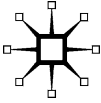


The Legacy of Punishment in International Law

The Legacy of Punishment in International Law

Harry D. Gould

palgrave
macmillan



THE LEGACY OF PUNISHMENT IN INTERNATIONAL LAW

Copyright © Harry D. Gould, 2010.

Softcover reprint of the hardcover 1st edition 2010 978-0-230-10438-9

All rights reserved.

First published in 2010 by PALGRAVE MACMILLAN® in the United States - a division of St. Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Where this book is distributed in the UK, Europe and the rest of the World, this is by Palgrave Macmillan, a division of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

Palgrave® and Macmillan® are registered trademarks in the United States, the United Kingdom, Europe and other countries.

ISBN 978-1-349-28894-6 ISBN 978-0-230-11307-7 (eBook)

DOI 10.1057/9780230113077

Library of Congress Cataloging-in-Publication Data

Gould, Harry D.

The legacy of punishment in international law / Harry D. Gould.

p. cm.

Includes bibliographical references.

1. International law. 2. International offenses. 3. Punishment.

I. Title.

KZ3410.G676 2010

341—dc22

2010007728

Design by Integra Software Services

First edition: September 2010

10 9 8 7 6 5 4 3 2 1

For my family with deepest love

Contents

Acknowledgments	ix
1 Introduction	1
2 The Historical Trajectory of International Punishment	15
3 <i>Jus Cogens</i>	45
4 Obligations <i>Erga Omnes</i> and the <i>Actio Popularis</i>	65
5 The Principle of Universal Jurisdiction	81
6 The Problematic Discourse of State Crime	109
7 Conclusion	137
Notes	141
Index	185

Acknowledgments

I hardly know where to begin in recognizing the wealth of assistance that has been rendered to me throughout the writing of this book. Although its direct ancestor was the dissertation I wrote under the supervision of Siba Grovogui in the Department of Political Science at the Johns Hopkins University, the roots extend much deeper. Having first been exposed to Kant's notion of the *categorical imperative* in John Clark's Ethics and International Relations seminar during my MA work in the Department of International Relations at Florida International University, I was positively astonished to find an apparently parallel legal concept, *jus cogens*, in Farrokh Jhabvala's International Law seminar. My interest in the idea of categorical obligation in international law comes from the early period of my MA coursework.

None of this, neither MA nor PhD nor completed book, could have happened without the generosity of the secretarial staffs at FIU and Johns Hopkins, and they all have my everlasting gratitude: Kathy Hasselbach, Mireille "Mimi" Sylvain-Davide, Martha Rodriguez, Michelle Real, Luz Aviles, Mary Cossio, Marge Collignon, Lisa Williams, Barbara Hall, and Kristin Szwajkowski.

Reaching back to my days as an undergraduate at New College of Florida, I would like to thank Dan McIntosh, who taught me to read IR and think IR, and Peggy Bates, who taught me (via lakes of red ink) to write IR.

During my doctoral studies, I was truly privileged to study with a number of marvelous faculty, all of whose fingerprints appear on this volume to one degree or another. Siba Grovogui and Dan Deudney built upon my previous work in IR Theory

in their own courses, and guided me with wisdom and patience through the dissertation writing process. Dick Flathman and Bill Connolly turned me from an IR student with a taste for and curiosity about political theory into a member of the small but growing community of scholars working on international political theory. Working on moral philosophy with Jerry Schneewind allowed for the kind of close reading and analysis of philosophical texts that would benefit Ethics and IR as a field, and alleviate much of its unseemly philosophical superficiality. Anthony Pagden demonstrated the proper way to undertake work on the history of ideas, and his tremendous familiarity with the authors featured in Chapter 2 of this book has saved me from innumerable embarrassments. Finally, seminars on Roman Law undertaken with Robert Westbrook laid the foundation for much of the analysis of contemporary practices' roots in the *corpus juris civilis*.

Having returned to FIU as a member of the faculty, I have had the pleasure of working with very kind, supportive colleagues who have provided me with guidance and friendship: Francois Debrix, my tenure mentor; Majid Al-Khalili; Paul Kowert; Lisa Prügl; Tom Breslin, who was very generous in helping to translate passages of Latin that exceeded my meager knowledge; Antonio Jorge, who kindly read and commented upon every word of this manuscript; Claire Apodaca; Ralph Clem; Felix Martin; Rich Olson; John Stack; Nicol Rae; Mohiaddin Mesbahi; Ben Smith; Paul Warren; and Jin Zeng.

Teaching at FIU has also allowed me to work with some outstanding students, several of whom have helped me out at various stages of the drafting of this manuscript, and I must add none of them were ever my graduate assistant; they all read and commented on chapter drafts of their own generosity. Thank you to Amir Mirtaheri, Lisa Samuel, Christopher Brown, Mohammad Houmayounvash, Charles Heck, and Serena Cruz for your specific contributions to this book. More generally, I owe thanks to my grad students in IR Theory 1 and IR Theory 2, and my undergrads in The Development of IR Thought. The grad students heard my ruminations

on state personality on numerous occasions, and my undergrad course helped shape my thoughts on the evolution of international punishment and its co-constitutive relationship with sovereignty. It was in the context of this undergrad course that I became acquainted with Richard Tuck's book *The Rights of War and Peace*. It was Professor Tuck's use of the theme of punishment that prompted my own reflections on the topic, and this work's debt to his book is readily apparent at multiple points.

The single greatest intellectual influence on my career generally, and this book particularly, has been Nick Onuf. It is my pleasure to have been—at various times—Nick's student, graduate assistant, colleague, and collaborator. Nick has read and commented on multiple drafts of everything that follows, and I have always benefitted from getting to read whatever Nick has been working on. I have completely lost track of the multitude of suggestions Nick has made that have shaped this book in fundamental ways: from its original (and my still-preferred) title, *Punishing Nations*; suggestions on how to frame a number of theoretical issues; solutions to theoretical problems; pointing out areas where my work duplicated earlier studies that, to my shame, I was unfamiliar with; and the rather unsexy task of fixing my clunky prose.

I am very grateful for the consistently challenging feedback on my work that I have received from discussants and co-panelists over the last several years. In particular I would like to acknowledge the following people. Chris Brown, Tony Lang, Cecelia Lynch, Brent Steele, Eric Heinze, Jacque Amoureux, Jon Carlson, Michael Struett, Jonathan Havercroft and Kate Schick.

Although it's a bit awkward to mention, thanks must also be extended to Mike Campbell Joe and Ruthanne Ward, Shenna Perez-Martin, Vernon Savage, Sally Rowley, and Carlos Danger for keeping me functioning properly through all of this.

Finally, I gratefully acknowledge Cambridge University Press and the *Review of International Studies* for permission to reprint "International Criminal Bodies," which was an earlier

xii • Acknowledgments

version of Chapter 6, and Palgrave Macmillan for permission to reprint “What Happened to Punishment in the Just War Tradition,” which, previously appeared as a chapter in Eric Heinze and Brent Steele eds, *Ethics, Authority and War* (2009) and parts of which appear in Chapter 2.