosocial Factors Conducive to Torture and Ill-Treatment*. A/75/179. New York: UN General Assembly.

———. 2021. *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer*. A/76/168. New York: UN General Assembly.

Méndez, Juan E. 2000. "International Human Rights Law, International Humanitarian Law and International Criminal Law and Procedure New Relationships." In *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, edited by Dinah Shelton, 65–74. Ardsley, NY: Transnational Publishers.

———. 2011. *Report Submitted by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez*. A/HRC/16/52. Geneva: Human Rights Council.

———. 2012. "Foreword." In *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, edited by Francesca Lessa and Leigh A. Payne, xvii–xxix. Cambridge; New York: Cambridge University Press.

Mercer, Johnny. 2020. *Overseas Operations (Service Personnel and Veterans) Bill (Seventh Sitting)*. House of Commons, Public Bill Committees. Hansard.

Meron, Theodor. 2011. *The Making of International Criminal Justice: The View from the Bench: Selected Speeches*. Oxford: Oxford University Press.

Merry, Sally Engle. 2006a. "Transnational Human Rights and Local Activism: Mapping the Middle." *American Anthropologist* 108 (1): 38–51.

———. 2006b. "New Legal Realism and the Ethnography of Transnational Law." *Law & Social Inquiry* 31 (4): 975–95.

Metcalf, Thomas R. 1995. *Ideologies of the Raj*. Cambridge: Cambridge University Press.

Metzger, Barbara. 2007. "Towards an International Human Rights Regime during the Inter-War Years: The League of Nations' Combat of Traffic in Women and Children." In *Beyond Sovereignty: Britain, Empire and Transnationalism, c. 1880-1950*, edited by Kevin Grant, Philippa Levine, and Frank Trentmann, 54–79. London: Palgrave Macmillan.

Milivojevic, Sanja, and Sharon Pickering. 2013. "Trafficking in People, 20 Years On: Sex, Migration and Crime in the Global Anti-Trafficking Discourse and the Rise of the 'Global Trafficking Complex.'" *Current Issues in Criminal Justice* 25 (2): 585–604.

Miller, Alice M. 2004. "Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection." *Health and Human Rights* 7 (2): 16.

Miller, Alice M., and Mindy Jane Roseman, eds. 2019. *Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law*. Philadelphia: University of Pennsylvania Press.

Miller, Alice M., and Tara Zivkovic. 2019. "Seismic Shifts: How Prosecution Became the Go-To Tool to Vindicate Rights." In *Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law*, edited by Alice M. Miller and Mindy Jane Roseman, 39–53. Philadelphia: University of Pennsylvania Press.

Miller, Zinaida. 2016. "Anti-Impunity Politics in Post-Genocide Rwanda." In *Anti-Impunity and the Human Rights Agenda*, edited by Karen Engle, Zinaida Miller, and Dennis M. Davis, 149–84. Cambridge: Cambridge University Press.

———. 2020. "Embedded Ambivalence: Ungoverning Global Justice." *Transnational Legal Theory* 11 (3): 353–81.

Milliken, Jennifer. 1999. "The Study of Discourse in International Relations: A Critique of Research and Methods." *European Journal of International Relations* 5 (2): 225–54.

Minow, Martha. 1998. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston: Beacon Press.

Moacanin, Milan. 1951. "International Criminal Jurisdiction." *New York Law School Student Law Review* 1 (1): 35–49.

Montesquieu, Charles Louis de Secondat, Baron de. 1777/1748. "The Spirit of the Laws, Book VI, Chapter XVII (Of the Rack)." In *The Complete Works of M. de Montesquieu*. Vol. 1. London: T. Evans.

Moran, Leslie J. 2001. "Affairs of the Heart: Hate Crime and the Politics of Crime Control." *Law and Critique* 12: 331–44.

Morgan, Stephen. 2020. *Overseas Operations (Service Personnel and Veterans) Bill (Sixth sitting)*. House of Commons, Public Bill Committees. Hansard.

Mort, Frank. 2000. *Dangerous Sexualities: Medico-Moral Politics in England Since 1830*. 2nd ed. London: Routledge.

Mouffe, Chantal. 2013. *Agonistics: Thinking the World Politically*. London: Verso.

———. 2014. "Democracy, Human Rights and Cosmopolitanism: An Agonistic Approach." In *The Meanings of Rights: The Philosophy and Social Theory of Human Rights*, edited by Costas Douzinas and Conor Gearty, 181–92. Cambridge: Cambridge University Press.

Moyn, Samuel. 2010. *The Last Utopia: Human Rights in History*. Cambridge, Mass: Harvard University Press.

———. 2014. *Human Rights and the Uses of History*. London; Brooklyn, NY: Verso.

———. 2015. *Christian Human Rights*. Philadelphia: University of Pennsylvania Press.

———. 2016. "Anti-Impunity as Deflection of Argument." In *Anti-Impunity and the Human Rights Agenda*, edited by Karen Engle, Zinaida Miller, and Dennis M. Davis, 68–94. Cambridge: Cambridge University Press.

———. 2020. "From Aggression to Atrocity Rethinking the History of International Criminal Law." In *The Oxford Handbook of International Criminal Law*, edited by Kevin Jon Heller, Jens David Ohlin, Sarah M.H. Nouwen, Frédéric Mégret, and Darryl Robinson, 341–60. Oxford: Oxford University Press.

Mumford, Andrew. 2014. *The Counter-Insurgency Myth: The British Experience of Irregular Warfare*. Abingdon: Routledge.

Munro, Vanessa E. 2005. "A Tale of Two Servitudes: Defining and Implementing a Domestic Response to Trafficking of Women for Prostitution in the UK and Australia:" *Social & Legal Studies* 14 (1): 91–114.

Musto, Jennifer Lynne. 2010. "Carceral Protectionism and Multi-Professional Anti-Trafficking Human Rights Work in the Netherlands." *International Feminist Journal of Politics* 12 (3–4): 381–400.

Mutua, Makau. 2001. "Savages, Victims, and Saviors: The Metaphor of Human Rights." *Harvard Journal of International Law* 42 (1): 201–45.

———. 2016. "Is the Age of Human Rights Over?" In *The Routledge Companion to Literature and Human Rights*, edited by Sophia McClennen and Alexandra Schultheis Moore, 450–58. London: Routledge.

Nanda, Ved P., and M. Cherif Bassiouni. 1972. "Slavery and Slave Trade: Steps toward Eradication." *Santa Clara Lawyer* 12 (2): 424–42.

Neier, Aryeh. 2012. *The International Human Rights Movement: A History*. Princeton, NJ: Princeton University Press.

Nelken, David. 2010. "Human Trafficking and Legal Culture." *Israel Law Review* 43 (3): 479–513.

Nepote, Jean. 1967. "International Crime." *Police Journal* 40 (1): 7–22.

Nicholls, David A. 2009. "Putting Foucault to Work: An Approach to the Practical Application of Foucault's Methodological Imperatives." *Aporia* 1 (1): 30–40.

Nietzsche, Friedrich. 2001/1882. *The Gay Science: With a Prelude in German Rhymes and an Appendix of Songs*. Edited by Bernard Williams. Translated by Josefine Nauckhoff. Cambridge: Cambridge University Press.

———. 2006. *On the Genealogy of Morality*. Edited by Keith Ansell-Pearson. Translated by Carol Diethe. New York: Cambridge University Press.

Nimaga, Salif. 2007. "An International Conscience Collective? A Durkheimian Analysis of International Criminal Law." *International Criminal Law Review* 7: 561–619.

Nimigan, Sarah. 2019. "The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity.'" *Journal of International Criminal Justice* 17 (5): 1005–29.

Nino, Carlos S. 1991. "The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina." *The Yale Law Journal* 100 (8): 2619–40.

———. 1996. *Radical Evil on Trial*. New Haven: Yale University Press.

Northern Aid. 1971. *Torture: The Record of British Brutality in Ireland*. Dublin: Northern Aid and Association for Legal Justice.

Nouwen, Sarah M.H. 2013. *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*. Cambridge: Cambridge University Press.

Nouwen, Sarah M.H., and Wouter G. Werner. 2015. "Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity." *Journal of International Criminal Justice* 13 (1): 157–76.

Nowak, Manfred. 2010. *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. A/65/273. New York: UN General Assembly.

Nowak, Manfred, Moritz Birk, and Giuliana Monina. 2019. "Introduction." In *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary*, edited by Manfred Nowak, Moritz Birk, and Giuliana Monina, 2nd ed. Oxford: Oxford University Press.

NPCC. 2019. *Modern Slavery Police Transformation - Programme Annual Report to 31 March 2019*. The National Police Chiefs Council. Accessed July 25, 2022, https://www.npcc.police.uk/Publication/2019/Modern%20Slavery%20Annual%20Report.pdf.

NPM. 2020. *Ten Years of the UK National Preventive Mechanism: Working Together to Prevent Torture and Ill-Treatment in Detention*. National Preventive Mechanism. Accessed July 25, 2022, https://icva.org.uk/wp-content/uploads/2020/03/NPM-10-Years-Report.pdf.

———. 2021. *Monitoring Places of Detention Eleventh Annual Report of the United Kingdom's National Preventive Mechanism 1 April 2019 – 31 March 2020*. CP 366. National Preventive Mechanism. Accessed July 25, 2022, https://www.cjini.org/getdoc/bf0a3c37-cb50-4da2-868e-81c3c793cd9a/NPM_AnnualReport_2019_20_WEB.aspx.

NVA. 1899. *The White Slave Trade - Transactions of the International Congress on the White Slave Trade, Held in London on the 21st, 22nd and 23rd of June, 1899, at the Invitation of the National Vigilance Association*. London: National Vigilance Association.

Obokata, Tom. 2006. *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach*. Leiden; Boston: Martinus Nijhoff Publishers.

O'Boyle, Michael. 1978. "Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom." *American Journal of International Law* 71 (4): 674–706.

O'Brien, Erin. 2019. *Challenging the Human Trafficking Narrative: Victims, Villains and Heroes*. London: Routledge.

O'Callaghan, Saen. 1965. *The White Slave Trade*. Robert Hale Ltd: London.

O'Connell Davidson, Julia. 2006. "Will the Real Sex Slave Please Stand Up?" *Feminist Review* 83 (1): 4–22.

———. 2010. "New Slavery, Old Binaries: Human Trafficking and the Borders of 'Freedom.'" *Global Networks* 10 (2): 244–61.

O'Connell, Paul. 2018a. "Human Rights: Contesting the Displacement Thesis." *Northern Ireland Legal Quarterly* 69 (1): 19–35.

———. 2018b. "On the Human Rights Question." *Human Rights Quarterly* 40 (4): 962–88.

Oette, Lutz. 2021. "The Prohibition of Torture and Persons Living in Poverty: From the Margins to the Centre." *International & Comparative Law Quarterly* 70 (2): 307–41.

———. 2022. "Personal Email Communication," May 18, 2022. On File with Author.

OHCHR. 2002a. *Methods of Combating Torture*. Human Rights Fact Sheets Series No 4/Rev 1. Geneva: United Nations.

———. 2002b. *Recommended Principles and Guidelines on Human Rights and Human Trafficking*. E/2002/68/Add.1. New York: UN Economic and Social Council.

———. 2004. *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Professional Training Series No. 8/Rev.1, HR/P/PT/8/Rev.1. New York; Geneva: United Nations.

———. 2010. *Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking*. HR/PUB/10/2. Geneva: United Nations.

———. 2014. *First Decade of the Mandate of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*. United Nations. Accessed July 25, 2022, https://www.ohchr.org/Documents/Issues/Trafficking/FirsDecadeSRon_%20trafficking.pdf.

———. 2016. *Human Rights - Handbook for Parliamentarians N° 26*. Inter-Parliamentary Union and the United Nations (Office of the Hight Commissioner for Human Rights). Accessed July 25, 2022, https://www.ohchr.org/sites/default/files/Documents/Publications/HandbookParliamentarians.pdf.

———. 2020. "INFORMATION NOTE: COVID-19, Prison Overcrowding, and Serving Sentences for Serious Human Rights Violations." OHCHR. 2020. Accessed June 25, 2022, www.ohchr.org/en/special-procedures/sr-truth-justice-reparation-and-non-recurrence/information-note-covid-19-prison-overcrowding-and-serving-sentences-serious-human-rights-violations.

Ohlin, Jens David. 2018. "The Right to Punishment for International Crimes." *Cornell Law School Research Paper No. 18-31*, 1–26.

Olsen, Tricia D., Leigh A. Payne, and Andrew G. Reiter. 2012. "Conclusion: Amnesty in the Age of Accountability." In *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, edited by Francesca Lessa and Leigh A. Payne, 336–58. Cambridge; New York: Cambridge University Press.

OMCT, WLW, Amnesty International and GJC. 2018. *Briefing Report - Thematic Briefing: Protecting Women from Violence through the UN Convention Against Torture*. World Organisation Against Torture, Women's Link Worldwide, Amnesty International and Global Justice Center. Accessed July 25, 2022, https://www.omct.org/site-resources/legacy/briefing_report__protecting_women_from_violence_through_the_un_convention_against_torture_2020-12-11-144516.pdf.

Orentlicher, Diane F. 1991. "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime." *The Yale Law Journal* 100 (8): 2537–2615.

———. 1994. "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation." *Studies of Transnational Legal Policy* 26: 425–75.

———. 2005. *Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity*. 2005. E/CN.4/2005/102/Add.1. New York: UN Economic and Social Council.

———. 2007. "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency." *International Journal of Transitional Justice* 1 (1): 10–22.

Osofsky, Hari M. 1997. "Domesticating International Criminal Law: Bringing Human Rights Violators to Justice." *The Yale Law Journal* 107: 191–226.

Otto, Dianne. 2015. "Decoding Crisis in International Law: A Queer Feminist Perspective." In *International Law and Its Discontents: Confronting Crises*, edited by Barbara Stark, 115–36. Cambridge: Cambridge University Press.

Owen, Sarah. 2020. *Overseas Operations (Service Personnel and Veterans) Bill*. House of Commons, Commons Chamber. Vol. 683. Hansard.

Padoa Schioppa, Antonio. 2007. *Storia Del Diritto in Europa: Dal Medioevo All'età Contemporanea*. Bologna: Il Mulino.

Paige, Tamsin Phillipa. 2019. *Petulant and Contrary: Approaches by the Permanent Five Members of the UN Security Council to the Concept of 'Threat to the Peace' under Article 39 of the UN Charter*. Leiden; Boston: Brill Nijhoff.

Papastephanou, Anestis. 1975. *General Assembly, 30th Session, 3rd Committee, 2160th Meeting*. A/C.3/SR.2160. New York: UN General Assembly.

Pardo, Rosario. 2009. *Handbook for Parliamentarians - The Council of Europe Convention on Action against Trafficking in Human Beings*. Parliamentary Assembly of the Council of Europe. Accessed July 25, 2022, https://rm.coe.int/168008ebd9.

Parry, John T., and Welsh S. White. 2002. "Interrogating Suspected Terrorists: Should Torture Be an Option?" *University of Pittsburgh Law Review* 63 (4): 743–66.

Pastor, Daniel R. 2006. "La Deriva Neopunitivista y El Desprestigio Actual de Los Derechos Humanos." *Jura Gentium*, 2006. Accessed July 25, 2022, http://www.juragentium.org/topics/latina/es/pastor.htm.

Pati, Roza. 2011. "States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia." *Boston University International Law Journal* 79: 79–142.

Paust, Jordan J. 2009. "The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions." *Valparaiso University Law Review* 43 (4): 1535–76.

Payne, Leigh A. 2015. "The Justice Paradox?" In *Transnational Legal Orders*, edited by Terence C. Halliday and Gregory Shaffer, 439–72. Cambridge: Cambridge University Press.

Pearson, Elaine. 2000. *Human Rights and Trafficking in Persons: A Handbook*. Bangkok, Thailand: Global Alliance Against Traffic in Women. Accessed July 25, 2022, https://www.gaatw.org/resources/publications/903-human-rights-and-trafficking-in-persons-a-handbook.

———. 2002. *Human Traffic, Human Rights: Redefining Victim Protection*. Anti-Slavery International. Accessed July 25, 2022, http://www.antislavery.org/wp-content/uploads/2017/01/hum_traff_hum_rights_redef_vic_protec_final_full.pdf.

Pella, Vespasian V. 1950. "Towards an International Criminal Court." *American Journal of International Law* 44 (1): 37–68.

Peršak, Nina. 2020. "Positive Obligations in View of the Ultima Ratio Principle." In *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR*, edited by Laurens Lavrysen and Natasa Mavronicola, 141–59. Oxford; New York: Hart Publishing.

Perugini, Nicola, and Neve Gordon. 2015. *The Human Right to Dominate*. Oxford: Oxford University Press.

Peters, Edward. 1985. *Torture*. New York; Oxford: Basil Blackwell.

Pickering, William SF, and William Watts Miller, eds. 1993. *Individualism and Human Rights in the Durkheimian Tradition*. Oxford: British Centre for Durkheimian Studies.

Pihlajamäki, Heikki. 2007. "The Painful Question: The Fate of Judicial Torture in Early Modern Sweden." *Law and History Review* 25 (3): 557–92.

Pillay, Navi. 2011. "'Torturers Will Be Brought to Justice Sooner or Later' – UN Human Rights Chief." June 24, 2011. Accessed July 25, 2022, https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11180&LangID=E.

Pinto, Mattia. 2018. "Awakening the Leviathan through Human Rights Law: How Human Rights Bodies Trigger the Application of Criminal Law." *Utrecht Journal of International and European Law* 34 (2): 161–84.

———. 2020. "Sowing a 'Culture of Conviction': What Shall Domestic Criminal Justice Systems Reap from Coercive Human Rights?" In *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR*, edited by Laurens Lavrysen and Natasa Mavronicola. Oxford; New York: Hart Publishing.

———. 2022. "Human Rights Penality and the Forgotten History of the Council of Europe's Report on Decriminalisation." Presented at the Workshop *Human Rights Penality: The Next Decade*. Birmingham, UK, March 25, 2022. On File with Author.

Pinto-Duschinsky, Michael. 2011. *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK*. Policy Exchange. Accessed July 25, 2022, https://policyexchange.org.uk/publication/bringing-rights-back-home-making-human-rights-compatible-with-parliamentary-democracy-in-the-uk/.

Piotrowicz, Ryszard. 2012. "States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations." *International Journal of Refugee Law* 24 (2): 181–201.

Pliley, Jessica R. 2010. "Claims to Protection: The Rise and Fall of Feminist Abolitionism in the League of Nations' Committee on the Traffic in Women and Children, 1919–1936." *Journal of Women's History* 22 (4): 90–113.

Polavarapu, Aparna. 2019. "Global Carceral Feminism and Domestic Violence: What the West Can Learn from Reconciliation in Uganda." *Harvard Journal of Law and Gender* 42 (1): 123–76.

Posner, Eric. 2014. *The Twilight of Human Rights Law*. Oxford; New York: Oxford University Press.

Posner, Richard A. 2004. "Torture, Terrorism, and Interrogation." In *Torture: A Collection*, edited by Sanford Levinson, 291–98. Oxford; New York: Oxford University Press.

Powderly, Joseph. 2019. "International Criminal Justice in an Age of Perpetual Crisis." *Leiden Journal of International Law* 32 (1): 1–11.

Powell, Anna Rice. 1888. "The International Federation for the Abolition of State Regulation of Vice." In *Report of the International Council of Women Assembled by the National Woman Suffrage Association*, 252–57. Washington, DC: National Woman Suffrage Association.

Power, Jonathan. 2001. *Like Water on a Stone: The Story of Amnesty International*. London: Allen Lane.

Pratt, John. 2005. *The New Punitiveness: Trends, Theories, Perspectives*. Cullompton, UK: Willan Publishing.

———. 2007. *Penal Populism*. London; New York: Routledge.

Punch, Maurice. 2003. "Rotten Orchards: 'Pestilence', Police Misconduct and System Failure." *Policing and Society* 13 (2): 171–96.

Quirk, Joel. 2021. "Are We Better Off on the Inside? Modern Slavery and Human Trafficking as Platforms for Political Mobilisation." In *Palermo Protocol 20th Anniversary Special: Are We Better off on the Inside?*, edited by Joel Quirk, Neil Howard, and Cameron Thibos, 4–10. London: Beyond Trafficking and Slavery/openDemocracy. www.opendemocracy.net/en/beyond-trafficking-and-slavery/are-we-better-inside-modern-slavery-and-human-trafficking-platforms-political-mobilisation/.

Quirk, Joel, and Julia O'Connell Davidson. 2015. "Moving Beyond Popular Representations of Trafficking and Slavery." In *Popular and Political Representations*, edited by Joel Quirk and Julia O'Connell Davidson. Vol. 1. London: Beyond Trafficking and Slavery/openDemocracy.

Raab, Dominic. 2021. *Human Rights Act Reform: A Modern Bill of Rights. A Consultation to Reform the Human Rights Act 1998*. CP 588. Ministry of Justice. Accessed July 25, 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf.

Răduleţu, Sebastian. 2015. "National Prosecutions as the Main Remedy in Cases of Massive Human Rights Violations: An Assessment of the Approach of the European Court of Human Rights." *International Journal of Transitional Justice* 9 (3): 449–68.

Rajah, Jothie. 2015. "'Rule of Law' as Transnational Legal Order." In *Transnational Legal Orders*, edited by Terence C. Halliday and Gregory Shaffer, 340–73. Cambridge: Cambridge University Press.

Ralph, Laurence. 2020. *The Torture Letters: Reckoning with Police Violence*. Chicago: The University of Chicago Press.

Ramsay, Peter. 2009. "The Theory of Vulnerable Autonomy and the Legitimacy of Civil Preventative Orders." In *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law*, edited by Bernadette McSherry, Alan Norrie, and Simon Bronitt, 109–39. Oxford: Hart Publishing.

———. 2012. *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law*. Oxford: Oxford University Press.

Rao, Anupama. 2001. "Problems of Violence, States of Terror: Torture in Colonial India." *Economic and Political Weekly*, 4125–33.

Raymond, Janice G. 2001. *Guide to the New UN Trafficking Protocol*. Coalition Against Trafficking in Women. Accessed July 25, 2022, http://www.resiland.org/files/guide_to_the_new_un_trafficking_protocol.pdf.

Reanda, Laura. 1991. "Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action." *Human Rights Quarterly* 13: 202.

Redress. 2000. *Challenging Impunity for Torture: A Manual for Bringing Criminal and Civil Proceedings in England and Wales for Torture Committed Abroad*. Mitcham, UK: The REDRESS Trust.

———. 2021. *Upholding the Convention against Torture: Briefing Paper on the Overseas Operations Bill, House of Lords Briefing Paper: Overseas Operations Bill*. Redress. Accessed July 25, 2022, https://redress.org/wp-content/uploads/2021/01/Overseas-Operations-Bill-Briefing-January-2021-2.pdf.

———. n.d. "Our Work." Accessed July 25, 2022. https://redress.org/our-work/.

Reilly, Niamh. 2018. "How Ending Impunity for Conflict-Related Sexual Violence Overwhelmed the UN Women, Peace, and Security Agenda: A Discursive Genealogy." *Violence Against Women* 24 (6): 631–49.

Rejali, Darius M. 2007. *Torture and Democracy*. Princeton; Oxford: Princeton University Press.

Renzulli, Isobel. 2022. "Prison Abolition: International Human Rights Law Perspectives." *The International Journal of Human Rights* 26 (1): 100–121.

Reydams, Luc. 2011. "The Rise and Fall of Universal Jurisdiction." In *Routledge Handbook of International Criminal Law*, edited by William A. Schabas and Nadia Bernaz, 337–54. Abingdon: Routledge.

Rigney, Sophie. 2018. "Postcard from the ICTY." In *International Law's Objects*, edited by Jessie Hohmann and Daniel Joyce, 366–76. Oxford: Oxford University Press.

Rijken, Conny, and Eefie de Volder. 2009. "The European Union's Struggle to Realize a Human Rights-Based Approach to Trafficking in Human Beings - A Call on the EU to Take THB-Sensitive Action in Relevant Areas of Law." *Connecticut Journal of International Law* 25: 49–80.

Rittich, Kerry. 2017. "Representing, Counting, Valuing: Managing Definitional Uncertainty in the Law of Trafficking." In *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery*, edited by Prabha Kotiswaran, 238–70. Cambridge: Cambridge University Press.

Roach, Kent. 1999. "Four Models of the Criminal Process." *Journal of Criminal Law and Criminology* 89 (2): 671.

Robertson, George. 2021. "UK's Move to Limit Torture Prosecutions Must Be Stopped." *Financial Times*, April 10, 2021. Accessed July 25, 2022, www.ft.com/content/d05be6e3-8dbf-4710-8c68-ee73deb9f172.

Robinson, Darryl. 2008. "The Identity Crisis of International Criminal Law." *Leiden Journal of International Law* 21: 925–63.

———. 2015. "Inescapable Dyads: Why the International Criminal Court Cannot Win." *Leiden Journal of International Law* 28 (02): 323–47.

Rodley, Nigel. 2001. *Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. A/56/156. New York: UN General Assembly.

———. 2002. "The Definition(s) of Torture in International Law." *Current Legal Problems* 55 (1): 467–93.

Rodley, Nigel, and Matt Pollard. 2006. "Criminalisation of Torture: State Obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." *European Human Rights Law Review* 2: 115–41.

———. 2011. *The Treatment of Prisoners under International Law*. 3rd ed. Oxford: Oxford University Press.

Rodríguez, Dylan. 2019. "Abolition as Praxis of Human Being: A Foreword." *Harvard Law Review* 132: 1575–1612.

Rodríguez García, Magaly. 2012. "The League of Nations and the Moral Recruitment of Women." *International Review of Social History* 57: 97–128.

Rodríguez-López, Silvia. 2018. "(De)Constructing Stereotypes: Media Representations, Social Perceptions, and Legal Responses to Human Trafficking." *Journal of Human Trafficking* 4 (1): 61–72.

Roht-Arriaza, Naomi. 1990. "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law." *California Law Review* 78 (2): 449–513.

———. 2005. *The Pinochet Effect: Transnational Justice in the Age of Human Rights*. Philadelphia: University of Pennsylvania Press.

———. 2006. "The New Landscape of Transitional Justice." In *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, edited by Naomi Roht-Arriaza and Javier Mariezcurrena, 1–16. Cambridge; New York: Cambridge University Press.

———. 2018. "Principle 1. General Obligations of States to Take Effective Action to Combat Impunity." In *The United Nations Principles to Combat Impunity: A Commentary*, edited by Frank Haldemann and Thomas Unger, 47–56. Oxford: Oxford University Press.

Ross, James. 2005. "A History of Torture." In *Torture: Does It Make Us Safer? Is It Ever OK? A Human Rights Perspective*, edited by Kenneth Roth and Minky Worden, 3–17. New York; London: The New Press.

Roth, Kenneth. 2004. "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization." *Human Rights Quarterly* 26 (1): 63–73.

Roth, Robert, and Françoise Tulkens. 2011. "Introduction." *Journal of International Criminal Justice* 9 (3): 571–75.

Royal Commission on Alien Immigration. 1903. *Report of the Royal Commission on Alien Immigration, with Minutes of Evidence and Appendix - Vol. 1., Presented to Both Houses of Parliament by Command of His Majesty*. London: Royal Commission on Alien Immigration.

Russell, Bertrand. 2004/1928. *Sceptical Essays*. London; New York: Routledge.

Russo, Chandra. 2016. "Witness Against Torture, Guantánamo and Solidarity as Resistance." *Race & Class* 58 (2): 4–22.

Ryngaert, Cedric. 2014. *Jurisdiction in International Law*. 2nd ed. Oxford: Oxford University Press.

Safferling, Christoph J.M. 2004. "Can Criminal Prosecution Be the Answer to Massive Human Rights Violations?" *German Law Journal* 5 (12): 1469–88.

Salter, Mark B., and Can E. Mutlu. 2013. *Research Methods in Critical Security Studies: An Introduction*. Abingdon; New York: Routledge.

Sanchez, Jesus-Maria Silva. 2008. "Doctrines Regarding the Fight Against Impunity and the Victim's Right for the Perpetrator to Be Punished." *Pace Law Review* 28 (4): 865–84.

Sander, Barrie. 2015. "International Criminal Justice as Progress: From Faith to Critique." In *Historical Origins of International Criminal Law: Volume 4*, edited by Morten Bergsmo, Wui Ling Cheah, Tianying Song, and Yi Ping, 749–835. FICHL Publication Series. Brussels: Torkel Opsahl Academic EPublisher.

———. 2019a. "Justifying International Criminal Punishment: A Critical Perspective." In *Philosophical Foundations of International Criminal Law: Foundational Concepts*, edited by Morten Bergsmo and Emiliano J. Buis, 167–240. FICHL Publication Series. Brussels: Torkel Opsahl Academic EPublisher.

———. 2019b. "The Expressive Turn of International Criminal Justice: A Field in Search of Meaning." *Leiden Journal of International Law* 32: 851–72.

———. 2020. "The Anti-Impunity Mindset." In *Power in International Criminal Justice*, edited by Morten Bergsmo, Mark Klamberg, Kjersti Lohne, and Christopher B. Mahony, 325–55. Brussels: Torkel Opsahl Academic EPublisher.

Sandholtz, Wayne, and Mariana Rangel Padila. 2014. "Juggling Rights, Juggling Politics Amnesty Laws and the Inter-American Court." Written for the *Facultad Latinoamericana de Ciencias Sociales – International Studies Association Joint International Conference*. Buenos Aires, Argentina, July 25, 2014. Accessed July 25, 2022, http://web.isanet.org/Web/Conferences/FLACSO-ISA%20BuenosAires%202014/Archive/5211d97f-650e-4bfd-b352-05f6a013929b.pdf.

Sandifer, Durward V. 1949. "The International Protection of Human Rights: The United Nations System." *American Society of International Law Proceedings* 43 (3): 59–64.

Sanghera, Jyoti. 2005. "Unpacking the Trafficking Discourse." In *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*, edited by Kamala Kempadoo, Jyoti Sanghera, and Bandana Pattanaik, 3–24. Boulder, CO: Paradigm Publishers.

———. 2007. "Preface." In *Collateral Damage - The Impact of Anti-Trafficking Measures on Human Rights around the World*, by GAATW. Global Alliance Against Traffic in Women. Accessed July 25, 2022, https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/ensuring_protection_070909/collateral_damage_gaatw_2007.pdf.

Sartre, Jean-Paul. 1958. "Preface: 'A Victory.'" In *The Question*, by Henri Alleg, translated by John Calder. London: John Calder.

Sattar, Adnan. 2016. "Neo-Retributivism in the Embrace of Human Rights." *Socialism and Democracy* 30 (3): 55–81.

———. 2019. *Criminal Punishment and Human Rights: Convenient Morality*. London; New York: Routledge.

Sayed, Hani. 2019. "The Regulatory Function of the Turn to Anti-Impunity in the Practice of International Human Rights Law." *Stanford Journal of International Law* 55 (1): 1–26.

Schabas, William A. 2011. "Criminology, Accountability, and International Justice." In *What Is Criminology?*, edited by Mary Bosworth and Carolyn Hoyle, 346–58. Oxford: Oxford University Press.

Schaffrath, Wilhelm Michael, ed. 1842. *Codex Saxonicus: Chronologische Sammlung Der Gesammten Praktisch-Gültigen Königlich Sächsischen Gesetze von Den Ältesten Zeiten, Vom J. 1255 an Bis Zum Schlusse des J. 1840. Enth. Die Ges. Gesetze Bis Zum 8. März 1818 - Volume 1*. Leipzig: F. Reclam.

Scharf, Michael P. 1996. "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes." *Law and Contemporary Problems* 59 (4): 41.

Schmitt, Carl. 2007/1932. *The Concept of the Political*. Chicago: University of Chicago Press.

Schwelb, Egon. 1960. "International Conventions on Human Rights." *International and Comparative Law Quarterly* 9: 654–75.

Schwöbel, Christine E. J. 2013. "The Comfort of International Criminal Law." *Law and Critique* 24 (2): 169–91.

———, ed. 2014a. *Critical Approaches to International Criminal Law: An Introduction*. London; New York: Routledge.

———. 2014b. "Introduction." In *Critical Approaches to International Criminal Law: An Introduction*, edited by Christine E. J. Schwöbel, 1–14. London and New York: Routledge.

Scott, David. 2017. "Regarding Rights for the Other: Abolitionism and Human Rights from Below." In *The Routledge International Handbook of Criminology and Human Rights*, edited by Leanne Weber, Elaine Fishwick, and Marinella Marmo, 50–60. London; New York: Routledge.

Sebba, Leslie. 2008. "'Victim-Driven' Criminalisation Some Recent Trends in the Expansion of the Criminal Law." In *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law*, edited by Bernadette McSherry, Alan Norrie, and Simon Bronitt, 59–84. Oxford: Hart Publishing.

Sedacca, Natalie. 2019. "The 'Turn' to Criminal Justice in Human Rights Law: An Analysis in the Context of the 2016 Colombian Peace Agreement." *Human Rights Law Review* 19 (2): 315–45.

Seibert-Fohr, Anja. 2009. *Prosecuting Serious Human Rights Violations*. Oxford: Oxford University Press.

Select Committee of the House of Lords. 1882. *Report from the Select Committee of the House of Lords on the Law Relating to the Protection of Young Girls: Together with the Proceedings of the Committee, Minutes of Evidence, and Appendix*. London: House of Lords.

Sen, Amartya. 2012. "The Global Reach of Human Rights." *Journal of Applied Philosophy* 29 (2): 91–100.

Sexton, Jared, and Elizabeth Lee. 2006. "Figuring the Prison: Prerequisites of Torture at Abu Ghraib." *Antipode* 38 (5): 1005–22.

Shamir, Hila. 2012. "A Labor Paradigm for Human Trafficking." *UCLA Law Review* 60: 76–136.

Shaw, George Bernard. 1912. "The Root of the White Slave Traffic." *The "Awakener,"* November 1912.

Shklar, Judith N. 1964. *Legalism: An Essay on Law, Morals and Politics*. Cambridge, Mass: Harvard University Press.

Shue, Henry. 1978. "Torture." *Philosophy & Public Affairs* 7 (2): 124–43.

———. 2006. "Torture in Dreamland: Disposing of the Ticking Bomb." *Case Western Reserve Journal of International Law* 37 (2): 231–39.

Sikkink, Kathryn. 2011. *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. New York; London: WW Norton.

———. 2012. "The Age of Accountability: The Global Rise of Individual Criminal Accountability." In *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, edited by Francesca Lessa and Leigh A. Payne, 19–41. Cambridge; New York: Cambridge University Press.

Siller, Nicole J. 2017. "Human Trafficking in International Law Before the Palermo Protocol." *Netherlands International Law Review* 64: 407–52.

Silverman, Lisa. 2001. *Tortured Subjects: Pain, Truth, and the Body in Early Modern France*. Chicago; London: University of Chicago Press.

Simon, Jonathan. 2007. *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. Oxford: Oxford University Press.

———. 2019. "For a Human Rights Approach to Reforming the American Penal State." *Journal of Human Rights Practice* 11 (2): 346–56.

Simpson, Gerry. 2012. "Atrocity, Law, Humanity: Punishing Human Rights Violators." In *The Cambridge Companion to Human Rights Law*, edited by Conor Gearty and Costas Douzinas, 114–33. Cambridge: Cambridge University Press.

Simpson, James. 2011. "No Brainer: The Early Modern Tragedy of Torture." *Religion & Literature* 43 (3): 1–23.

Skogan, Wesley G., Arthur J. Lurigio, and Robert C. Davis. 1990. "Criminal Victimization." In *Victims of Crime: Problems, Policies, and Programs*, edited by Arthur J. Lurigio, Wesley G. Skogan, and Robert C. Davis, 7–22. Newbury Park, CA: SAGE Publications.

Skrivankova, Klara. 2007. "United Kingdom." In *Collateral Damage - The Impact of Anti-Trafficking Measures on Human Rights around the World*, by GAATW. Global Alliance Against Traffic in Women. Accessed July 25, 2022, https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/ensuring_protection_070909/collateral_damage_gaatw_2007.pdf.

Skrobanek, Siriporn. 2000. "Preface." In *Human Rights and Trafficking in Persons: A Handbook*, by Elaine Pearson, 2. Bangkok, Thailand: Global Alliance Against Traffic in Women. Accessed July 25, 2022, https://www.gaatw.org/resources/publications/903-human-rights-and-trafficking-in-persons-a-handbook.

Smith, Molly, and Juno Mac. 2020. *Revolting Prostitutes: The Fight for Sex Workers' Rights*. London; Brooklyn, NY: Verso.

Snagge, Thomas W. 1881. "Appendix A. Report of T.W. Snagge, Esq., of the Middle Temple, Barrister-at-Law, on the Alleged Traffic in English Girls to Immoral Purposes in Foreign Towns." In *Report from the Select Committee of the House of Lords on the Law Relating to the Protection of Young Girls: Together with the Proceedings of the Committee, Minutes of Evidence, and Appendix*, by Select Committee of the House of Lords. London: House of Lords.

Snyder, Jack, and Leslie Vinjamuri. 2004. "Trials and Errors: Principle and Pragmatism in Strategies of International Justice." *International Security* 28 (3): 5–44.

Sokhi-Bulley, Bal. 2016. *Governing (Through) Rights*. Oxford; Portland, OR: Hart Publishing.

Solan, Lawrence M., and Peter M. Tiersma. 2012. *The Oxford Handbook of Language and Law*. Oxford: Oxford University Press.

Sonnenfels, Joseph. 1776. *Su l'abolizione Della Tortura Del Sig. Di Sonnenfels, Consigliere Nella Reggenza d'Austria Di S.M: E Professore Di Politica, Tradotto Dal Tedesco Con Alcune Osservazioni Sul Medesimo Argomento*. Milano: Galeazzi.

Sorochinsky, Mykola. 2009. "Prosecuting Torturers, Protecting Child Molesters Toward a Power Balance Model of Criminal Process for International Human Rights Law." *Michigan Journal of International Law* 31 (1): 157–229.

Spade, Dean. 2015. *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*. Durham, NC; London: Duke University Press.

Spalek, Basia. 2006. *Crime Victims: Theory, Policy and Practice*. Basingstoke, UK; New York: Palgrave Macmillan.

Spanish Atrocities Committee. 1897. *Revival of the Inquisition. Details of the Tortures Inflicted on Spanish Political Prisoners*. London: J. Perry for the Spanish Atrocities Committee.

Sparks, Richard. 2001. "Penality." In *The SAGE Dictionary of Criminology*, edited by Eugene McLaughlin and John Muncie, 204–6. SAGE Publications.

Special Body of Experts on Traffic in Women and Children. 1927a. *Report of the Special Body of Experts on Traffic in Women and Children: Part One*. C.52.M.52.1927.IV. Geneva: League of Nations.

———. 1927b. *Report of the Special Body of Experts on Traffic in Women and Children: Part Two*. C.52(2).M.52(1).1927.IV. Geneva: League of Nations.

Special Rapporteur on extrajudicial, summary or arbitrary executions. 2019a. *Annex to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Investigation into the Unlawful Death of Mr. Jamal Khashoggi*. A/HRC/41/CRP.1. Geneva: Human Rights Council.

———. 2019b. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Investigation of, Accountability for and Prevention of Intentional State Killings of Human Rights Defenders, Journalists and Prominent Dissidents*. A/HRC/41/36. Geneva: Human Rights Council.

Speekenbrink, A.H.J.M. 1974. *General Assembly, 29th Session, 3rd Committee, 2064th Meeting*. A/C.3/SR.2064. New York: UN General Assembly.

Spierenburg, Pieter. 1984. *The Spectacle of Suffering Executions and the Evolution of Repression: From a Preindustrial Metropolis to the European Experience*. Cambridge: Cambridge University Press.

Sriram, Chandra Lekha. 2003. "Revolutions in Accountability: New Approaches to Past Abuses." *American University International Law Review* 19 (2): 301–429.

Ståhl, Jan. 1974. *General Assembly, 29th Session, 3rd Committee, 2064th Meeting*. A/C.3/SR.2064. New York: UN General Assembly.

Stahn, Carsten. 2019. *A Critical Introduction to International Criminal Law*. Cambridge: Cambridge University Press.

———. 2020. *Justice as Message: Expressivist Foundations of International Criminal Justice*. Oxford: Oxford University Press.

Stahn, Carsten, and Mohamed M. El Zeidy. 2011. *The International Criminal Court and Complementarity: From Theory to Practice*. Cambridge: Cambridge University Press.

Stambøl, Eva Magdalena. 2021. "Neo-Colonial Penality? Travelling Penal Power and Contingent Sovereignty." *Punishment & Society* 23 (4): 536–56.

Starmer, Keir. 2014. "Human Rights, Victims and the Prosecution of Crime in the 21st Century." *Criminal Law Review* 11: 777–87.

Stavros, Stephanos. 2020. "Criminal Law Responses to Hate Speech: Towards a Systematic Approach in Strasbourg?" In *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR*, edited by Laurens Lavrysen and Natasa Mavronicola, 117–38. Oxford; New York: Hart Publishing.

Stead, William T. 1885a. "The Maiden Tribute of Modern Babylon – I." *Pall Mall Gazette*, July 6, 1885.

———. 1885b. ""We Bid You Be of Hope"." *Pall Mall Gazette*, July 6, 1885.

———. 1885c. "The Maiden Tribute of Modern Babylon – III." *Pall Mall Gazette*, July 8, 1885.

———. 1885d. "The Maiden Tribute of Modern Babylon – IV." *Pall Mall Gazette*, July 10, 1885.

Stephen, James Fitzjames. 1883. *History of Criminal Law in England*. Vol. 1. London: Macmillan and Co.

Stolle, Peer, and Tobias Singelnstein. 2007. "On the Aims and Actual Consequences of International Prosecution of Human Rights Crimes." In *International Prosecution of Human Rights Crimes*, edited by Wolfgang Kaleck, Michael Ratner, Tobias Singelnstein, and Peter Weiss, 37–52. Varleg, Berlin, Heidelberg: Springer.

Stoyanova, Vladislava. 2014. "Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking." *Cambridge Journal of International and Comparative Law* 3 (2): 407–43.

———. 2017. *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law*. Cambridge: Cambridge University Press.

Stumpf, Juliet. 2006. "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power." *American University Law Review* 56 (2): 367–419.

Sub-Commission on the Status of Women to the Commission on Human Rights. 1946. *Appendix I to the Report of the Commission on Human Rights to the Second Session of the Economic and Social Council: Report of the Sub-Commission on the Status of Women to the Commission on Human Rights*. E/38/Rev.1. New York: UN Commission on Human Rights.

Tallack, William. 1889. *Penological and Preventive Principles. With Special Reference to Europe and America, and to the Diminution of Crime, Pauperism, and Intemperance, to Prisons and Their Substitutes, Habitual Offenders, Sentences, Neglected Youth, Education, Police, Statistics, Etc*. London: Lea Wertheimer & Co.

———. 1890. "Prisons and Criminal Treatment." In *Summary of a Lecture Delivered at the London Institution*. Accessed July 25, 2022, www.jstor.org/stable/10.2307/60222733.

———. 1897. "Spain and the Torture." *The Times*, June 7, 1897.

Tallgren, Immi. 2002. "The Sensibility and Sense of International Criminal Law." *European Journal of International Law* 13 (3): 561–95.

———. 2013. "The Durkheimian Spell of International Criminal Law?" *Revue Interdisciplinaire d'études Juridiques*, 71 (2): 137–69.

Tapia Tapia, Silvana. 2018. "Feminism and Penal Expansion: The Role of Rights-Based Criminal Law in Post-Neoliberal Ecuador." *Feminist Legal Studies* 26 (3): 285–306.

———. 2022a. "Human Rights Penality and Violence Against Women: Feminist Abolitionism as Decolonial Resistance." Presented at the Workshop *Human Rights Penality: The Next Decade*. Birmingham, UK, March 25, 2022. On File with Author.

———. 2022b. *Feminism, Violence Against Women, and Law Reform: Decolonial Lessons from Ecuador*. London: Routledge.

Taylor, Peter Alfred. 1875. *Bill 155 Second Reading*. House of Commons, Commons Chamber. Vol. 224. Hansard.

Taylor, Stephanie. 2013. *What Is Discourse Analysis?* London: Bloomsbury.

Teitel, Ruti. 2003. "Transitional Justice Genealogy." *Harvard Human Rights Journal* 16: 69–94.

———. 2014. *Globalizing Transitional Justice: Contemporary Essays*. Oxford: Oxford University Press.

———. 2015. "Transitional Justice and Judicial Activism: A Right to Accountability?" *Cornell International Law Journal* 48: 385–422.

The Earl of Albemarle. 1956. *Torture in India*. House of Lords, Lords Chamber. Vol. 141. Hansard.

The Earl of Carnarvon. 1856. *Torture in India*. House of Lords, Lords Chamber. Vol. 140. Hansard.

The Earl of Ellenborough. 1956. *Torture in India*. House of Lords, Lords Chamber. Vol. 141. Hansard.

The Howard Association. 1870. "Pamphlet Dated 1870." Accessed July 25, 2022, https://www.google.co.uk/books/edition/_/3Z5LAAAAcAAJ?hl=en&gbpv=0.

The Lord Bishop of Leeds. 2021. *Overseas Operations (Service Personnel and Veterans) Bill*. House of Lords, Lords Chamber. Vol. 810. Hansard.

The Master of Elibank. 1909. *Alleged Torture of Prisoners (India)*. House of Commons, Commons Chamber. Vol. 11. Hansard.

Thomasius, Christian. 2004/1705. "Über Die Folter." In *The Witchcraft Sourcebook*, edited by Brian P. Levack, 168–70. New York; London: Routledge.

Thoreson, Ryan. 2022. "'Discriminalization': Sexuality, Human Rights, and the Carceral Turn in Antidiscrimination Law." *California Law Review* 110 (2): 431–88.

Ticktin, Miriam. 2006. "Where Ethics and Politics Meet." *American Ethnologist* 33 (1): 33–49.

Tittemore, Brian D. 2005. "Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law." *Southwestern Journal of Law & Trade in The Americas* 12: 429–75.

Traffic in Women and Children Committee. 1926. *Report on the Work of the Fifth Session*. C.240.M.89.1926.IV. Geneva: League of Nations, Advisory Committee on the Protection and Welfare of Children and Young People.

———. 1930. *Study of Laws and Regulations with a View to Protecting Public Order and Health in Countries Where the System of Licensed Houses Has Been Abolished*. C.380.M.164.130.IV. Geneva: League of Nations.

———. 1931. *Concise Study of the Laws and Penalties Relating to Souteneurs - Part I*. C.441.M.188.1931.IV. Geneva: League of Nations.

Tugendhat, Thomas, and Laura Croft. 2013. *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power*. Policy Exchange. Accessed July 25, 2022, https://policyexchange.org.uk/publication/the-fog-of-law-an-introduction-to-the-legal-erosion-of-british-fighting-power/.

Tugendhat, Thomas. 2020. *Overseas Operations (Service Personnel and Veterans) Bill*. House of Commons, Commons Chamber. Vol. 608. Hansard.

Tulkens, Françoise. 2011. "The Paradoxical Relationship between Criminal Law and Human Rights." *Journal of International Criminal Justice* 9: 577–95.

———. 2012. "Human Rights as the Good and the Bad Conscience of Criminal Law." In *Resisting punitiveness in Europe: Welfare, Human Rights, and Democracy*, edited by Sonja Snacken and Els Dumortier, 156–173. Abingdon: Routledge.

Tunick, Mark. 1992. *Punishment: Theory and Practice*. Berkeley; Los Angeles; Oxford: University of California Press.

Turković, Ksenija. 2016. "International and National Courts Confronting Large-Scale Violations of Human Rights." Speech at the *Opening of the Judicial Year – Seminar*. Strasbourg, January 29, 2016. Accessed July 25, 2022, www.echr.coe.int/Documents/Speech_20160129_Turkovic_JY_ENG.pdf.

Twining, William Lawrence, and Penelope Elizabeth Twining. 1973. "Bentham on Torture." *Northern Ireland Legal Quarterly* 24 (3): 305–56.

Tzouvala, Ntina. 2020. *Capitalism as Civilisation: A History of International Law*. Cambridge: Cambridge University Press.

UK Foreign & Commonwealth Office. 2011. *FCO Strategy for the Prevention of Torture 2011-2015*. Human Rights and Democracy Department. Accessed July 25, 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/35449/fcostrategy-tortureprevention.pdf.

UK Government. 2012. *Consideration of Reports Submitted by States Parties to the Human Rights Committee under Article 40 of the Convention - Seventh Periodic Reports of States Parties Due in July 2012 - United Kingdom, the British Overseas Territories, the Crown Dependencies*. CCPR/C/GBR/7. Geneva: UN Human Rights Committee.

———. 2017. *Sixth Periodic Report to the Committee against Torture Submitted by the United Kingdom of Great Britain and Northern Ireland under Article 19 of the Convention Pursuant to the Optional Reporting Procedure, Due in 2017*. CAT/C/GBR/6. Geneva: UN Committee Against Torture.

———. 2020. *Overseas Operations (Service Personnel and Veterans) Bill*. Bill 117 2019-21. United Kingdom.

UK Ministry of Defence. 2020. *Overseas Operations (Service Personnel and Veterans) Bill: Explanatory Notes*. Bill 117–EN. House of Commons. Accessed July 25, 2022, https://publications.parliament.uk/pa/bills/cbill/58-01/0117/en/20117en.pdf.

UK Ministry of Justice. 2009. *The Government Response to the Joint Committee on Human Rights Report Closing the Impunity Gap: UK Law on Genocide (and Related Crimes) and Redress for Torture Victims*. Cm. 7704. London: Joint Committee on Human Rights.

UN. 1975. *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*. A/CONF.56/10. Geneva: United Nations.

———. 1980. *Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace. Copenhagen, 14-30 July 1980*. A/CONF.94/35. New York; Geneva: United Nations.

———. 1985. *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace. Nairobi, 15-26 July 1985*. A/CONF.116/28/Rev.1. New York; Geneva: United Nations.

———. 1999. *Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution*. Accessed July 25, 2022, https://legal.un.org/unjuridicalyearbook/pdfs/english/by_volume/2006/chpVI.pdf.

UN CEDAW. 2020. *General Recommendation No. 38 (2020) on Trafficking in Women and Girls in the Context of Global Migration*. CEDAW/C/GC/38. New York: Committee on the Elimination of Discrimination Against Women.

UN Commission on Human Rights - Drafting Committee. 1948. *Second Session, Twenty-Third Meeting*. E/CN.4/AC.1/SR.23. New York: UN Economic and Social Council.

UN Commission on Human Rights.

UN Department of Economic and Social Affairs. 1959. *Study on Traffic in Persons and Prostitution (Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others)*. ST/SOA/SD/8. New York: United Nations.

UN Secretary-General. 1947. *Report by the Secretary-General to the Social Commission, First Session: Note on Prostitution, Traffic in Women and Children and Obscene Publications*. E/CN.5/14. New York: UN Economic and Social Council.

———. 1948. *Report by the Secretary-General to the Social Commission, Third Session: Draft Convention of 1937 for Suppressing the Exploitation of the Prostitution of Others*. E/CN.5/41. New York: UN Economic and Social Council.

———. 1955a. *Annotations on the Text of the Draft International Covenant on Human Rights*. A/2929. New York: United Nations.

———. 1955b. *Draft International Covenants on Human Rights - Annotation*. A/2929. New York: UN General Assembly.

———. 1982. *Question of Slavery and the Slave Trade in All Their Practices and Manifestations, Including the Slavery-Like Practices of Apartheid and Colonialism, Inquiry on the Status of Combating of the Traffic in Persons and of the Exploitation of the Prostitution of Others: Report by the Secretary-General.* E/CN.4/Sub.2/AC.2/1982/13. New York: UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Slavery.

———. 2003. *Integration of the Human Rights of Women and a Gender Perspective - Traffic in Women and Girls*. E/CN.4/2003/74. New York: UN Commission on Human Rights.

———. 2004a. *Promotion and Protection of Human Rights – Impunity. Note by the Secretary-General.* 2004. E/CN.4/2004/88. New York: UN Commission on Human Rights.

———. 2004b. *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. S/2004/616. New York: UN Security Council.

UNCAT. 2008. *General Comment No. 2 'Implementation of Article 2 by States Parties.'* CAT/C/GC/2. Geneva: UN Committee Against Torture.

———. 2012. *General Comment No. 3 'Implementation of Article 14 by States Parties.'* CAT/C/GC/3. Geneva: UN Committee Against Torture.

———. 2013. *Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, Adopted by the Committee at Its Fiftieth Session (6-13 May 2013).* CAT/C/GBR/CO/5. Geneva: UN Committee Against Torture.

———. 2014. *Report of the Committee against Torture to the General Assembly*. A/69/44. Geneva: UN Committee Against Torture.

UN.GIFT. 2008. "A Victim Centred Approach as a Key to Increasing the Effectiveness of Criminal Justice Responses to Human Trafficking." In *Background Paper - 007 Workshop: From Protection to Prosecution: A Strategic Approach.* Austria Center Vienna.

UNHRC. 1982. *General Comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment).* A/37/40 at 94. Geneva: UN Human Rights Committee.

———. 2001. *Concluding Observations of the Human Rights Committee: Croatia*. CCPR/CO/71/HRV. Geneva: UN Human Rights Committee.

———. 2004. *General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*. CCPR/C/21/Rev.1/Add. 13. Geneva: UN Human Rights Committee.

"United Nations Treaty Collection." n.d. Accessed July 25, 2022, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-11-a&chapter=7&clang=_en.

UNODC. 1999. *Handbook on Justice for Victims*. Geneva: United Nations Office on Drugs and Crime.

———. 2016. *Global Report on Trafficking in Persons 2016*. Vienna: United Nations. Accessed July 25, 2022, https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf.

———. 2020. *Global Report on Trafficking in Persons 2020*. Vienna: United Nations. Accessed July 25, 2022, https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf.

Van Dyke, Ruth. 2019. "The UK's Response to Modern Slavery: Law, Policy and Politics." In *The Modern Slavery Agenda: Policy, Politics and Practice in the UK*, edited by Gary Craig, Alex Balch, Hannah Lewis, and Louise Waite, 47–74. Bristol, UK: Policy Press.

Van Kempen, Piet Hein. 2013. "Four Concepts of Security—A Human Rights Perspective." *Human Rights Law Review* 13 (1): 1–23.

———, ed. 2014. *Criminal Law and Human Rights*. Farnham, UK: Ashgate.

Vance, Carole S. 2012. "Innocence and Experience: Melodramatic Narratives of Sex Trafficking and Their Consequences for Law and Policy." *History of the Present* 2 (2): 200–218.

Veçoso, Fabia Fernandes Carvalho. 2016. "Whose Exceptionalism? Debating the Inter-American View on Amnesty and the Brazilian Case." In *Anti-Impunity and the Human Rights Agenda*, edited by Karen Engle, Zinaida Miller, and Dennis M. Davis, 185–215. Cambridge: Cambridge University Press.

Verri, Pietro. 1843/1777. "Osservazioni Sulla Tortura, e Singolarmente Sugli Effetti Che Produsse All'occasione Delle Unzioni Malefiche, Alle Quali Si Attribuì La Pestilenza Che Devastò Milano l'anno 1630." In *Storia Della Colonna Infame*, by Alessandro Manzoni. Parigi: Baudry, Libreria Europea.

Vidal-Naquet, Pierre. 1963. *Torture: Cancer of Democracy*. Harmondsworth: Penguin Books Ltd.

Vinjamuri, Leslie, and Jack Snyder. 2015. "Law and Politics in Transitional Justice." *Annual Review of Political Science* 18 (1): 303–27.

Voltaire. 1901/1764. "Torture." In *The Works of Voltaire, A Contemporary Version, Vol. VII (Philosophical Dictionary, Part 5)*, edited by John Morley and Tobias Smollett, translated by William F. Fleming. New York: E.R. DuMont. Accessed July 25, 2022, https://oll.libertyfund.org/title/fleming-the-works-of-voltaire-vol-vii-philosophical-dictionary-part-5#Voltaire_0060-07_1597.

———. 2012/1766. "Commentario Su Dei Delitti e Delle Pene." In *Dei Delitti e Delle Pene, Con Il Commento Di Voltaire*, by Cesare Beccaria. Roma: Newton Comton Editori.

Von Hirsch, Andrew. 1976. *Doing Justice: The Choice of Punishments*. New York: Hill and Wang.

Von Hirsch, Andrew, and Andrew Ashworth. 2005. *Proportionate Sentencing: Exploring the Principles*. Oxford; New York: Oxford University Press.

Vucetic, Srdjan. 2011. "Genealogy as a Research Tool in International Relations." *Review of International Studies* 37 (3): 1295–1312.

Wacquant, Loïc. 2001. "The Penalisation of Poverty and the Rise of Neo-Liberalism." *European Journal on Criminal Policy and Research* 9 (4): 401–12.

———. 2009. *Punishing the Poor: The Neoliberal Government of Social Insecurity*. Durham, NC; London: Duke University Press.

Wadham, John. 2020. *Letter from NPM Chair John Wadham to Robert Buckland QC MP Regarding the Rights of People in Detention during COVID-19*. National Preventive Mechanism. Accessed July 25, 2022, https://s3-eu-west-2.amazonaws.com/npm-prod-storage-19n0nag2nk8xk/uploads/2020/03/NPM-letter-to-Robert-Buckland-re-COVID19-300320.docx-WEB-2.pdf.

Waldron, Jeremy. 2012. *Dignity, Rank, and Rights*. Edited by Meir Dan-Cohen. New York: Oxford University Press.

Walklate, Sandra. 2017. "Victims: Needs, Rights and Justice." In *The Routledge International Handbook of Criminology and Human Rights*, edited by Leanne Weber, Elaine Fishwick, and Marinella Marmo, 71–79. London; New York: Routledge.

Walkowitz, Judith R. 1980. *Prostitution and Victorian Society: Women, Class, and the State*. Cambridge; New York: Cambridge University Press.

———. 1992. *City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian London*. Chicago: University of Chicago Press.

Wallace, Ben. 2020. *Overseas Operations (Service Personnel and Veterans) Bill*. House of Commons, Commons Chamber. Vol. 608. Hansard.

Ward, Tony, and Shahrzad Fouladvand. 2018. "Human Trafficking, Victims' Rights and Fair Trials." *Journal of Criminal Law* 82 (2): 138–55.

Warzazi, Halima Embarek. 2000. *Report of the Working Group on Contemporary Forms of Slavery on Its Twenty-Fifth Session*. E/CN.4/Sub.2/2000/23. New York: UN Commission on Human Rights.

We Charge Genocide. 2014. *Police Violence against Chicago's Youth of Color: A Report Prepared for the United Nations Committee Against Torture on the Occasion of Its Review of the United States of America's Third Periodic Report to the Committee Against Torture*. We Charge Genocide. Accessed July 25, 2022, http://report.wechargegenocide.org/.

Weatherburn, Amy. 2016. "Using an Integrated Human Rights-Based Approach to Address Modern Slavery: The UK Experience." *European Human Rights Law Review* 2: 184–94.

Webb, Simon. 2018. *A History of Torture in Britain*. Barnsley: Pen & Sword History.

Webbe, Claudia. 2020. *Overseas Operations (Service Personnel and Veterans) Bill*. House of Commons, Commons Chamber. Vol. 608. Hansard.

Weber, Benjamin D. 2021. "Anticarceral Internationalism: Rethinking Human Rights through the Imprisoned Black Radical Tradition." *Journal of African American History* 106 (4): 706–35.

Whitaker, Benjamin. 1982. *Report by Mr. Benjamin Whitaker, Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities - Updating of the Report on Slavery*. E/CN.4/Sub.2/1982/20. New York: UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Slavery.

Whitehouse, Paul. 2013. "Foreword." In *In the Dock - Examining the UK's Criminal Justice Response to Trafficking*, by Rachel Annison, 3. Anti-Slavery International. Accessed July 25, 2022, http://www.antislavery.org/wp-content/uploads/2017/01/in_the_dock_final.pdf.

Wijers, Marjan, and Lin Lap-Chew. 1999. *Trafficking in Women Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution*. Foundation Against Trafficking in Women. Accessed July 25, 2022, http://lastradainternational.org/lsidocs/1137-Trafficking%20in%20women%20Wijers-Lap%20Chew.pdf.

Willcox, Richard R. 1958. "Prostitution and Venereal Disease." *International Review of Criminal Policy* 13: 67–98.

Williams, Brian, and Hannah Goodman. 2007. "The Role of the Voluntary Sector." In *Handbook of Victims and Victimology*, edited by Sandra Walklate, 240–54. Cullompton: Willan Publishing.

Williams, James. 1911. "Torture." In *Encyclopædia Britannica*. Vol. 27.

Williams, Katherine S. 2013. "Punishment of Serious Human Rights Violations by Changing Internal Moral Codes." *State Crime Journal* 2 (2): 173.

Willis, William Nicholas. 1912. *The White Slaves of London*. Boston: Richard G. Badger, The Gorham Press.

Wilson, David. 1974. *General Assembly, 29th Session, 3rd Committee, 2071st Meeting*. A/C.3/SR.2071. New York: UN General Assembly.

Wilson, Helen Mary. 1911. *Law and Administration in Regard to the Social Evil: An Outline of Existing Conditions and Projected Reforms in the Principal Civilised States*. London: The British Committee of the International Federation for the Abolition of State Regulation of Prostitution.

———. 1916. "On Some Causes of Prostitution with Special Reference to Economic Conditions." Written for the *Eleventh Congress of the International Abolitionist Federation*. Paris, June 9-12, 1913. The Association for Moral and Social Hygiene.

———. 1926. *Prostitution and the Law: Is Prostitution a Trade?* London: Association for Moral and Social Hygiene.

Woetzel, Robert K. 1968. "International Criminal Law and Human Rights: The Sharp Edge of the Sword." *Proceedings of the American Society of International Law at Its Annual Meeting* 62: 117–18.

Wolcott, Harry F. 1990. *Writing up Qualitative Research*. Newbury Park, CA: SAGE Publications.

Working Group on the Declaration of Human Rights. 1947. "Summary Record of the Fourth Meeting." E/CN.4/AC.2/SR.4. New York: UN Commission on Human Rights.

World Conference on Religion and Peace. 1968. "The Findings of the World Conference on Religion and Peace (October 16-21, 1970, Kyoto, Japan)." *Contemporary Religions in Japan* 9 (4): 339–76.

Wyngaert, Christine van den. 2006. "Human Rights between Sword and Shield." Lecture at the *Award Ceremony Prize, Human Rights League*. Antwerp, December 2006.

Zalaquett, José. 1989. "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints." In *State Crimes: Punishment or Pardon*, edited by Aspen Institute, 23–65. Queenstown: Aspen Institute.

Zedner, Lucia. 1994. "Reparation and Retribution: Are They Reconcilable?" *Modern Law Review* 57 (2): 228–50.

———. 2016. "Penal Subversions: When Is a Punishment Not Punishment, Who Decides and on What Grounds?" *Theoretical Criminology* 20 (1): 3–20.

Zunino, Marcos. 2019. *Justice Framed: A Genealogy of Transitional Justice*. Cambridge: Cambridge University Press.

Statutes, treaties, international material cited

Act No. XXIV (Originally, The Madras District Police Act. Now, The Tamil Nadu District Police Act). 1859. India.

Aliens Act. 1905. United Kingdom.

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. 2005. A/RES/60/147. UN General Assembly.

Charter of the International Military Tribunal - Annex to the Agreement by the Government of United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, The Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis. 1945. 280 UNTS 1951.

Charter of the United Nations. 1945. 1 UNTS XVI.

Code of Conduct for Law Enforcement Officials. 1979. A/RES/34/169. UN General Assembly.

Code of Criminal Procedure. 1872. India.

Contagious Diseases Act. 1864. United Kingdom.

———. 1866. United Kingdom.

———. 1869. United Kingdom.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 1984. 1465 UNTS 85.

Convention against Transnational Organised Crime. 2000. 2225 UNTS 209.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. 1950. 96 UNTS 271.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. 1971. 974 UNTS 177.

Convention for the Suppression of Unlawful Seizure of Aircraft. 1970. 860 UNTS 105.

Convention on the Elimination of All Forms of Discrimination against Women. 1979. 1249 UNTS 13.

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents. 1973. 1035 UNTS 167.

Convention on the Prevention and Punishment of the Crime of Genocide. 1948. 78 UNTS 227.

Convention on the Rights of the Child. 1989. 1577 UNTS 3.

Coroners and Justice Act. 2009. United Kingdom.

Council of Europe Convention on Action against Trafficking in Human Beings. 2005. CETS No 197.

Covenant of the League of Nations. 1919. 225 CTS 195.

Criminal Justice Act. 1988. United Kingdom.

Criminal Law (Amendment) Act. 1885. United Kingdom.

———. 1912. United Kingdom.

Criminal Law of Tuscany (Codice Leopoldino). 1786. Grand Duchy of Tuscany (now Italy).

Decision No 7/20: Prevention and Eradication of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment. 2020. Organization for Security and Co-operation in Europe.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. 1985. A/RES/40/34. UN General Assembly.

Declaration of King Louis XVI. 1788. France.

Declaration on Human Rights Education and Training. 2011. A/RES/66/137. UN General Assembly.

Declaration on the Elimination of Discrimination Against Women. 1967. A/RES/22/2263. UN General Assembly.

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 1975. A/RES/3452(XXX). UN General Assembly.

Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances. 1992. A/RES/47/133. UN General Assembly.

Decree of the French Constituent Assembly of 8 and 9 October 1789. 1789. France.

Decree of King Louis XVI, Abolishing the Question Préparatoire. 1780. France.

Decree of Maria Theresa of Austria (Vienna). 1776. Austria-Hungary.

Decrees of Fredrick II. 1754. Prussia. Accessed July 25, 2022, http://www.friedrich.uni-trier.de/de/roedenbeck/1/text/.

ECOSOC DEC 16(LVI). 1974. E/DEC/16 (LVI). UN Economic and Social Council.

ECOSOC RES 1685(II). 1972. E/RES/1685 (LII). UN Economic and Social Council.

ECOSOC RES 1981/40. 1981. E/RES/1981/40. UN Economic and Social Council.

ECOSOC RES 1983/30. 1983. E/RES/1983/30. UN Economic and Social Council.

ECOSOC RES 1990/46. 1990. E/RES/1990/46. UN Economic and Social Council.

ECOSOC RES 43(IV). 1947. E/412. UN Economic and Social Council.

Edict of the Emperor to Reform Justice in the Low Countries. 1787. Belgium.

EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. 2011. 2011/36/EU. European Union.

EU Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA. 2012. 2012/29/EU. European Union.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. 1987. ETS No 126.

European Convention on Human Rights. 1950. ETS No 5.

European Convention on the Compensation of Victims of Violent Crimes. 1983. ETS No 116.

Framework Decision on the Standing of Victims in Criminal Proceedings. 2001. 2001/220/JHA. European Union, Council of the European Union.

French Code Pénal. 1810. France.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. 1949. 75 UNTS 31.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. 1949. 75 UNTS 85.

Geneva Convention Relative to the Protection of Civilian Persons in Times of War. 1949. 75 UNTS 297.

Geneva Convention Relative to the Treatment of Prisoners of War. 1949. 75 UNTS 135.

Human Rights Act. 1998. United Kingdom.

ICC Elements of Crimes (as Amended). 2000. ICC-ASP/1/3 (Pt II-B); PCNICC/2000/1/Add.2. International Criminal Court.

Immigration Act. 2014. United Kingdom.

Impunity. 1998. E/CN.4/RES/1998/53. UN Commission on Human Rights.

Indian Penal Code. 1860. India.

Indian Police Act. 1861. India.

Inter-American Convention to Prevent and Punish Torture. 1985. OASTS 67.

International Agreement for the Suppression of the "White Slave Traffic." 1904. I LoNTS 83.

International Convention against the Taking of Hostages. 1979. 1316 UNTS 205.

International Convention for the Protection of All Persons from Enforced Disappearances. 2006. 2716 UNTS 3.

International Convention for the Suppression of the Traffic in Women and Children. 1921. 9 LoNTS 415.

International Convention for the Suppression of the Traffic in Women of Full Age. 1933. 150 LoNTS 431.

International Convention for the Suppression of the White Slave Traffic. 1910. Great Britain TS 20 (1912).

International Convention on the Elimination of All Forms of Racial Discrimination. 1965. 660 UNTS 195.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. 1990. 2220 UNTS 3.

International Covenant on Civil and Political Rights. 1966. 999 UNTS 171.

Modern Slavery Act. 2015. United Kingdom.

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 2002. 2375 UNTS 237.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. 2000. 2173 UNTS 222.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. 2000. 2171 UNTS 227.

Order of Fredrick II. 1740. Prussia. Accessed July 25, 2022, http://www.friedrich.uni-trier.de/de/roedenbeck/1/text/.

Ordinance of His Majesty on Military Jurisdiction, and on the Crimes, and the Punishments of the People of War. 1789. Sicily (now Italy).

OSCE Action Plan to Combat Trafficking in Human Beings. 2003. PC.DEC/557 & Annex. Organization for Security and Co-operation in Europe.

OSCE Declaration on Trafficking in Human Beings. 2002. MC(10).JOUR/2. Organization for Security and Co-operation in Europe.

Overseas Operations (Service Personnel and Veterans) Act. 2021. United Kingdom.

Prevention of Prostitution. 1985. A/RES/40/103. UN General Assembly.

Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 1982. A/RES/37/194. UN General Assembly.

Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. 1989. E/RES/1989/65. UN Economic and Social Council.

Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). 2014.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime. 2000. 2237 UNTS 319.

Recommendation 1065(1987), Traffic in Children and Other Forms of Child Exploitation. 1987. R1065(1987). Council of Europe, Parliamentary Assembly.

Recommendation of the Committee of Ministers to Member States Concerning Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults. 1991. R(91)11. Council of Europe, Committee of Ministers.

Recommendation of the Committee of Ministers to Member States on Assistance to Victims and the Prevention of Victimisation. 1987. R(87)21. Council of Europe, Committee of Ministers.

Recommendation of the Committee of Ministers to Member States on Participation of the Public in Crime Policy. 1983. R(83)7. Council of Europe, Committee of Ministers.

Recommendation of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure. 1985. R(85)11. Council of Europe, Committee of Ministers.

Recommendation of the Parliamentary Assembly - State of Human Rights in Europe: The Need to Eradicate Impunity. 2009. R(2009)1876. Council of Europe, Parliamentary Assembly.

Resolution 1983 (2014), Prostitution, Trafficking and Modern Slavery in Europe. 2014. Res 1983 (2014). Council of Europe, Parliamentary Assembly.

Resolution on the Eradication of Torture in the World. 2014. 2013/2169(INI). European Union, European Parliament.

Resolution on the Exploitation of Prostitution and Traffic in Human Beings. 1989 OJ C 120. European Union, European Parliament.

Rome Statute of the International Criminal Court. 1998. A/CONF.183/9. International Criminal Court.

Rules of Procedure and Evidence. 2002. ICC-ASP/1/3 and Corr.1. International Criminal Court.

Promotion of National Unity and Reconciliation Act. 1995. South Africa.

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Mandate of the Special Rapporteur. 2011. A/HRC/RES/16/23. UN Human Rights Council.

Traffic in Women and Girls. 1995. A/RES/50/1995. UN General Assembly.

———. 2000. A/RES/55/67. UN General Assembly.

Trafficking in Women and Girls. 2018. A/RES/73/146. UN General Assembly.

Treason Act. 1708. United Kingdom.

UN Global Plan of Action to Combat Trafficking in Persons. 2010. A/RES/64/293. UN General Assembly.

Union with Scotland Act. 1706. United Kingdom.

Universal Declaration of Human Rights. 1948. A/RES/217(III). UN General Assembly.

UNSC RES 2331. 2016. S/RES/2331. UN Security Council.

UNSC RES 2388. 2017. S/RES/2388. UN Security Council.

UNSC RES 808. 1993. S/RES/808. UN Security Council.

UNSC RES 827. 1993. S/RES/827. UN Security Council.

UNSC RES 955. 1994. S/RES/955. UN Security Council.

Victims of Crime Act. 1984. H.R.6403. United States of America.

Vienna Declaration and Programme of Action. 1993. A/CONF.157/23. World Conference on Human Rights in Vienna.

Cases cited

A v Home Secretary (No 2). 2005 [2005] UKHL 71. House of Lords.

A v United Kingdom. 1998 App No 100/1997/884/1096. European Court of Human Rights.

Abu Zubaydah v Lithuania. 2018 App No 46454/11. European Court of Human Rights.

Advisory Opinion: Armenia. 2022 Req No P16-2021-001. European Court of Human Rights, Grand Chamber.

Al Nashiri v Romania. 2018 App No 33234/12. European Court of Human Rights.

Allen v Hounga. 2014 [2014] UKSC 47. UK Supreme Court.

Almonacid Arellano et al v Chile. 2006 Series C No 154. Inter-American Court of Human Rights.

Armani Da Silva v United Kingdom. 2016 App No 5878/08. European Court of Human Rights, Grand Chamber.

Azanian Peoples Organization (AZAPO) and Others v President of the Rep of S Afr. 1996 4 SA 672. South African Constitutional Court.

Barbato v Uruguay. 1983 A/38/40 at 124. UN Human Rights Committee.

Barrios Altos v Peru. 2001 Series C No 75. Inter-American Court of Human Rights.

Belgium v Senegal (Questions relating to the Obligation to Prosecute or Extradite). 2012. International Court of Justice.

Caballero-Delgado and Santana v Colombia. 1995 Series C No 22. Inter-American Court of Human Rights.

Cestaro v Italy. 2014 App No 6884/11. European Court of Human Rights.

CN v United Kingdom. 2012 App No 4239/08. European Court of Human Rights.

Communication No 353/2008 (decision on Ukraine). 2011 CAT/C/47/D/353/2008. UN Committee against Torture.

EOG v Secretary of State for the Home Department. 2020 [2020] EWHC 3310 (Admin). UK Queen's Bench Division (Administrative Court).

Felipe and Evelyne Pestaño v Philippines. 2010 ICCPR/C/98/D/1619/2007. UN Human Rights Committee.

Filartiga v Pena-Irala. 1980 630 F.2d 876. US Court of Appeals, Second Circuit.

Gäfgen v Germany. 2010 App No 22978/05. European Court of Human Rights, Grand Chamber.

Gelman v Uruguay. 2011 Series C No 221. Inter-American Court of Human Rights.

Goiburú et al v Paraguay. 2006 Series C No 153. Inter-American Court of Human Rights.

Gomes Lund et al v Brazil. 2010 Series C No 219. Inter-American Court of Human Rights.

Ireland v United Kingdom. 1976 App No. 5310/71. European Commission of Human Rights.

———. 1978 App No. 5310/71. European Court of Human Rights, Plenary.

———. 2018 App No. 5310/71. European Court of Human Rights.

Jeronovičs v Latvia. 2016 App No 44898/10. European Court of Human Rights, Grand Chamber.

Kaya v Turkey. 1998 App No 158/1996/777/978. European Court of Human Rights.

Kiliç v Turkey. 2000 App No 22492/93. European Court of Human Rights.

Marguš v Croatia. 2014 App No 4455/10. European Court of Human Rights, Grand Chamber.

Massacres of El Mozote v El Salvador. 2012 Series C No 252. Inter-American Court of Human Rights.

MC v Bulgaria. 2003 App No 39272/98. European Court of Human Rights.

MS v Secretary of State for the Home Department. 2020 [2020] UKSC 9. UK Supreme Court.

Njaru v Cameroon. 2007 CCPR/C/89/D/1353/2005. UN Human Rights Committee.

Nuremberg Military Tribunals. 1946. Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume II: "*The Medical Case*" "*The Milch Case*." Nuremberg Military Tribunals.

O v Commissioner of Police of the Metropolis. 2011 [2011] EWHC 1246 (QB). UK Queen's Bench Division.

Opuz v Turkey. 2009 App No 33401/02. European Court of Human Rights.

Paniagua Morales et al v Guatemala. 1998 Series C No 37. Inter-American Court of Human Rights.

Prosecutor v Furundžija. 1998 IT-95-17/1-T. International Criminal Tribunal for the Former Yugoslavia.

Prosecutor v Kunarac et al 2002 IT-96-23 & IT-9623/1-A. International Criminal Tribunal for the Former Yugoslavia.

Public Committee v Government of Israel. 1999 H.C. 5100/94. Israeli High Court of Justice.

R (PK (Ghana)) v Secretary of State for the Home Department. 2018 [2018] EWCA Civ 98. UK Court of Appeal (Civil Division).

R (QSA) v Secretary of State for the Home Department. 2018 [2018] EWHC 407 (Admin). UK Divisional Court.

R (TDT) v Secretary of State for the Home Department. 2018 [2018] EWCA Civ 1395. UK Court of Appeal (Civil Division).

R v Bow Street Magistrate, ex p. Pinochet (No. 3). 1999 [2000] 1 AC 147. House of Lords.

R v Connors and others. 2013 [2013] EWCA Crim 324. UK Court of Appeal (Criminal Division).

R v Joseph (Verna Sermanfure). 2017 [2017] EWCA Crim 36. UK Court of Appeal (Criminal Division).

R v L. 2013 [2013] EWCA Crim 991. UK Court of Appeal (Criminal Division).

R v LM. 2010 [2010] EWCA Crim 2327. UK Court of Appeal (Criminal Division).

R v O. 2008 [2008] EWCA Crim 2835. UK Court of Appeal (Criminal Division).

R v Reeves Taylor. 2019 [2019] UKSC 51. UK Supreme Court.

Rantsev v Cyprus and Russia. 2010 App No 25965/04. European Court of Human Rights.

Siliadin v France. 2005 App No 73316/01. European Court of Human Rights.

Simón, Julio Héctor y Otros. 2005 S.1767.XXXVIII. Supreme Court of Argentina.

SM v Croatia. 2020 App No 60561/14. European Court of Human Rights, Grand Chamber.

The Greek Case. 1969 App No. 3321/67, 3322/67, 3323/67, 3344/67. European Commission of Human Rights.

VCL and AN v United Kingdom. 2021 App Nos 77587/12 and 74603/12. European Court of Human Rights.

Velásquez Rodríguez v Honduras. 1988 Series C No 4. Inter-American Court of Human Rights.

Villagrán Morales et al v Guatemala. 1999 Series C No 63. Inter-American Court of Human Rights.

Vinter and Others v United Kingdom. 2013 App Nos 66069/09, 130/10 and 3896/10. European Court of Human Rights.

X and Y v Netherlands. 1985 App No 8978/80. European Court of Human Rights.

Zimbabwe Human Rights NGO Forum v Zimbabwe. 2006 AHRLR128. African Commission on Human and Peoples' Rights.