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Should States have the Right to Punish Municipal Offences Committed Abroad?

Alejandro Chehtman*

Abstract: This paper provides a philosophical critique of the principles that currently govern extraterritorial criminal jurisdiction under public international law. I start by outlining an interest-based justification for the right to punish offenders which, I suggest, is sensitive to the territorial dimension of the criminal law. On its basis, I argue that the nationality and passive personality principles have hollow foundations; by contrast, this justification fully explains what makes the territoriality and protective principles morally sound. Finally, this paper takes issue with the two most influential justifications for legal punishment available in the literature, i.e., retribution and deterrence. It argues that when pressed against the issue of extraterritoriality, they are committed to conferring upon states universal criminal jurisdiction for municipal offences. Although this does not prove them wrong, it is an implication that few of their supporters would be happy to endorse.

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“The Spaniards violated all rules when they set themselves up as judges of the Inca Atahualpa. If that prince had violated the law of nations with respect to them, they would have had a right to punish him. But they accused him of having put some of his subjects to death, of having had several wives, &c – things, for which he was not at all accountable to them; and, to fill up the measure of their extravagant injustice, they condemned him by the laws of Spain.”¹

INTRODUCTION

Under the Sexual Offences Act 2003, the UK claims the right to punish its nationals or residents who commit certain types of sexual crimes, e.g., on a holiday trip to South-East Asia. Similarly, under article 113-7 of its Penal Code, France claims jurisdiction over any felony committed outside its territory where the victim is a French national at the time the offence took place. Although the criminal law is usually regarded as mainly territorial in its application, these types of provisions are fairly standard in the vast majority of states. For some reason, however, they have not received much attention from either scholars working on the philosophy of international law or on the justification of legal punishment. And this gap in the literature is a significant one because, I shall argue, the issue of extraterritoriality sheds new light both on the appropriate scope of states’ criminal jurisdiction and on the justification of punishment, by pressing deterrence and retribution on a significant difficulty that has gone largely unnoticed.

Thus, this paper appraises the relationship between territory and states’ right to punish. Under International Law it is possible to distinguish five different bases for a state S’s criminal jurisdiction: territoriality, nationality, passive personality, protection and universality.² These rely, respectively, on whether the offence was committed on the territory of a particular state, by one of its nationals, against one of its nationals, against the sovereignty or national security of that state or irrespectively of any of the above considerations. Let me briefly introduce the main theses I shall defend in this paper. First, I shall argue against the normative soundness of the nationality and passive personality principles, i.e., S exercising extraterritorial criminal jurisdiction on grounds of the nationality of the offender

¹ Emmerich de Vattel, *Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (New York: AMS Press, 1773, Reprint, 1982) 110. Although this quotation eloquently shows precisely what is at stake in this paper, a point of clarification is in order. In short, de Vattel got the facts wrong, possibly following the at his time well-known account of Garcilazo. In short, the Inca Atahualpa was not tried through a fair procedure as sometimes suggested but rather executed, in haste, on expediency grounds. Cortés and some of his men feared an attempt to rescue him. Moreover, this decision by Hernán Cortés was heavily criticized in Spain on grounds that lacked the right to try a King. For a good account of this story see J. Hemming, *The Conquest of the Incas* (London: Papermac, 1993).

² Sometimes other bases of jurisdiction are articulated, such as the floating territorial principle, jurisdiction on embassies abroad, in aircrafts (B.J. George Jr., 'Extraterritorial Application of Penal Legislation' (1966) 64 Michigan L Rev. 609 and M. Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford: Oxford University Press, 2003), specially chapter 6). These ‘quasi-territorial’ bases of jurisdiction are beyond the scope of this paper.

or that of the victim respectively. I shall suggest that the arguments on which both these principles are usually advocated either beg the fundamental question they are meant to answer or collapse into a less appealing form of universal jurisdiction. By contrast, I suggest that the territoriality and the protective principles are can be fully explained by a justification for legal punishment that is sensitive to the issue of extraterritoriality. Secondly, I shall argue that most arguments based on deterrence and retribution, when pressed against this issue, are committed to granting S a power to punish O that is universal in scope. I take these two theories as examples but I suggest that this claim holds also for most mixed theories that involve a combination of deontological and consequentialist considerations. This is largely because the goods these theories are based on –retribution, deterrence, moral reform, incapacitation, etc.– don't seem to have any territorial foundation. Of course, this implication does not prove them wrong but, I suspect, it is something that few of their defenders would be happy to endorse. By contrast, I suggest that the justification for legal punishment sketched here is able to accommodate more plausibly the difficulties stemming from the issue of extraterritoriality, thereby possessing a significant advantage.

Before going any further, I need to further clarify what the question at stake is here. For this purpose, four points of disambiguation are in order. First, and perhaps most clearly, the purpose of this enquiry is not to clarify which principles are currently in force as a matter of international or domestic criminal law. Rather, it purports to discern which of these principles *ought* to be in force at the bar of justice.

Secondly, I suggest that the right to punish O can be best portrayed as a normative power to alter certain of O's moral boundaries, usually by inflicting harm on her, coupled with a liberty to do so and a claim-right not to be interfered with.³ In this paper, I shall be concerned only with the *power* to punish offences committed extraterritorially. So defined, the right to punish does not entail that S is at liberty to obtain custody over her by force, or to pursue an investigation on the territory of a foreign state without that state's consent. The question examined here, then, is whether, for example, Israel had the power to try Eichmann when Eichmann was on its territory, not whether it was at liberty to 'arrest' him in Argentina and held a claim-right against Argentina to not interfere with that arrest.⁴ To avoid any possible equivocation between these incidents I will assume throughout that the defendant is present on the territory of the state that claims jurisdiction over her at the point when it wants to exercise its power.

Thirdly, this paper examines the *grounds* on which S's courts can claim criminal jurisdiction to punish an offender (O). It deals with the question of

³ I shall use the standard Hohfeldian terms to refer to different incidents of a right, namely, liberties, claim-rights, powers and immunities. These incidents correlate, respectively, with a no-right, a duty, a liability and a disability. On this, see W. Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919).

⁴ On the absolute independence between this power and this claim-right under public international law see, generally, F. A. Mann *Further Studies in International Law* (Oxford: Clarendon Press, 1990) 19 and 21.

whether a particular state can claim to have, or adequately serve, the interest that justifies it holding a power to punish O. This question should not be conflated with that regarding the particular conditions that each concrete state court should meet in order to claim, *itself*, the right to punish O. Let me illustrate this distinction. A court of a prosecuting state (PS) may serve an interest of the population of the state in whose territory an offence was committed (TS) in trying O for an act of murder she committed there.⁵ This particular court, however, may at the same time fail to meet the conditions that justify it, *in particular*, holding such power. This may be because, e.g., it would normally decide on O's culpability on grounds of confessions extracted by torture. Thus, it is only the former question that will be tackled here.

Finally, my argument is limited to domestic offences. In arguments on the distribution of criminal jurisdiction, three sorts of considerations are often relevant: the territory on which the offence was committed, the nationality of the people involved in the offence (offender or victim), and the kind of offence the court is dealing with, i.e., whether the act is allegedly a domestic or an international offence. As regards the latter distinction, this paper only examines right of states to punish offences under their municipal criminal laws. It does not address what are often considered offences under international criminal law such as, e.g., genocide, war crimes or crimes against humanity. I shall simply assume here that this distinction between domestic and international offences holds without trying to clarify which offences belong in each group.

THE PROPOSED EXPLANATION FOR THE RIGHT TO PUNISH

Before I can tackle the main issue at hand, I will succinctly present the justification for legal punishment that I advocate in this paper. Justifications of punishment are notoriously complex, and there is not space here to defend this theory on its own terms. What I do want to suggest, however, is that the theory of punishment I advocate gains some support from the issues of extraterritoriality discussed here; in particular, it offers a better explanation for our intuitions about extraterritorial punishment than do the two most broadly justifications available in the literature, i.e., deterrence and retribution.

As stated above, I suggest that the right to punish ought to be understood mainly as the power to alter certain moral boundaries of an offender (O). In short, the justification for this normative power I propose is based on the assumption that having a system of criminal law in force constitutes a public good that benefits the individuals that live under it in a certain way. I suggest that having a

⁵ For simplicity, I will use throughout this essay PS for the state that wants to prosecute O, and TS for the state on whose territory the offence was committed. When these two are the same state I shall refer to it as S.

set of legal rules prohibiting murder, rape, etc. in force contributes to the sense of dignity and security of individuals in any particular society. This is, admittedly, an empirical claim whose plausibility will have to be taken at face value here. I assume that the collective interest individuals have in this system being in force, i.e., binding on them, is sufficiently important to grant S a right to punish those who violate these rules.⁶

It has been plausibly argued that a system of criminal law is in force if and only if both those subject to it and external observers have reasons to believe so.⁷ For this to obtain, two conditions must be met: i) those who violate these criminal rules should be punished; and ii) this punishment ought to be meted out by a body expressly authorized by *that* legal system. These conditions explain why this collective interest entails both a power to punish offenders and why this power should be held by a given court authorized by a particular legal system (in short, that which claims to be binding). I shall introduce one qualification to this argument. This collective interest grants states only a *prima facie* right to punish O. In other words, this interest would not prevail over all the other interests of individuals under such a system. Thus, I will assume that for S to hold an actual right to punish O, O must have forfeited her immunity and her claim-right against being punished. O can be said to characteristically do so when she attempts to violate someone else's rights.

This argument does not entail that the right to punish is grounded on an *increase* in the sense of dignity and security that individuals enjoy in a particular society. This would lead to a purely consequentialist argument and to trying to maximize this sense of dignity and security. Rather, the relationship of implication works in the opposite direction, i.e., it is because having certain criminal rules in force contributes to our sense of dignity and security that a state (S) holds the power to punish an offender (O). Thus, this argument relies on the interest individuals in S hold in these laws being in force rather than directly on the interest they have in their physical security. Once there is a certain level of law enforcement we can safely argue that the legal system is in force. This is all this argument requires. Accordingly, it collapses neither into disproportionate penalties nor into a justification to punish the innocent.

⁶ I also assume that rights are better explained as interests of particular normative weight. I cannot address with any detail the debate between the Interest and the Will theories of rights here. For the interest-based theory of rights see, mainly, M. Kramer's 'Rights without Trimmings' in M. H. Kramer, N.E. Simmonds, and H. Steiner, *A Debate over Rights* (Oxford: Oxford University Press, 1998), Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988) and C. Fabre, *Whose Body is it Anyway?: Justice and the Integrity of the Person* (Oxford: Oxford University Press, 2006), Chapter 1. For a recent defence of these two theories see M.H. Kramer and H. Steiner, 'Theories of Rights: is There a Third Way?' (2007) 27(2) OJLS, 281.

⁷ On this, see Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999) 171.

THE PRINCIPLE OF TERRITORIALITY

The principle of territoriality in criminal law is commonly regarded as a manifestation of the state's sovereignty. It entails that a state has the normative power to prescribe criminal rules which are binding on every person who is, for whatever reason, on its territory. Crucially for our purposes, it also entails the normative power to punish those who violate its rules within its borders. I will not address the issue of when a particular offence can be said to be committed on the territory of a particular state. That is a complicated enough question whose consideration merits a treatment that is beyond the object of this enquiry.⁸ Thus, I only will tackle here the standard cases in which, e.g., both the conduct of O and its result (e.g., V's death) occurred on the territory of state S. As a basis for criminal jurisdiction, the principle of territoriality raises little controversy.⁹ However –or perhaps precisely for this reason– any justification for the right to punish concerned with evaluating its extraterritorial application needs, first, to be able to account convincingly for this basic principle.

Quite uncontroversially, the right to self-government includes the right to establish a system of criminal law. By this, I mean that among their rights over a given territory, societies hold the power to dictate laws and enforce them by punishing those who violate them. I have suggested that the normative power to punish offenders is justified by the collective interest of the members of S in having a system of laws prohibiting, e.g., murder, rape, etc. in force.¹⁰ Now, someone might suggest that this argument explains only why S has a right to punish those who commit an offence on its territory against a resident of S.¹¹ It might seem an unfortunate implication of my argument that the residents of S have not, themselves, an interest in their criminal laws protecting foreigners on holidays. However, I think this is not the case for two reasons. First, because offences against foreigners committed in S do, as a matter of fact, undermine S's criminal laws being in force, thus affecting this public good. When O murders V in S, she puts into question the existence of S's legal rule prohibiting murder. This reasoning holds even if both O and V, are not members of S, who happened to be accidentally on the territory of S (e.g., on holidays). Moreover, I believe this holds even if V is killed *because* he is not a member of S. For example, when a bomb is detonated in a bus full of foreign tourists with the purpose of killing aliens, this certainly affects the belief of the people in S that the rule against murder is in

⁸ The standard doctrine distinguishes between subjective and objective territoriality, and the more controversial effects doctrine. For a good discussion on this see the classical piece by M. Akehurst 'Jurisdiction in International Law' (1972-1973) 46 BYIL 145 and, more recently, the excellent monograph by Hirst, n 2 above, specially Chapters 3 and 4.

⁹ See, for example, 'Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 AJIL, no. Supplement 439, 480-83, with a list of countries that explicitly apply it and a list of international sources.

¹⁰ As I will argue below, by members I refer not to the technical concept of citizens, not even more or less permanent residents; rather, I include in this concept every person who happens to be, for whatever reason, on the territory of a particular state.

¹¹ For present purposes I treat nationals and permanent residents alike.

force. This explains why states, which are often portrayed as self-interested machines, characteristically prohibit the murder of any person on their territory, and not only the murder of their nationals/residents. Indeed, we should not conflate the belief that a rule is in force with the somewhat different one that I, *in particular*, am less vulnerable to being a victim of a criminal offence. Criminal laws, I suggest, can ground the former belief, but not the latter.

Secondly, I suspect that this alleged difficulty is created by a rather oversimplified answer to the question of whose interest explains S's normative power to punish O. In effect, I suggest that this collective interest is also shared by individuals who happen to be in S accidentally, or for a very short period of time. In other words, the interests of temporary visitors also matter. It is the interest of all these individuals in S that collectively ground S's right to punish, not merely the interests of the nationals or members of S. Let me illustrate this point. Ramon is an Argentinean national. When he travels in Italy on holidays, he has an interest in people there abiding by most of the Italian criminal laws. While walking down an alley in Rome or dining in a festive *Trattoria* in Naples, Ramon has an interest in most of Italy's criminal laws being in force. Although it might not be as strong – after all he will probably be out of the country in a matter of days – this interest is similar to that of any other Italian national or permanent resident sitting next to him. Albeit temporarily, I suggest that Ramon's interest is part of the collective interest that justifies Italian courts holding a power to punish those who violate Italy's criminal rules. In other words, if the power to punish offenders is grounded on the interest of certain individuals taken collectively, I do not see any grounds on which we could simply override the interest of non-residents that are temporarily in S.

These considerations, then, fully explain the territoriality principle to the extent that it involves S holding a normative power to punish anyone who violates its criminal law within its borders. Let us now examine whether S can claim an exclusive right to do so, or whether other states (PS, PS2, etc.) could claim the power to exercise their criminal jurisdictions concurrently. In effect, the collective right to self-government each society holds does not merely include the power to criminalize certain behaviours. It also entails an immunity against foreign states dictating and enforcing its criminal rules on the territory of S. This immunity explains why Sri Lanka is *prima facie* disabled from dictating criminal rules that apply in the UK. This immunity must also be explained on grounds of the interests of the people in S. I shall assume here that individuals in S have a collective interest in deciding how to regulate the behaviour of individuals on their own territory that is sufficiently important to warrant conferring upon S the power to do so, and putting other states under a disability to do so. Yet, this immunity can be neither absolute nor unconditional. Following Raz and Margalit I suggest this immunity holds only insofar it contributes to the well-being of the members

of S, and that it is limited by the interests of non-members.¹² Accordingly, the interest that explains S's immunity does not necessarily preclude S2 holding a power to punish O for crimes committed in S. Where individuals in S2 have a significant interest in their criminal laws being in force in S, S would not be entitled to complain if S2 were to punish O for an offence she committed in S.¹³

To sum up, this section fully accounts for the principle of territoriality. I have shown that S can claim a right to punish violations to its criminal laws when those violations occurred on its territory, regardless of the nationality of either O or V. Also, S holds this right exclusively, in so far as other states do not have a relevant interest in punishing O.

THE NATIONALITY PRINCIPLE

In this section I examine the moral credentials of the 'nationality principle'. In other words, the issue at stake is whether PS has a normative power to punish O for a crime she committed abroad (in TS), on the grounds that O is a national of PS. Akin to the principle of territoriality, this basis for criminal jurisdiction is also quite uncontroversial under existing international law.¹⁴ In fact, it has been generally recognized that the "original conception of law was personal", and only the appearance of the territorial state gave rise to the right to subject aliens to the *lex loci*.¹⁵ Recently, this basis of jurisdiction has been a growing significantly in some states, and some lawyers even advocate making it a general basis for criminal jurisdiction in the UK.¹⁶ For example, the UK has recently claimed a right to punish O for certain sexual offences committed against children, regardless of where the act was committed, if O happens to be a national or a resident of the UK.¹⁷ Although many countries have self-imposed restrictions to the application

¹² J. Raz and A. Margalit, 'National Self-Determination' in J. Raz, *Ethics in the Public Domain. Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994).

¹³ A note of caution is in order here. Just as I have argued that only a certain specific interest can explain S's power to punish O, it is not the case that any interest that S2 may have would suffice to override S's immunity. On this see sections 4, 5 and 6 below.

¹⁴ See L.F.L. Oppenheim *et al*, *Oppenheim's International Law / Vol.1, Peace* (Harlow: Longman, 9th ed, 1992), V. Lowe 'Jurisdiction' in Malcolm D. Evans, *International Law* (Oxford; New York: Oxford University Press, 2nd ed, 2006) 345, and Akehurst, n 8 above. For more cautious positions, albeit considering it uncontroversial, see I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 6th ed, 2003) 301-2 and A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) 281. See also article 12 b) of the ICC Statute, where this basis of jurisdiction stands side by side with the territoriality principle.

¹⁵ J. L. Brierley 'The Lotus Case' (1928) 44 *Law Quarterly Review* 155-6.

¹⁶ See the Sex Offenders Act 1997, Landmines Act 1998 and the Nuclear Explosions (Prohibition and Inspections) Act 1998. Also, P. Arnell, 'The Case for Nationality Based Jurisdiction' (2001) 50 *ICLQ* 961.

¹⁷ See Sexual Offences Act 2003 s 5-15 and 72, and Schedule 2.

of this basis of jurisdiction it is generally argued that, as a matter of principle, there is no rule against extending it as far as they see fit.¹⁸

I have assumed that PS's normative power to punish O is explained by the collective interest of the members of PS in having a system of criminal laws in force. I now contend that this justification cannot accommodate the nationality principle. In short, there seems to be no way in which PS's criminal rules being *in force* require punishing O for a robbery she committed in TS, simply on the grounds that she happens to be a national of PS. For one thing, it seems odd to say that O has violated the laws of PS. But even granting this proposition for the sake of argument, the collective interest of the members of PS in the sense of security and dignity that criminal laws provide them does not seem to be affected by a robbery in TS. Inhabitants of PS may feel horrified by a particular crime committed abroad, but the system of criminal rules under which they live is not put into question by these offences. This conclusion is at odds with current international law as well as, to some extent, with common sense morality. In the remainder of this section I examine the arguments put forward to justify this basis for extraterritorial criminal jurisdiction.

Nationality-based criminal jurisdiction has been defended, for instance, on the basis of the proposition that the way in which a state treats its nationals is, in general, not a matter for international law or foreigners to have a say in (unless there is a gross violation of human rights). In Vaughan Lowe's words, "[i]f a State were to legislate for persons who were indisputably its nationals, who could complain?"¹⁹ This argument, however, begs the relevant question, i.e., it assumes rather than explains what particular interest of PS (or, more precisely, of the members of PS) is sufficiently important to ground O's liability to have punishment inflicted upon her. Likewise, it fails to take seriously TS's immunity against having criminal laws being prescribed on its territory by foreign authorities. These two are precisely the issues we need to explain if we are to claim that PS holds this right.

One response to the first of these questions has been: the right of PS to punish, for example, certain sexual offences committed by its members in TS has to do with the possibility of recidivism within PS.²⁰ A first remark that needs to be made here is that, if anything, this argument provides a justification for punishing PS's residents and not its nationals. In other words, it cannot explain why PS would hold a power to punish its nationals residing permanently abroad. This argument would therefore change the scope of this basis of jurisdiction in a way that, to some extent, would be controversial under current international law. But leaving this aside, the problem with this argument is that it has to justify the right

¹⁸ Regarding self-imposed restrictions, in some countries the law requires that the offence be a crime under the law of the state in whose territory it was committed (e.g. Egypt, see Cassese, n 14 above, 281). In others, it is only provided for certain particularly serious offences (e.g. France).

¹⁹ Lowe, n 14 above, 347. See also 'Draft Convention on Jurisdiction with Respect to Crime', n 9 above, 519.

²⁰ Arnell, n 16 above, 961 and Lowe, n 14 above, 347.

to punish on the basis of incapacitation or, to a lesser extent, the moral reform of the offender. Most legal and political philosophers reject these arguments as a plausible justification for legal punishment *simpliciter*. It seems to me that nothing in the extraterritorial application of criminal laws would override these clear, well-established considerations.

In a different vein, it has been claimed that nationality constitutes an ‘evolution’ from the ‘narrow’, ‘self-interested’ territorial purposes of the state.²¹ In other words, the criminal laws of the UK now ‘protect’ children abroad against, e.g., certain sexual offences committed by citizens or residents of the UK.²² However, if the extraterritorial exercise of criminal jurisdiction by PS is justified by the extra protection awarded to these children, I do not see on what possible grounds this right could be limited to PS’s own nationals. In other words, if what does the justificatory work is the extra ‘protection’ awarded, for example, to children abroad, a strict application of this argument would lead to the principle of passive personality, i.e., jurisdiction based on the nationality of the victim, or eventually to universal jurisdiction, but not to the nationality principle. To that extent, this argument can be readily rejected as a basis for the nationality principle.

Some further arguments try to ground this particular right in an interest other than the interests of the members of PS. For example, this power to punish has been based on the interest of O in having a fair trial, or not facing capital punishment.²³ This argument might show that certain states, namely those which cannot guarantee a fair trial or which provide for capital punishment, would lack the power to punish O.²⁴ But it simply does not follow from this that the state of which O is a national holds the right to punish her. Somewhat differently, the right of PS has been based on an interest of the members of TS. The argument goes: TS might have an interest in not being forced to face the option of either punishing O (and face diplomatic pressure and bad international publicity) or simply release her.²⁵ But this realpolitik based argument is based on a *non sequitur*. TS may have an interest in avoiding such a nasty scenario; this would probably depend on the identity of PS and TS, as well as plausibly of V and O. But even if we accept that this is necessarily the case for the sake of argument, this claim does not warrant the stated conclusion. Rather, TS’s interests seem to grant it a power to decide whether to: a) exercise its right to punish O itself (despite diplomatic pressure); b) simply release her; or c) have PS punish O. This interest entails that it is up to TS, and only up to TS, to decide. Thus, this argument cannot justify PS’s right to punish O. All it can show is that TS holds a normative power to authorize other

²¹ Arnell, n 16 above, 960.

²² Sex Offenders Act 1997 s7(2).

²³ Arnell, n 16 above, 959.

²⁴ Indeed, I would argue that states which cannot guarantee a fair trial lack the power to punish O, regardless of what the basis of its jurisdiction is. The question of capital punishment is a more difficult one that, unfortunately, is certainly beyond the scope of this paper.

²⁵ Arnell, n 16 above, 960. *A contrario*, suggesting that PS has an interest in punishing O to preserve its good relations with TS, see G.R. Watson ‘Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction’ (1992) 17 Yale J. Int’l L, 68-9. My answer to both arguments is the same.

states, such as PS, to punish O, and this is not the same as claiming that PS holds *itself* a right to do so. Granting PS a right for the sake of TS, moreover, seems to me a very unappealing form of judicial imperialism.

Some scholars are concerned with what they call jurisdictional gaps and the need to fight ‘impunity’. Two different scenarios are often mentioned. First, this problem would obtain when O returns to her country (PS) after committing an offence in TS. For the extradition laws in many states claim at least a right not to have their nationals extradited.²⁶ Now, from a moral point of view this is of little relevance. Someone advocating this view would need to provide an argument to show that states hold a right not to have their nationals extradited, something which is open to doubt. Even if we grant for the sake of argument that states do hold that right, it once again does not follow that PS would, as a result, have the right to punish O. In other words, the fact that the members of PS have an interest in not extraditing O that is sufficiently important to grant PS a liberty not to do so, is simply unrelated to the question of whether they have an interest in their state punishing her or not. I have argued that under these circumstances they lack an interest that can confer upon PS the right to punish O. If impunity is so important to the members of PS, then it should simply refrain from withholding O.²⁷

Finally, it is often argued that the nationality principle is based on the special relationship that links individuals to the state of which they are members. This relationship is usually referred to as *allegiance*.²⁸ This argument depends of what exactly this relationship amounts to. A first consideration that needs to be made here is that none of the well-known arguments defending the intrinsic ‘ethical significance’ of nationality seem to entail the application of PS’s criminal laws to its nationals abroad.²⁹ Basically, these arguments are meant to explain why states have the duty to give priority to their own nationals in matters such as the

²⁶ Some states, such as most European countries, go further and claim to be under a duty not to do so. See C. L. Blakesley, 'A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes' (1984) *Utah L. Rev.* 685, 709.

²⁷ A somewhat more difficult case is that in which the offence is committed in a territory where no state has jurisdiction (*terra nullius*). The nationality principle was argued as a basis for criminal jurisdiction when O, a U.S. national, killed V on a Guano Island (*Jones v United States* (1890), 137 U.S. 202L. On the position in English Law, see Hirst, n 2 above, 217). Under my justification for the right to punish, PS would lack the right to punish O in this case. But even if we recognize that PS has the right to punish O on the grounds that we want to avoid impunity, it does not follow that *only* the state of which O is a member has a right to do so. Rather, the logical implication of objecting to my solution on these grounds is that *any* state would have a right to exercise criminal jurisdiction over O, not just the state to which the offender belongs. Thus, avoiding impunity cannot explain the nationality principle.

²⁸ Eg. *Blackmer v United States*, 284 U.S. 421, 427 (1932), *United States v King*, 552 F.2d 833, 851 (9th Cir. 1976) quoted in Watson, n 25 above, 68. If this were the only justification for the right to punish in these cases, it seems that this would exclude the practice of some states that claim jurisdiction over O even if she acquired her nationality after they committed the crime (see art. 5 of the French *Code d'Instruction Criminelle*, quoted in 'Draft Convention on Jurisdiction with Respect to Crime', n 9 above, 522. The Netherlands applied a similar provision in art. 5(2) of its Penal Code (1881). See also the *Cabim's Case* [1608] 4 Co. Rep. 1 (1793).

²⁹ I borrow the expression from D. Miller, 'The Ethical Significance of Nationality' (1988) 98 *Ethics* 647.

protection of their interests or, at least, the right to do so.³⁰ Therefore, they do not directly support the principle of nationality. If anything, they may provide an argument for the principle of passive personality, i.e., the right of PS to protect V (wherever she is) by punishing those who violate her rights. Hence, they will be examined below.

Alternatively, we may build this allegiance relationship under the terms of a 'mutual exchange of benefits' scheme.³¹ Defenders of this argument would suggest that because O receives protection and other benefits from PS, she also has to bear the burdens of her membership to P. A first objection against this argument is that it does not seem to apply to every state. Indeed, not every state seems to confer enough benefits upon their members so as to claim from them a duty to bare their burdens while abroad.³² Members of PS who had to flee on humanitarian or economic grounds, for example, would seem to be excluded from this argument. Crucially, however, even if O is under certain obligations towards PS, this approach still begs the crucial question, namely, what is the interest of the people in PS that justifies O being under a duty to comply with PS's criminal rules abroad. Consider the following case: O travels to TS and robs a bank. When he is back in PS, he is prosecuted under PS's criminal law and punished. Now, it is unclear to me what is PS's interest in O respecting PS's laws abroad. Certainly, the right to punish O is not based on PS's members in enjoying the sense of dignity and security that their system of criminal laws provides them. I fail to see in what meaningful sense O's act undermined PS's criminal rules or the sense of dignity and security of the people in PS. Other interests that PS may put forward would collapse into unappealing justifications for the right to punish (incapacitation or moral reform), or into some form of universal jurisdiction (deterrence or retribution). In other words, I contend that unless there is a specific element in the offence itself (e.g., its effects or purpose) that affect the public good that individuals in PS themselves enjoy, PS would lack the power to enforce its criminal rules against O.

A defender of the allegiance argument may reply that individuals in PS would have an interest in O not being able to make *fraude à la loi* of PS, i.e., go abroad to do something criminalized at home. This argument, again, seems not to stand on the grounds of nationality but of permanent residence. But leaving this issue aside, it might seem persuasive. However, I believe that it gets its intuitive plausibility from something other than the nationality of the perpetrator or, for that matter,

³⁰ On this, see standardly D. Miller, *On Nationality* (Oxford: Oxford University Press, 1995), S. Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001), Y. Tamir, *Liberal Nationalism, Studies in Moral, Political, and Legal Philosophy* (Princeton, N.J.: Princeton University Press, 1993).

³¹ Miller, n 30 above, 61.

³² Interestingly, until well in the 20th Century many European powers had 'national courts' in the territories of other states (e.g., Persia, China, the Ottoman Empire, etc.) to try their citizens for crimes committed abroad. This jurisdiction, however, was based on capitulation treaties and not on a right held by the European powers themselves. See W. E. Grisby 'Mixed Courts of Egypt' (1896) 12(3) *Law Quarterly Review* 252 and A. M. Latter 'The Government of the Foreigners in China' (1903) 19(3) *Law Quarterly Review* 316.

her permanent residence. Suppose a family decides to take their young daughter abroad to circumcise her, a practice that is currently illegal in the UK.³³ Individuals in PS may of course have an interest in O being punished. However, it pays to take a closer look at what this interest might be. It is unlikely that the girl who has been subjected to this awful practice has an interest in her parents being imprisoned after what she already had to go through. Thus, we need to turn to the interests of other individuals on PS. Unlike the interest of those in TS, I suspect their interest would be based on incapacitation, deterrence or moral reform.³⁴ The problem, however, is that incapacitation and moral reform are often considered morally indefensible and deterrence, as I will argue below, would lead us to universal jurisdiction, not to jurisdiction based on the nationality of the offender.

I conclude, therefore, that as a basis for criminal jurisdiction the nationality principle is altogether unjustified. Moreover, I have contended that most of the arguments that are usually put forward to defend this widely accepted normative power either beg the relevant question or ultimately justify the jurisdiction of PS on other more controversial grounds, such as universality or passive personality. In the next section I will turn to this latter basis of criminal jurisdiction.

THE PASSIVE PERSONALITY PRINCIPLE

This section addresses the question of whether PS has the moral right to punish O for a crime she committed abroad, on the grounds that V is a member of PS. This basis of criminal jurisdiction is among the most contested ones in contemporary International Law.³⁵ It is the only regular basis of criminal jurisdiction that was not included in the 1935 Harvard Draft Convention on Jurisdiction with Respect to Crime.³⁶ However, it has been increasingly adopted by states.³⁷ Although there currently seems to be a trend to endorse it, this trend relates to what I have

³³ I am indebted to Anna Silver for pointing me to this case.

³⁴ Examples of this are Hirst, n 2 above, 271 and Watson, n 25 above, 68.

³⁵ Oppenheim says it is inconsistent (Oppenheim, n 14 above, 468). It was heavily criticized by Judge Moore in the *Lotus* case (PCIJ, Ser. A, no.10). And even there the majority, which accepted that Turkey had the right to punish Mr. Demons on the grounds of territoriality, did not fully endorse the principle of passive personality.

³⁶ n 9 above.

³⁷ The Harvard Research project (1935) contains a list of 28 states that have adopted this principle; many of them still endorse it (see Oppenheim, n 14 above, 472). France, for example, objected vociferously against the application of this principle by Turkey in the *Lotus* case (n 34 above). Indeed, before 1975, it recognized jurisdiction on this basis but it was rarely applied. To do so it required a decision of the *Ministère Public* that it was in the public interest to do so. This occurred when the offence had some territorial effects or endangered the security of the state. To that extent, it is hard to say that jurisdiction was based on passive personality. France's Criminal Procedure Law provides for its criminal jurisdiction for crimes (as opposed to *délits*) committed extraterritorially against its nationals (art. 689 of its *Code de Procédure Pénale* referring to art. 113-7 of its *Code Pénal*).

conceptualized as crimes under international law, such as genocide. It does not have to do with the extraterritorial application of a state's municipal criminal law.³⁸

Does the justification for punishment outlined in this paper endorse this basis of jurisdiction? The question is, once again, whether the members of PS have a collective interest in their criminal laws being in force abroad vis-à-vis offences committed against a co-national. In the previous section, I have argued that they lack an interest in having PS's criminal laws enforced against them or their co-nationals (or co-residents) abroad. The opposite proposition, however, might seem promising. I suggest, however, that this position is also unconvincing. Advocates of the passive personality principle need to show that, in fact, O's act puts into question the bindingness of the criminal rules in PS. I believe that is not an easy task. If V, a German citizen, is assaulted by a group of infuriated monks while visiting a Tibetan monastery in the Himalayas, this would hardly affect the confidence of individuals in Germany in the German criminal laws being in force.

Moreover, I suspect that it is not even true that the German citizens abroad have an interest in the German criminal law being in force extraterritorially that would be sufficiently important to grant Germany a power to punish O in this type of case. The reason for this is, in short, that German criminal law cannot provide abroad the benefits that justify Germany's right to exercise criminal jurisdiction at home. An example will clarify my point. While walking through an alley in Buenos Aires it would be awkward for a German citizen to feel that his rights are to some extent granted by the German criminal law. This would hold, I suggest, even if the German criminal law system did provide, as a matter of law, for extraterritorial criminal jurisdiction on the grounds of passive personality. This is because I explain the power to punish by reference to a public good. This public good benefits the individuals within a particular territory. Because of the features of this public good, it cannot be enjoyed by the members of PS extraterritorially. In fact, this is the case with most public goods offered by PS, such as public health or transport. While V is abroad, the only system of criminal law that can contribute to her (relative) sense of dignity and security is the criminal law of the territorial state. This is so, I suggest, at least when we refer to municipal offences. It follows that PS would lack a right to punish O extraterritorially on the grounds that one of the victims of her offence is a member of PS.

It is time to tackle the arguments proposed by those who defend the ethical significance of nationality. These arguments generally endorse the proposition that individuals have certain special obligations towards their co-nationals.³⁹ These arguments vary with regard to the duties each one gives rise to, and some of them recognize that the content of these obligations is, in fact, indeterminate. However, it seems safe to assume that all of them entail that PS has a special obligation to protect the interests of its nationals. This special obligation implies that they also

³⁸ Lowe, n 14 above, 351. See in particular, the Joint Separate Opinion of Judges Higgins, Hooijmans, and Buergenthal in the *Arrest Warrant* case (ICJ Reports, 2002, at 11).

³⁹ The standard arguments are made by Miller, n 30 above, Scheffler, n 30 above, 60 and 79, and Tamir, n 30 above, 137.

have a right to do so.⁴⁰ Now, if the nationality bond intrinsically requires PS to fulfil these special duties, it seems that the proponents of special obligations to co-nationals are committed to extending this protection abroad. So far, so good. However, to assert a right to punish on the basis of this proposition is a *non sequitur*. As I have explained elsewhere, the right to protect V does not *per se* entail a power to punish O. In short, we are usually ready to recognise S's power to punish O for a homicide even if V's rights cannot be protected anymore. Therefore, a further argument is needed. It seems to me that the only way in which we could meaningfully say that this right to protect entails a right to punish is by claiming that legal punishment is justified by its deterrent effects.

As it will be apparent by now, I am not sympathetic towards arguments based on deterrence as a general justification for the right to punish O. But even if we accept it for the sake of argument, this argument would lead us away from the passive personality basis of jurisdiction and into universality. Indeed, if PS's right to punish is based on its deterrent effect on potential offenders, it seems that PS holding a power to punish O extraterritorially would create a larger deterrent effect than allowing only the territorial state to do so. On these grounds, it would be sensible to make this effect as large as possible. But then, why limit this jurisdictional power only to the state of the victim? Or, again, why limit the power of PS to punish extraterritorially offences committed only against its nationals? The logical implication of deterrence is that every state ought to have the right to punish every offence committed anywhere. Only this would maximize the deterrent effect of the criminal law. Thus, the right to protect one's fellow nationals does not lead to a jurisdiction based on passive nationality. This argument collapses into a universally held right to punish O. Accordingly, I will deal with it below.

To conclude, I suggest there is no argument that can explain the right of PS to punish O on the grounds that V is a national of PS. In the previous section I also rejected the proposition that PS has the right to exercise criminal jurisdiction on the grounds that O is a member of that state. Let me briefly examine now whether PS might have a right to punish O if both these conditions obtain. A case with this configuration occurred recently in Ferrugem, a holiday village in Brazil. A group of Argentinean youngsters (O1, O2 and O3) killed another Argentinean national in a fight (V).⁴¹ Would Argentina have a right to punish O1, O2 and O3? I have assumed that Argentina's power to punish O can only be justified by reference to the stabilization of its own criminal rules. It seems clear that for the system of Argentina's criminal rules to be in force *in Argentina*, i.e., for it to be able to contribute to the sense of dignity and security on its territory, it is immaterial whether O1, O2 and O3 are punished. The nationality of both the offenders and the victim cannot alter that plain fact.

⁴⁰ This argument is also used by international criminal law scholars. See Cassese, n 14 above, 282.

⁴¹ For the Malvino case, see <http://www.clarin.com/diario/2006/12/21/sociedad/s-05202.htm>.

THE PROTECTIVE PRINCIPLE

The protective principle is invoked when PS claims criminal jurisdiction to punish O for offences against its security, integrity, sovereignty or important governmental functions committed on the territory of TS.⁴² It is beyond the scope of this enquiry to clarify the scope of this principle, i.e., which offences do in fact meet the test of affecting these goods or which goods in particular do warrant PS having jurisdiction these grounds. I shall concentrate for present purposes on certain offences for which the principle is standardly invoked, such as those committed against PS's governmental authorities, its military forces, counterfeiting of currency or public documents issued by the state.⁴³ It seems safe to argue that currently this basis for criminal jurisdiction is reasonably well established under international law.⁴⁴ It should be noted, however, that states have had diverging attitudes towards this principle. While Continental Europe and Latin America have often advocated this basis of jurisdiction, the Anglo-American world has traditionally opposed it.⁴⁵ However, more and more the US and the UK have tended to come to terms with it and use it for their purposes.

There are several arguments that purportedly justify PS's criminal jurisdiction on grounds of 'protection'. Among the most popular ones are self-defence, deterrence, and protection *stricto sensu*. I will not deal with them here because, although I consider all of them ultimately unsuccessful, I agree with the main point they are trying to make.⁴⁶ Rather, I shall examine whether the justification for legal punishment advocated here can accommodate this basis for extraterritorial criminal jurisdiction. I have argued that the justification for PS's power to punish O is based on the collective interest of individuals in PS in having

⁴² See C.L. Blakesley, 'Extraterritorial Jurisdiction' in M. Cherif Bassiouni (ed), *International Criminal Law* (Ardsley, N.Y.: Transnational Publishers, 1998) 54, J.N. Maogoto, 'Countering Terrorism: From Wigged Judges to Helmeted Soldiers – Legal Perspectives on America's Counter-Terrorism Responses' (2004-5) 6 *San Diego Int LJ* 258. This principle has also been extended to the 'protection' of the interests of members of military allies; France and the Communist countries constitute regular examples of this (see Akehurst, n 8 above, 159).

⁴³ The protective principle is relied upon nowhere in English Law (Hirst, n 2 above, 49). *Joyce v DPP* ([1946] AC 347) is usually referred to as an example of this principle being relied upon by a British Court. Hirst rejects this understanding of Joyce. Although I disagree with him on this, this issue is outside the scope of the present paper.

⁴⁴ Art. 8 of the 1883 the Institute of International Law adopted a resolution which contained the following principle (in Oppenheim, n 14 above, 470, at note 28). See also the 'Draft Convention on Jurisdiction with Respect to Crime', n 9 above, 543 and 551, for a list of 43 states that provided for it either in their legislation in force or in their projected criminal codes. More recently, see art. 694 of the French *Code de procédure pénale*. The U.S.'s *Omnibus Diplomatic Security Act* of 1985 is broadly based on the protective principle, although it does rely also on passive personality. For an exception, see M.R. García-Mora 'Criminal Jurisdiction over Foreigners for Treason and Offences against the Safety of the State Committed Upon Foreign Territory' (1957-1958) 19(3) *University of Pittsburgh L Rev.* 567.

⁴⁵ At least until the late 1950s, the UK and the US both seemed to have rejected this basis of jurisdiction unless a bond of allegiance between the offender and the sovereign was found. Treason seemed to have been the overarching concern.

⁴⁶ On deterrence as a justification for the protective principle see section 8 below and 'Protective Principle of Jurisdiction Applied to Uphold Statute Intended to Have Extra-Territorial Effect' (1962) 62(2) *Columbia L Rev.* 371, 375. For a careful, though not necessarily critical, treatment of the other arguments see García-Mora, n 44 above.

a system of criminal laws *in force*. This is because, or so I claim, this system is a public good that provides the inhabitants of PS with a relative sense of dignity and security that contributes to their well-being. Thus, the relevant question is whether the members of PS have a collective interest in their criminal laws being in force extraterritorially vis-à-vis certain offences against, e.g., the security and political independence of the state. I contend they do. Let me illustrate this point by way of an example:

The scene was Washington, November and December 1921. The world's naval powers had come to negotiate limits to shipbuilding to prevent a runaway naval race and save money. The point in contention was the ratio of tonnage afloat between the three largest navies, those of Britain, the United States, and Japan. The US proposed a ratio of 10:10:6. ... But the Japanese were unhappy and would not budge from their insistence on a 10:10:7 ratio.... Calculations difficult to summarize here meant that Western navies would be at a disadvantage in Japanese waters with a 10:10:7 ratio, but would have ships enough to dominate even far from home ports if they could insist successfully on 10:10:6. ... Two years earlier after months of work [Herbert O.] Yardley had solved an important Japanese diplomatic code; ... on December 2, as the naval conference struggled over its impasse on the ratio, a copy of a cable from Tokyo was delivered to Yardley's team and deciphered almost as quickly as a clerk could type. The drift of the message ... was an instruction to Japan's negotiators to defend the ratio tenaciously, falling back one by one through the four positions only as required to prevent the negotiations from breaking down entirely. As Yardley later described..., position number four was agreement to the 10:10:6 ratio. 'Stud poker,' Yardley wrote, 'is not a very difficult game after you see your opponent's hole card.' So it proved. On December 12 the Japanese caved."⁴⁷

Now this act of espionage is as harmful to Japan's interests (and those of the Japanese) as acts of espionage against Japan on its own territory. In other words, it makes little difference where the codes were broken or the secret message intercepted. But then, if the Japanese have the power to punish those who carry out acts of espionage against Japan on its territory, it must follow that Japan would have to hold this power extraterritorially. In other words, unlike cases of theft or murder against V, espionage against PS, even if carried out on TS, will affect the interests of the members of PS. For them to be able to enjoy the thin protection that this rule being in force provides, the rule has to be binding on O irrespectively of where she commits the act of espionage. Moreover, the members of PS would have an interest in PS prosecuting and punishing espionage against PS, but not against PS2. Indeed, this entails, in our example, that China would be disabled from prosecuting Mr. Yardley for his deed. Finally, PS would hold this power

⁴⁷ Taken from T. Powers 'Black Arts' (2005) 52(8) *New York Review of Books*.

regardless of whether TS decides to prosecute O itself or not. In short, the justification for legal punishment defended in this paper is able to explain PS's power to punish O on grounds of protection.

It should be noted that this basis for criminal jurisdiction has not been free from criticism. The underlying preoccupation focuses on the rights of those individuals subjected to this type of prosecution. On the one hand, it has been argued that these trials will be necessarily biased or politically conditioned.⁴⁸ This objection, however, affects only some of the offences that usually give rise to the protective principle, but not necessarily many others such as counterfeiting currency or public documents, or even perjury to the detriment of national authorities abroad. More importantly, perhaps, even with regard to those offences for which this objection may have some bite, e.g. treason, espionage or crimes with a political element in general, the difficulty it creates has nothing to do with the extraterritorial character of the prosecution. Rather, it affects this kind of trial, period. The Dreyfus affair in late 19th Century France and, more recently, the trials against Mossaui in the U.S. and some members of ETA in Spain illustrate this neatly.⁴⁹

On the other hand, it has been argued that this type of jurisdiction lends itself to inadmissible extensions.⁵⁰ This is historically true. Famously, Professor Jessup cites a case in which, during the Nazi period, a German court approved the prosecution in Germany of a Jewish alien who had extramarital intercourse with a German girl in Czechoslovakia on the basis of the "purity of the German blood."⁵¹ Salman Rushdie's death fatwah seems another powerful illustration of this danger. Without going that far, many provisions that invoke the protective principle are unacceptably vague. For example, the Hungarian Penal Code at some point provided for jurisdiction for any act against 'a fundamental interest relating to the democratic, political and economic order of the Hungarian People's Republic'.⁵² As it is often said, the fact that PS can abuse a right it has is hardly a conclusive argument against PS holding that right in the first place. In other words, these examples show cases of blatant abuse of this doctrine, but they say very little about its application to offences that do in fact affect the security or political independence of PS.

Finally, one should ask whether PS's laws being in force abroad can provide the members of PS with any sense of dignity and security in this type of case, for I have argued that the public good of punishment benefits the individuals on the territory of the state where they are. For instance, I argued that a German citizen, while abroad, cannot enjoy the sense of dignity and security provided by the German criminal laws, but rather, it is the criminal laws of the country where she

⁴⁸ García-Mora, n 44 above.

⁴⁹ On the ETA trials and its complaints see, e.g., the STC 136/1999, *Adolfo Ariza Flamariqe et al.* by the Spanish Constitutional Court (in BOE núm. 197, 18/08/1999, 26-96).

⁵⁰ García-Mora, n 44 above, 583.

⁵¹ P.C. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) 50.

⁵² In Akehurst, n 8 above, 58.

is (T) being in force that can contribute to her sense of dignity and security.⁵³ Would that not undermine the argument I make in this section? I suggest it would not. In this case we are not considering the sense of dignity and security that the German criminal laws provide to, e.g., Germany's Chancellor abroad. In effect, Frau Merkel herself, on a visit to Patagonia, would have an interest in Argentina's criminal laws being in force. The issue at stake here then is not *her* sense of dignity and security. Rather, the protective principle is explained by the sense of dignity and security it provides to the German people in Germany regarding their Chancellor, while she is abroad. And this, I contend, German criminal law is perfectly able to contribute to.

UNIVERSAL JURISDICTION

Universal jurisdiction entails the right of PS to punish O regardless of where her crime was committed. The nationality of both O and V is immaterial under this basis of criminal jurisdiction. As a matter of law, it is well-established that states do not hold universal criminal jurisdiction to try individuals for domestic offences.⁵⁴ Moreover, I know of no serious normative position that would argue differently. But then, why address this broadly uncontroversial issue? The reason is quite simple. So far, this paper has been focussed on assessing the normative grounds of different principles on which the criminal jurisdiction of the state is based. To that extent I have argued that two well-established beliefs held by most international lawyers, i.e., the nationality and passive personality principles, have hollow foundations. In this section, I somewhat change the scope of the enquiry. The issue here is not so much whether states do in fact have a power to punish O on universality grounds. Rather, my purpose is to show that retribution and deterrence, which are arguably the two most prominent considerations on which most justifications available in the literature for legal punishment rest (in whole or in part), if applied consistently, would necessarily advocate PS holding a power to punish O on universality grounds.⁵⁵ In other words, this section is directed against some well-established beliefs held by many philosophers of punishment.

But first I need to show why the argument advocated in this paper does not lead to this unfortunate consequence. I have argued that PS's power to punish O is justified by the collective interest of the members of PS in having in force a

⁵³ See the section on passive personality above.

⁵⁴ See Article 1 of The Princeton Principles on Universal Jurisdiction available at http://www.law.uc.edu/morgan/newsdir/unive_jur.pdf.

⁵⁵ Admittedly, I simplify here the literature on the justification of legal punishment. Several accounts rely on more than one consideration and many have sought to combine deontological and consequentialist elements in ways that I cannot examine here. For an influential example see, J. Braithwaite and P. Pettit, *Not Just Deserts: A Republican Theory of Punishment* (Oxford: Clarendon Press, 1990).

system of laws prohibiting, e.g., murder, rape, etc. The question is thus, once again, whether the members of PS have a collective interest in their domestic criminal laws being in force universally. From the arguments stated so far in this paper it should be clear that this is not the case. When discussing the nationality and passive personality principle I claimed that there seems to be no way in which Finland's criminal rules being *in force* requires punishing O for a robbery she committed in Nepal. For one, it seems odd to say that O has violated the laws of Finland. But more importantly, I suggest that the sense of security and dignity that Finnish criminal laws being in force provides individuals in Finland is not affected by a robbery in Nepal. Indeed, inhabitants of Finland may feel sympathetic to the victims of a crime committed elsewhere, but the system of criminal rules under which they live is not put into question by that offence. Therefore, I contend, Finland would simply lack the power to punish O for a domestic offence on universality grounds.

How would a deterrence-based theory analyse this situation? The central tenet on which deterrence is grounded is that punishment is justified as a means of protecting individual's rights and other valuable public goods by deterring potential offenders. The protection granted justifies the suffering inflicted upon O. Deterrence seems inevitably attached to the following reasoning: the 'more' punishment is exacted, the stronger the deterrence effect of criminal law would be and, as a result, the fewer violations of these rights and goods would obtain. In particular, the deterrent effect has been said to depend on the certainty, severity and celerity of the punishment.⁵⁶ Now, it surely seems that allowing states to exercise their criminal jurisdiction on grounds of universality will contribute to the certainty of the punishment. More importantly, perhaps, this would contribute to the *perceived* certainty of the punishment. It is obviously beyond the scope of this enquiry to even begin to consider how strong this extra deterrent effect would be. That, I suspect, will greatly depend on the type of crimes and the type of offenders. Shoplifting and money-laundering may well be differently affected.⁵⁷ In any case, if we accept that there will be *some* extra deterrence, it follows that this justification is stuck with advocating universal jurisdiction. This, surely, does not prove this justification wrong. But it shows that it will be up to those who defend it to explain either why it is not true that deterrence is committed to such a view, or that such a view is, as a matter of fact, morally appealing.

Of course, the deterrence theorist might respond that this would be too quick. Deterrence is only one consideration that must be included in a broader calculation of utility, i.e., we need to balance it against other countervailing considerations, such as for instance the friction that the exercise of universal

⁵⁶ J. Bentham, *The Rationale of Punishment* (London: 1830), chapter VI.

⁵⁷ I leave aside, for present purposes, the issue of how this would affect acts that are considered offences in S but not in S2, a standard example being that of abortion. I suspect that advocates of deterrence would have to argue in favour of S having universal jurisdiction for this type of acts as well. In any case these cases seem to represent a small minority of the totality of offences and, therefore, I need not rely on them to make my point against both deterrence theory and retributivism.

jurisdiction for domestic offences would create between states. This balancing assumes that it would be possible to measure the relevant levels of utility and disutility that each of these considerations warrant, something which could be doubted. However, with this further consideration in mind, we may admit that a consistent consequentialist would be able to deny that deterrence is committed to conferring upon states a right to punish O that is universal in scope.

I find this restatement more plausible but ultimately unconvincing for two reasons. First, although successful in restricting the territorial scope of the right to punish, this move may end up being too restrictive. For instance, if avoiding international friction overrides deterrence in the overall calculus of utility, it follows that the UK would be unjustified in punishing Russian agents for the alleged crime of Litvinenko, which was perpetrated in central London.⁵⁸ This implication, by itself, casts some doubts on how successful this restatement ultimately is, but so the more if we take into consideration another important feature of the right to punish. Indeed, my second point against this more elaborate version of deterrence has to do with what I consider to be, ultimately, an advantage of the language of rights over unfettered consequentialism. In short, if the balance between conflict avoidance and deterrence is in favour of the former, the consequentialist would be committed to the view that S is unjustified in punishing O. By contrast, to say that S holds the right to punish O means that it is up to S, and only up to S, to decide whether it decides to punish O, even at the expense of creating friction with S2. Thus, the rights-based account I endorse is able to explain a further important feature of the current practice of legal punishment, namely, that provided that individuals in S hold a sufficiently weighty interest in S punishing O, and I suggest they do, this confers upon S the right to decide whether or not to punish a particular offender, even when this entails a suboptimal level of utility. Accordingly, on the basis of these two considerations, the argument I advocate here is still more attuned with some of the central features of the current institution of legal punishment, than the revised consequentialist argument.

Interestingly, retributivist justifications for legal punishment seem to face a similar difficulty than standard deterrence. The central tenet of retributive justifications for legal punishment is that 'S has the right to punish O because O deserves to be punished'. A distinction is warranted here: some retributivists argue that this proposition only explains why it is permissible to punish O.⁵⁹ In the language of rights I have been using so far, this argument explains why O lacks a claim-right not to be punished. It does not explain why PS has the power to do so. This version of retributivism is not committed to universal jurisdiction but it does not, either, provide a complete justification for the institution of legal punishment. To that extent, it has little to say about the central issue at hand. A second type of

⁵⁸ For a good coverage of this affair see, generally, http://topics.nytimes.com/top/reference/timestopics/people/l/alexander_v_litvinenko/index.html.

⁵⁹ D. McDermott 'The Permissibility of Punishment' (2001) 20 *Law and Philosophy* 403.

retributivist suggests that desert is also a sufficient condition to grant PS the power to punish O. I take issue with this; regardless of what is the precise explanation of the proposition ‘S has the right to punish O because O deserves to be punished’, it seems to warrant the conclusion that PS should have the right to punish O irrespectively of where the offence was committed. This follows, at least, as long as retributivism is not able to qualify that tenet by claiming that O deserves to be punished *by X*. But retributivists characteristically do not take that approach. Take for example Ted Honderich’s argument that the truth in retributivism is that punishment is justified by grievance-satisfaction.⁶⁰ It seems to me that to the victim, and all those who sympathise with him, it would make little difference, in terms of the grievance satisfaction they would get, which state does in fact punish O, as long as O is effectively punished. In short, then, it seems that most retributivists will also be committed to defending PS’s holding criminal jurisdiction on universality grounds.⁶¹

In the remainder of this section I shall concentrate on two arguments that may provide responses to this problem: von Hirsch and Ashworth’s liberal argument for legal punishment and R.A. Duff’s influential more communitarian approach.⁶² von Hirsch and Ashworth see punishment as mainly explained in terms of censure, though their justification is supplemented by an element of deterrence. On the particular issue at stake here their argument goes as follows: a) offences are moral wrongs; b) by censuring the offender, punishment provides recognition of the conduct’s wrongfulness; c) this recognition should be made by a public authority and *on behalf of the wider community*, because it relates to basic norms of decent interaction among individuals;⁶³ d) the state is, so the argument goes, the only body capable of providing such public valuation of O’s conduct.⁶⁴ The main difficulty their argument faces is that it does not identify the wider community on whose behalf censure should be conveyed. This may be because their main underlying concern is to establish that legal punishment is the business of the state rather than of private individuals. However, what it means is that they fail to explain *which* state’s business it is. Von Hirsch and Ashworth consider themselves conventional liberals. The community they seem to have in mind is that of a group of individuals who share some basic norms of decent interaction. But then this community would have to include every individual worldwide. After all, most

⁶⁰ T. Honderich, *Punishment: The Supposed Justifications* (Harmondsworth: Pelican Books, 1984) 233-4.

⁶¹ In effect, I suspect that Nozick’s influential argument that punishment connects the offender with ‘correct values’ will be liable to this charge. See R. Nozick, *Philosophical Explanations* (Oxford: Clarendon, 1981).

⁶² See, respectively, A. Duff, *Punishment, Communication, and Community, Studies in Crime and Public Policy* (Oxford: Oxford University Press, 2001), A. Von Hirsch and A. Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005).

⁶³ In fact, they refer here to citizens rather than individuals (Von Hirsch and Ashworth, *ibid*, 30). However, this cannot be meant in any meaningful way. Otherwise, one would have to infer from this argument that as long as the “indecent” interaction is towards an alien, the criminal law would have nothing to say on this. Their own liberal stance would most certainly be inconsistent with that proposition.

⁶⁴ *ibid* 29-31. Italics added.

moral wrongs do not depend upon territorial boundaries or political allegiances. Now, on these grounds, it would be up to them to explain why PS would not be in a position to provide a public valuation of O's offence perpetrated in TS. For it seems to me that both PS and TS's decision would amount to a public recognition of the conduct's wrongfulness. If, as they say, the disapproving response to the conduct should not be left to victims and others immediately affected,⁶⁵ they would need to provide an argument explaining why it should have to be left to the state on whose territory the offence was perpetrated.

By contrast, I suggest Duff's communitarian theory of punishment does not necessarily collapse into universal jurisdiction. Duff sees punishment as a secular penance whose main purpose is to communicate censure to moral agents. He is therefore very much concerned with being able to reach the offender's moral conscience. I will not examine the soundness of this argument here.⁶⁶ My main interest is to appraise Duff's argument in the light of extraterritoriality. For punishment to reach O's moral conscience, two conditions must be met. First, O needs to have committed a wrong; and secondly, PS needs to have the moral standing to censure her for that conduct. It is the second limb of his argument that is relevant to us here. Duff suggests that for PS to have moral standing to punish O, it must fulfil two conditions. First, it must have the appropriate relationship to O, or to her action in question. This implies the existence of a political community on behalf of which punishment is imposed, i.e., a linguistic community that shares a normative language and a set of substantive values, to the extent so as to render mutually intelligible the normative demands that the law makes on its citizens. Secondly, PS must not have lost that standing as a result of some (wrongful) previous dealing with O. Duff's argument does much better than most of its rivals in this context. This, I believe, is because Duff is aware that the question of the justification for punishment is not just about whether it is permissible to punish O, but rather, and crucially, about whether some particular body (S) has the right to do so. Again, the answer to this question depends crucially on what constitutes for Duff a political community in the relevant sense. If he makes the requirements too thin (i.e., mutual recognition and protection of basic human rights) then he would have to admit that almost any body would have the moral standing to censure O, and as a result he would end up advocating universal criminal jurisdiction for every violation of a basic right. But I think this is not what he has in mind. Duff seems to be talking of a thicker notion of political community. Accordingly, his argument would be safe from collapsing into universal jurisdiction.

However, it might be that his approach faces other difficulties. Now, Duff has recently elaborated on his explanation of when a particular body has the

⁶⁵ *ibid* 30.

⁶⁶ On this see the interesting exchange between Duff and von Hirsch in Duff, above n 62 and A. Von Hirsch, *Censure and Sanctions* (Oxford; New York: Clarendon Press, Oxford University Press, 1993).

appropriate standing to bring O into account for her offence.⁶⁷ Moreover, he developed this framework having in mind the questions raised by international criminal law. Basically, he argues that the concept of responsibility has a relational dimension. O is responsible for X to Y or, better, O is responsible *as W* for X to Y.⁶⁸ To illustrate: as a university teacher, Duff claims, there are only certain bodies or individuals who can call O into account if, e.g., she delivers an ill prepared lecture. In effect, she will not be accountable to “a passing stranger, or to [her] aunt, ... or to the Pope”.⁶⁹ A careful examination of the merits of this account is beyond the scope of this paper. I shall concentrate here on how well this argument can do vis-à-vis the issue of territoriality. Duff uses it to argue against a territorial conception of criminal jurisdiction. “[L]iving (or acting) within a specified geographical area” does not by itself have the normative significance that an answer to the “as what” question requires.⁷⁰ Rather, individuals should respond ‘as citizens’ of a political community. By political community he understands ‘an idea of people living together (as distinct from merely beside each other) in a society defined by some set of shared values and understandings which might be implicit, inchoate or disputed, but without which society, politics and law would be impossible.’⁷¹ This conception of a political community is not of particular relevance here. What matters for us is the relevance that *belonging* to a political community has for O to be accountable to a particular state for a criminal offence. On this, Duff argues that “[t]he wrongs that properly concern a political community, as a political community, are those committed within it by its own members”.⁷²

This conception, Duff admits, requires an obvious qualification, i.e., it needs to extend to visitors and temporary residents, as well as citizens. But this causes problems. Duff’s argument for O being accountable to S is that O belongs to that political community, she is a citizen of S. But visitors and temporary residents are not citizens. With regard to them he claims that they should, as guests, “be accorded many of the rights and protections of citizenship, as well as being expected to accept many of [its] duties and responsibilities”.⁷³ Duff does not elaborate on this. As it stands, his argument for this extension seems to rely on the benefits accorded to visitors in terms of rights and protections. But this argument undermines his overall explanation. In effect, if all we need for O to be accountable to S is that she receives certain rights and protection from S, the notion of citizenship, i.e., that she *belongs* to that political community, ceases to do any justificatory work. If, by contrast, Duff wants to maintain that criminal responsibility is a relational concept and it makes O responsible *to S* on the

⁶⁷ A. Duff, ‘Criminal Responsibility, Municipal and International’ (unpublished manuscript: 2006, cited with permission from the author).

⁶⁸ *ibid* 1.

⁶⁹ *ibid* 5.

⁷⁰ *ibid* 9.

⁷¹ *ibid* 9, footnote omitted.

⁷² *ibid* 13.

⁷³ *ibid* 14.

grounds that O is a citizen of S, he needs to provide an alternative explanation of why visitors are accountable to S. To sum up, then, it seems to me that all that Duff is requiring is that O or V receive certain rights from TS, and this seems to me a territorial conception of jurisdiction.⁷⁴

A POSSIBLE OBJECTION

Before concluding, I want to briefly examine one final possible objection. Admittedly, many people would find the theory of criminal jurisdiction advocated here simply too restrictive. They may protest, for instance, that by preventing states from exercising their criminal jurisdiction extraterritorially on grounds other than protection, this approach would preclude joint efforts by states to fight certain forms of criminality. This is not what this argument entails. True, it warrants that PS is not able to punish O for an offence she committed outside its territory unless it threatens its security or political independence. The reason for this is, basically, that individuals in PS lack an interest in PS's criminal laws being in force abroad that would trump the interest of individuals in TS in not having a foreign authority dictating criminal laws on its territory. However, I have also suggested that it might be the case that the members of TS have an interest in PS being able to enforce TS's criminal laws.⁷⁵ In short, I now contend that this interest is sufficiently important to warrant TS a normative power to authorize PS to punish offences committed on the territory of TS. In other words, the interest of individuals in TS not only warrants TS a power to punish O for an offence she committed on its territory, but it also explains TS's power to authorize a foreign authority to do so, and thereby waive its immunity against having foreign criminal rules enforced on its territory. But this is simply not the same as arguing that PS, *itself*, has the power to punish O. My argument entails only this latter proposition.

Let me put it more clearly. My argument allows for states to hold a normative power to make treaties granting each other extraterritorial criminal jurisdiction for acts committed on their respective territories. The Conventions of the Council of Europe on Cybercrime (2001) and on Action against Trafficking in Human Beings (2005), and the 2003 UN Convention against Corruption are but a few examples of this.⁷⁶ In addition, states can authorize, as they often do, a particular state to exercise jurisdiction on its territory in the context of an extradition treaty and they

⁷⁴ This, without even beginning to consider the situation of O, a national of S1 and S2, who commits an act in S3 that is against the laws of S1 but mandatory under the laws of S2.

⁷⁵ See the section on the nationality principle above.

⁷⁶ Available at http://www.coe.int/t/dg2/trafficking/campaign/Source/PDF_Conv_197_Trafficking_E.pdf (arts. 31 1.d and e and 31.3 and the obscure art. 31.5), <http://conventions.coe.int/Treaty/en/Treaties/Word/185.doc> (arts. 22.1.b, 22.3 and 22.4) and http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf (art. 42.3), respectively. See also article 4 of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances at http://www.unodc.org/pdf/convention_1988_en.pdf.

can either provide PS with a full power to exercise extraterritorial criminal jurisdiction or subject it to certain limitations. Finally, states have a power to grant jurisdiction to foreign states for all sorts of domestic crimes.

To conclude, I willingly admit that, in Chief Justice Taft's words, some offences "are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute..."⁷⁷ However, this does not warrant PS's having extraterritorial criminal jurisdiction. My contention is that it is up to TS, and only up to TS, to decide on whether PS will hold the power to punish O for an offence she committed on the territory of TS. This explanation holds only vis-à-vis what we may call internationalized criminal law, i.e., domestic criminal laws that are enforceable extraterritorially by domestic courts.⁷⁸

CONCLUSION

The findings of this paper are quite straightforward. I have argued that international law theory has failed to provide a convincing explanation for the existing bases of territorial and extraterritorial jurisdiction for municipal offences under international law. In this context, I provided a justification for legal punishment which accounts for the territoriality and protective principles, namely, it provides states the right to punish offences committed on their territory or against their security and political independence. By contrast, this argument rejects the proposition that states hold the right to punish O on grounds of the nationality of the offender or that of the victim. I suggested that an extraterritorial state would hold such right only when authorized by territorial state. Finally, I argued that the two most influential considerations on which most justifications for legal punishment rest, i.e. deterrence and retribution, when examined under the light of extraterritoriality, are committed to granting states a right to punish O universal in scope. This, I suggest, does not prove them wrong, but it certainly is an implication that few of their defenders would be happy to endorse.

⁷⁷ 260 U.S. 94, 98, referred to in 'Draft Convention on Jurisdiction with Respect to Crime', n 9 above, 545. Although in this case the court left open the question of whether this basis of jurisdiction applied also to aliens, the reasoning seems to lead inevitably to that conclusion.

⁷⁸ This proposition, however, does not cover 'purely' international crimes such as genocide, war crimes or crimes against humanity. On this see, A. Roberts and R. Guelff, *Documents on the Laws of War* (Oxford: Oxford University Press, 3rd ed, 1999).