

The Morality of Extraterritorial Punishment

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PhD Law

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Alejandro Chehtman

Abstract

This thesis provides a philosophical account of the morality of extraterritorial punishment. The introduction clarifies the methodology by putting forward an analytical account of moral rights and endorsing the interest-based theory of rights, and presents a normative appraisal of the moral significance of political boundaries. Chapter 1 presents an innovative interest-based justification for the right to punish. Chapter 2 examines the extraterritorial scope of this right to punish with regards to domestic offences. It argues that the justification here advocated is the best suited to account for the strong intuition that the right to punish should be primarily territorial in scope, and provides a critique of the principles for states' power to punish offences committed extraterritorially currently in force under international law. The next part of the thesis focuses on extraterritoriality in the context of international criminal law. Chapter 3 argues that the defining feature of the concept of an international crime is that it warrants conferring upon *some* extraterritorial body the power to punish their perpetrators regardless of the nationality of both offender and victim. Chapter 4 provides a fresh look at universal and international jurisdiction, i.e., at the theoretical explanation for the proposition that *every* state should have the right to punish international crimes and the scope of the jurisdiction of the International Criminal Court. Chapter 5 provides a theory of legitimate authority to punish offenders. It relies on an innovative application of the influential service conception of authority to this specific question and permits a philosophical examination of issues such as show trials, victor's justice, *tu quoque*, and trials *in absentia* or against defendants who have been abducted abroad. A conclusion summarizes the central findings of the thesis and suggests possible avenues for future research.

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I often hear that writing a PhD dissertation is a solitary endeavour. This has not been my experience. I have discussed different parts of the thesis in several contexts. I presented an early version of Chapter 1 at the Criminal Law and Social Theory Seminar and the Political Theory PhD Seminar at LSE, and at the Brave New World Conference (2006), in Manchester University. I presented a previous version of Chapter 2 at the ALSP Conference (2007) at Keele University, the Law and Philosophy Conference at Stirling University, the Criminal Law and Social Theory Seminar at LSE, and the Brave New World Conference (2007). Previous versions of Chapter 3 were presented at the LSE Forum for Legal and Political Theory, the Society for Applied Philosophy Annual Conference (2008), and the UK IVR Conference, at the University of Edinburgh (2008). I presented a previous version of Chapter 4 at the First Annual Post-Graduate Colloquium on International Law, at SOAS (2008). Parts of Chapters 3 and 5 were presented at the LSE Symposium on Citizenship and Criminalization (2008). I am grateful to all these audiences for their constructive criticism, particularly to Markus Dubber, Antony Duff, Katrin Flikschuh, Mathew Kramer, Andrew Lang, Thomas Poole, Peter Ramsay, Paul Roberts and Hillel Steiner.

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Introduction

“the justice of each nation ought in general to be confined to the punishment of crimes committed on its own territories”

Emmerich de Vattel, 1758.

1. The morality of extraterritorial punishment

This thesis is concerned with providing a normative theory of extraterritorial punishment. Extraterritoriality is a feature that is deeply entrenched in the practice of legal punishment. For one, states often claim the right to punish certain offences provided under their own domestic laws even when they are committed outside their territorial boundaries. Many states, for instance, claim the right to punish certain offences committed by or against their own nationals on the territory of a foreign state.¹ Similarly, states often criminalize conduct such as the counterfeiting of their currency, espionage or treason regardless of where they happen to be performed. International Law recognizes states these extraterritorial powers. In short, then, although domestic criminal law is usually regarded as primarily territorial in its application, these types of provisions are fairly standard in the vast majority of states.

Moreover, since the end of WW2, but crucially since the end of the Cold War there has been a significant development in the practice of extraterritorial punishment for crimes provided under international law. Many individuals have been prosecuted in different parts of the world for crimes against humanity, war crimes, genocide, etc. before domestic, international, or ‘hybrid’ tribunals which were often enough located outside the territorial boundaries of the state in which the offences were perpetrated. Paradigmatic examples of this trend, and of the difficulties it creates, are the current proceedings against Omar Al-Bashir, standing President of Sudan, before the

¹ For instance, under the Sexual Offences Act 2003 English and Welsh courts hold the right to punish English or Welsh nationals or residents who commit certain offences, e.g., in a trip to South-East Asia. Similarly, under article 113-7 of its Penal Code, France claims jurisdiction over any felony committed anywhere in the world when the victim is a French national at the time the offence took place.

International Criminal Court in The Hague, and the extradition proceedings against former Chilean dictator Augusto Pinochet in the UK.

Finally, the issue of extraterritorial punishment is of pressing importance in certain debates on criminal justice in the context of globalization. The clearest example is perhaps that of transnational terrorism. To illustrate, the U.S. currently holds several hundred people detained in Guantanamo and other foreign prisons. A crucial underlying claim in this situation is that the U.S. holds the right to punish these individuals even if the acts for which they would be punished were committed outside its territory. Several of the normative claims made in this context have been applied, *mutatis mutandi*, to other phenomena such as transnational organized crime, including drug-trafficking, cybercrime, trafficking in human beings, etc.

For some reason, however, extraterritoriality has not received much attention from either people working on the philosophy of international law or on the justification for legal punishment. It has also been entirely neglected by the literature on global justice.² This gap in the literature is a significant one. First, because as I shall argue in this thesis, providing a philosophical account of extraterritorial punishment both sheds new light on, and challenges, some widely held positions regarding the appropriate scope of the right to punish. And also, because it confronts debates concerning the justification for legal punishment with an important problem that challenges the normative and explanatory force of the leading arguments in the field. The aim of this thesis is, therefore, to provide a convincing normative account of the issue of extraterritorial punishment; but also to steer current debates on criminal justice and the philosophy of punishment in new and pressing directions, bringing them more in line with issues such as globalization, the emergence of transnational crime, terrorism, war, and the responses to mass atrocities.

² See, e.g., Simon Caney, *Justice Beyond Borders : A Global Political Theory* (Oxford: Oxford University Press, 2005) and Thomas Pogge, *Global Justice* (Oxford: Blackwell, 2001), Thomas Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs* 33 (2005), John Rawls, *The Law of Peoples With "The Idea of Public Reason Revisited"* (Cambridge, Ma.: Harvard University Press, 1999) and Thom Brooks, ed., *The Global Justice Reader* (Oxford: Blackwell, 2008).

Having introduced the central issue this thesis will be concerned with, three important points of clarification are in order. First, this thesis will provide a philosophical examination of the moral justification for the laws regulating extraterritorial punishment. It is neither a black letter law analysis of what legal rules are currently in force, nor an abstract normative account which purports to come up with an entirely innovative set of principles that should regulate the practice of extraterritorial punishment. This account builds on current widely endorsed legal rules and practices, but stands apart from them by examining the moral principles on the basis of which they can be justified. To conduct this enquiry I will use the method of ‘reflective equilibrium’ or ‘coherence model’.³ I start with a set of moral principles that I consider reliable. These are neither simple moral intuitions, nor mere personal preferences. They are normative considerations for which I will argue in some detail. On the basis of these principles, I will assess the morality of the basic rules governing extraterritorial punishment under international and domestic criminal law. It is likely that some principles have such normative force that they will make us revise certain standard legal practices; but it is also likely that some established legal rules are seen as so fundamental as to count against certain of these principles. The coherence method entails going back and forth between the basic principles and the established set of rules and practices until we reach a perfect fit between basic reliable principles and morally justified legal rules, namely, a point of ‘reflective equilibrium’. This method assumes that readers will “be willing to modify or relinquish some of their beliefs if they could be shown that by so doing, they would strengthen the support for others that are more fundamental, and increase internal coherence generally.”⁴

Second and somewhat relatedly, this thesis takes as a given that the world is divided into states, which are territorial units with their own political organization and a

³ See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999) and Norman Daniels, ‘Wide Reflective Equilibrium and Theory Acceptance in Ethics’, *The Journal of Philosophy* 75, no. 5 (1979). For applications of this method in criminal law theory see Joel Feinberg, *The Moral Limits of the Criminal Law / Vol.1, Harm to Others* (New York ; Oxford: Oxford University Press, 1984); this is also similar to the methodology in Duff, Tadros, etc Antony Duff et al., *The Trial on Trial. Vol. 3, Towards a Normative Theory of the Criminal Trial* (Oxford: Hart, 2007).

⁴ Feinberg, *Harm to Others*, 18.

more or less permanent population. It will also acknowledge the existence of international criminal tribunals and other forms of supranational arrangements. This thesis is not about devising a new set of institutions that would best tackle the problem of criminality in its current forms and varieties. There are good reasons to address the empirical context in which a normative argument is made, since even though normative claims and factual conditions belong to different levels of discourse, they are not entirely unrelated. For a start, that context constitutes an exogenous limitation that links the argument to a certain state of affairs. Moreover, factual conditions do raise normative questions. Accordingly, I readily admit that the normative issue of extraterritoriality as examined here stems from the fundamental fact that the world is politically divided into states. However, I will not put this form of organization into question, but rather work within its framework in order to develop a consistent moral argument able to account convincingly for most of our core intuitions regarding the practice of extraterritorial punishment.

Thirdly, I need to somewhat isolate the specific normative question I will concentrate on from other, closely related issues. Ultimately, any justification for legal punishment needs to make an argument of the following sort: “A is morally justified in punishing O on the grounds of C, D, etc.” where “A” is a certain individual or body that metes out punishment to “O”, and “C, D, etc.” are the reasons that justify inflicting this punishment. Jeffrie Murphy has suggested that providing a full account of that claim involves answering at least five interrelated, albeit distinct questions.⁵ First, one needs to provide an adequate theory of criminalization, i.e., of the sort of behaviours that can be the object of criminal sanctions, and distinguish criminal punishment from, e.g., torts or liability for damages. Secondly, one needs to explain the moral justification for legal punishment, to wit, “how a certain conduct which is clearly morally wrong when considered in isolation ... can be morally justified all things considered”.⁶ Thirdly, one needs to explain why a particular body (e.g., the state) would

⁵ Jeffrie Murphy, 'Does Kant Have a Theory of Punishment?' *Columbia Law Review* 87 (1987).

⁶ *ibid*, 510.

be legitimately entitled to perform this task. Fourthly, one would need to provide an adequate theory of criminal liability, that is, a set of rules governing, *inter alia*, justifications, excuses, and other defences. And finally, one would need an account of the appropriate punishments.

Arguably, not every one of these questions is relevant to the case for *extraterritorial* punishment. By this I do not mean that they are unrelated to it. Rather, I mean that a plausible argument focused on the specific issue of extraterritoriality need not sort out all of them in full. For example, examining the rules that should govern individual criminal liability in the international sphere is certainly beyond the scope of this thesis.⁷ On similar grounds, I will provide here neither an account of what makes certain conduct criminalizable, nor one of the appropriate punishments that should be available (i.e., sentencing rules). Rather, I will concentrate only the specific considerations on which *the extraterritorial scope* of the right to punish rests, which I will argue have to do with the justification for A holding the right to mete out legal punishment to O.

In this thesis I will defend seven interrelated propositions.

1. For a given body A to have the *right* to punish a certain individual O someone's interest must be sufficiently important to warrant conferring upon A that right, *and* A must be able to claim the authority to do so.
2. In order to explain the (extraterritorial) *scope* of this right we need to look at the interest that explains conferring upon that given body the power to mete out legal punishment to O.
3. A state's right to punish O is justified mainly by reference to the collective interest that individuals in that state have in there being a system of criminal rules prohibiting murder, rape, theft, etc. in force.
4. States' right to punish O is primarily territorial in scope.

⁷ For a recent, extensive overview see Kai Ambos, *La Parte General Del Derecho Penal Internacional. Bases Para Una Elaboración Dogmática (Der Allgemeine Teil Des Völkerstrafrechts: Ansätze Einer Dogmatisierung)* (Montevideo: Fundación Konrad-Adenauer, 2005).

5. The right of a particular state to punish O can be exercised extraterritorially in the case of domestic offences only when these are perpetrated against its sovereignty, security or important governmental functions.
6. There are certain offences, namely international crimes, that warrant conferring upon at least *some* extraterritorial body a right to punish their perpetrators.
7. *Every* individual state and the *International Criminal Court* have the moral right to punish individuals for these offences irrespectively of where the alleged crime was committed.

I will also defend three more critical positions. First, I will argue that although an account of authority is necessary to provide a complete justification for the right to punish O, the extraterritorial scope of this right is unrelated to the considerations on which this authority is explained. Secondly, I will claim that certain rules currently in force governing the extraterritorial application of states' domestic criminal laws lack any sound moral justification. In particular, I will argue against the right attributed to states to punish O based on the fact that either O or the victim are a national of that state. Finally, I will argue that the leading normative justifications for legal punishment are ill-suited to deal with the issue of extraterritoriality. This is because they either lead to problematic restrictions to the territorial application of a state's domestic criminal laws (such as the inability of a state to punish offences committed on its territory by foreigners); or they collapse the distinction between domestic and international crimes by advocating the same broad principles of extraterritorial jurisdiction for both. But let us start from the beginning. In the remainder of this introduction I will introduce the methodology I will use throughout this thesis and clarify further the normative challenges that a plausible case for extraterritorial punishment would have to face under current, non-ideal conditions.

2. Our point of departure

Ronald Dworkin has famously suggested that political theories could be classified as rights-based, duty-based or goal based, depending on which of these moral concepts was considered of ultimate importance.⁸ This classification can also be applied to theories exploring the morality of certain legal practices or institutions. In this thesis, I will use a rights-based approach to examine the moral justification for extraterritorial punishment. It is certainly beyond the scope of these introductory remarks to show that rights-based theories have better grounds or are more convincing in general than goal-based or duty-based theories. Rather, I shall merely provide some reasons for the choice I make.

Right-based theories may be plausibly favoured by normative, epistemological and purely practical considerations. From a normative perspective, they usually are deontological theories. To that extent they are free from the deep objections raised against justifications grounded on a teleological or consequentialist structure (goal-based theories).⁹ From an epistemological standpoint, the source and significance of the moral weight attached to rights can be explicated convincingly. As a result of its rising popularity among contemporary philosophers and legal scholars, the language of rights has acquired a great deal of clarity and insight. As I will show in the following pages, we can make explicit to a significant extent what rights are, what it means to have a right, and what the case for a particular right is. Finally, from a more practical point of view, rights discourse is extremely influential in national and international politics as well as in moral and legal philosophy. As we see everyday in different contexts, most relevant actors frame their demands in terms of rights, whether that be the right to life, the right to privacy, the right to social welfare, the right to private property, etc. This has cast some doubts regarding the emancipatory potential of rights discourse,¹⁰ but it has

⁸ Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1994), 169-173.

⁹ For some of the well-known criticisms see, e.g., Bernard Williams' *A Critique of Utilitarianism* in J. J. C. Smart and Bernard Williams, *Utilitarianism - for and Against* (London: Cambridge University Press, 1973), 108-118 and Rawls, *A Theory of Justice*.

¹⁰ See Costas Douzinas, *The End of Human Rights : Critical Legal Thought at the Turn of the Century* (Oxford: Hart, 2000); David Kennedy, *The Dark Sides of Virtue* (Princeton University Press, 2004).

certainly not undermined their established popularity. Thus, contingent as all this may be, rights provide a common and compelling language in which competing arguments are framed.

Before going any further, I need to make this assumption thinner and more plausible in the light of the relevant literature on rights. First of all, using a rights-based theory does not amount to saying that morality in general is exclusively rights-based. There are some convincing objections against the latter claim, which I need not consider here.¹¹ It may be enough to note how implausible it seems to claim that rights are the *sole* source of moral value. Secondly, for a given theory to be rights-based, rights need not necessarily figure in its first premise. Clearly enough, some rights will be based on some more fundamental right or sets of rights. For instance, the specific right to write a political pamphlet is normally grounded on the right to freedom of expression. But not all rights are necessarily valued for rights-related reasons. Some basic or ultimate rights will usually be grounded on considerations that are, themselves, not framed in the language of rights. For example, in Dworkin's theory of rights the fundamental right to be treated with equal concern and respect is not grounded on a more fundamental right but on human beings' dignity or their political equality.¹² Similarly, other rights, such as the right of individuals to criticise their government, are usually considered important wholly or primarily as the instrument of social goods. Thus, right-statements work as some kind of middle-level reasons which can help us tackle difficult philosophical issues. In Raz's words, they "belong to the ground level of practical thought in which we use simple-to-apply rules".¹³

In any case, their fit to our present enquiry might be put into question. Someone may object, for instance, that the view that the criminal law is rights-based is analytically unwarranted. Indeed, although rules (legal rules in particular) and rights (legal rights) are usually related to one another in many normative contexts, this is only a somewhat

¹¹ Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988), chapter 8.

¹² Dworkin, *Taking Rights Seriously*, 198.

¹³ Joseph Raz, *Ethics in the Public Domain : Essays in the Morality of Law and Politics* (Oxford: Clarendon Press; Oxford University Press, 1994), 48.

recent, contingent association.¹⁴ Rules and normative systems in general have functioned without being construed in terms of rights throughout most of human history.¹⁵ Moreover, the criminal law is usually described exclusively in terms of duties and liabilities rather than rights. Its statutes describe conduct such as murder, manslaughter, robbery, etc., and prescribe or attach certain penalties to those who commit them. There is, many would argue, something artificial in arguing that the legal rule which penalizes the intentional killing of another person is *basically* stating that individuals have a (legal) right to life.¹⁶

Admittedly, the criminal law is best described in terms of duties and liabilities. However, these concepts can, themselves, be normatively *justified* in terms of rights, or so I will argue below. The duty not to kill someone is *explained* by the right of that person not to be killed. It is that particular right that does the justificatory work behind the prohibition on murder. Similarly, A's liability to have punishment inflicted upon her for murdering B is explained by the state's right to punish offenders. It is that right, or so I shall argue throughout this thesis, that needs justification. In short, then, the conceptual and normative apparatus that rights provide not only is adequately suited to tackle the issue at hand; it also clarifies to a significant extent the specific questions that this thesis needs to address and the kind of answer it needs to provide.

3. An account of rights

Rights, then, have become pervasive and fundamental features of practical thought in law, morality and politics. In virtue of this, it may be assumed that they, themselves, need no justification but rather that they call for an explanation.¹⁷ In the following

¹⁴ See Richard. Tuck, *Natural Rights Theories. Their Origin and Development* (Cambridge: Cambridge University Press, 1979).

¹⁵ The most famous example of this is the Ten Commandments. "Thou shalt not kill" said nothing about anyone having a right to life.

¹⁶ Hart in his classic *Legal Rights* claims that expounding the criminal law in terms of rights would be confusing and even redundant (H.L.A. Hart, *Essays on Bentham* (Oxford: Oxford University Press, 1982) 186 and, mainly, 192).

¹⁷ See Raz at the beginning of Personal Well-being in his *The Morality of Freedom*. Against this, Scanlon *Rights Goals and fairness* in Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984)

pages I will not provide an original account of what rights are. Rather, I shall concentrate on what I consider the most plausible one available in the literature. But first, a point of terminology is in order. Unless I specify otherwise, I will not talk about legal rights. As suggested above, the subject of this enquiry is not what legal rights and duties individuals and states have under current international law, but rather what legal rights and duties they *should* have at the bar of justice. The way in which I propose to answer this question is to examine what *moral* rights they have.¹⁸ Throughout, I make the standard assumption that legal and moral rights have the same structure.¹⁹

3.1 The conceptual analysis of rights

There is enough consensus in the literature that regardless of whether conceived as trumps,²⁰ side-constraints,²¹ or exclusionary or pre-emptive reasons²², the normative force that rights have is very significant, even if short of being considered absolute. That is, the language of rights accounts for the *strength* of a particular normative statement.

Wesley Hohfeld's classical analysis of types of legal rights, as well as its application *mutatis mutandi* to moral rights, remains in its essential features substantially unchallenged.²³ Hohfeld argued that the proposition "A has a right to ϕ " distinguishes four distinct types of jural relations or incidents, namely,

137 and Cécile Fabre, *Social Rights under the Constitution. Government and the Decent Life* (Oxford: Oxford University Press, 2000), 15.

¹⁸ Moral rights must be distinguished from the much more controversial concept of "natural rights". Regardless of the specific content of natural rights, the main conceptual difference between both is that natural rights normally claim an 'ontological status' (Hart in Waldron, ed., *Theories of Rights* 78) that, to my knowledge, has never been successfully established.

¹⁹ Fabre, *Social Rights under the Constitution*, 114; Peter Jones, *Rights* (London: Macmillan, 1994), 47-48; Raz, *Ethics in the Public Domain*, 238.

²⁰ Dworkin, *Taking Rights Seriously*; Waldron, ed., *Theories of Rights*.

²¹ Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974).

²² See Raz, *The Morality of Freedom*, 195-196. On this see below. For criticism of Raz's position on this matter, see N.E. Simmonds' *Rights at the Cutting Edge* in Matthew H. Kramer, Simmonds, N.E., Steiner, Hillel, *A Debate over Rights* (Oxford: Oxford University Press, 1998), 204.

²³ Wesley Hohfeld, *Fundamental Legal Conceptions* (Yale University Press, 1919). For recent accounts on rights that draw heavily on him, Kramer et al, *A Debate over Rights*, Leif Wenar, 'The Nature of Rights', *Philosophy and Public Affairs* 33, no. 3 (2005), and Cécile Fabre, *Whose Body Is It Anyway? : Justice and the*

Claim-right	Liberty	Power	Immunity
↕	↕	↕	↕
Duty	No-right	Liability	Disability ²⁴

To say that A has a claim-right means that she is owed a duty by other(s). For instance, my right to personal safety means, among other things, holding everyone to a duty not to physically attack me. To have a liberty-right, by contrast, is to be free from a duty to act (or refrain from acting) in a certain way.²⁵ Take Hart's example: under English law, I am at liberty to look over my garden fence at my neighbour in that I have no legal duty not to do that. This, of course, does not entail that my neighbour is under a duty himself to allow to be looked at. He could certainly build a taller wall or plant a tree. A power can be defined as the ability to change one or more of these jural relations (liberties, claims, powers or immunities). Examples of powers include the right to vote, to make contracts, to get married, etc. Conversely, someone is said to possess an immunity when someone else lacks precisely this ability. Under public international law heads of state and other high-ranking officials are generally considered immune from the jurisdiction of the domestic courts of other states. This means that, at least while they are in office, they are not liable to being punished by a foreign state. These four relationships can be plausibly divided into two levels, the first one covering claim-rights and liberties and the second one, powers and immunities.

Yet, rights are characteristically formed by more than one of these incidents.²⁶ Throughout the thesis I will refer to specific incidents when appropriate; when I use the term right I will be referring to the 'molecular' right composed by two or more of these incidents.

Integrity of the Person (New York: Oxford University Press, 2006), chapter 1. For some dispute, see L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987).

²⁴ I modify Hohfeld's terminology in line with the most usual expressions for each of these positions.

²⁵ Hart, *Essays on Bentham*, 166-167. Saying that B has no duty to ϕ is logically identical to saying that A has no right that B ϕ s. At least a duty derived from that right. To that extent, the jural position that contradicts a liberty is termed a "No-right". No-right stands for no-claim-right.

²⁶ See, characteristically, Wenar, 'The Nature of Rights'.

Three relevant distinctions are in order here. On the one hand, while first order relations determine whether a particular action is permissible, impermissible or obligatory, second order relations determine the possibility or impossibility of a change in someone's moral situation. To claim that A is under a duty not to deprive B of her freedom of movement means that it is impermissible (wrong) for her to do so. By contrast, to say that A is under a disability to vote does not (necessarily) mean that it would be *wrong* or *impermissible* for her to do so. Rather, the implication would be that her vote would be *null* and *void*, i.e., of no effect. This thesis is mainly about the extraterritorial scope of a particular power: the power to punish. In this respect, it is important to bear this distinction in mind when considering the implications of claiming that a court C has acted *ultra vires* or lacked the *power* to punish a particular individual O.

On the other hand, to say that A has the power to ϕ does not necessarily mean that she is at liberty to do so. The classical example is that A in many instances has the power to sell a good G she knows is stolen to B, even if she would be under a duty not to do so; she would be criminally liable and liable to pay compensation to the original owner but the legal effects of the sell would stand. There is, hence, some degree of normative independence between the different levels. This is not to claim, however, that there are certain situations in which the wrong involved in transferring or modifying certain rights is such that it precludes the transference or modification itself.²⁷ Indeed, A would lack the power to sell B a gun so that she can kill C.

Finally, a crucial feature of Hohfeld's analysis of rights for our purposes is its relational aspect. Put differently, rights capture a normative relation between \mathcal{A} , the right holder, and B a certain (potentially identifiable) individual who is bound to respect that right. For instance, when \mathcal{A} lends B her complete collection of 'The Sopranos', B is under a duty towards \mathcal{A} to return it. Yet if this is true we need to make sense of a particular distinction usually made in the literature. To wit, some rights are said to be

²⁷ Fabre, *Whose Body Is It Anyway?*, 26. From a non-Hohfeldian perspective see Jeremy Waldron, 'A Right to Do Wrong', *Ethics* 92 (1981).

held *in personam* while others are said to be *in rem*. This means that while the former are held against a specific individual or group, others are said to be held against humanity at large. An example of the former is A's right that B returns her Sopranos collection. An example of the latter is A's claim not to be tortured. Rights *in rem* can be seen therefore as undermining this relational aspect of rights that I claim will be relevant for the theory of extraterritorial punishment I develop in this thesis. However, I suggest they do nothing of the kind. Rights *in rem* should be understood as a shortcut for a significant amount of bilateral jural relationships between A and several potentially identifiable duty-bearers. The fact that we need not identify them all at once does not mean that we cannot do so. In sum, the concept of rights *in rem* is simply another way in which rights talk simplifies our normative thinking.

3.2 The interest-will theories debate: identifying the right-holder

In the contemporary literature on rights, there are two main general theories that purportedly explain the nature of rights, i.e., the choice or will theory and the interest theory. The debate between them has been described as a "stand-off".²⁸ This debate is prominent enough not to merit a full description here. Both theories presuppose that rights confer some sort of benefit to the right-holder. The specific point of contention is the "directionality of duties", that is, it has to do with identifying the right-holder to whom the relevant duty is owed.²⁹

The will theory claims that having a right means having a "legally respected choice".³⁰ Thus, the essential feature of a right is that the right-holder is able to control the performance of the duty that it is owed to her. She may waive or extinguish the duty or leave it in existence; after breach, she may leave it 'un-enforced' or may

²⁸ H. Steiner, "Working Rights", in Kramer et al, *A Debate over Rights*.

²⁹ Matthew H. Kramer and Hillel Steiner, 'Theories of Rights: Is There a Third Way?' *Oxford Journal of Legal Studies* 27, no. 2 (2007), 298.

³⁰ Hart, *Essays on Bentham*, 190. On this, also Jones, *Rights*, 32-36 and Sumner, *The Moral Foundation of Rights*.

‘enforce’ it, for example, by suing compensation; and she may in turn waive or extinguish the obligation to pay compensation.³¹

There are at least three fundamental shortcomings to this theory. First, it leads (explicitly and inevitably) to the implausible claim that, *inter alia*, babies, children and the severely mentally ill cannot be right-holders. After all, they do not have this legally protected choice themselves. Secondly, it cannot accommodate rights over which we have no control regarding their disposition, such as the right not to be tortured. Under almost every system of criminal law, victims of torture lack both the power to waive someone else’s duty not to commit any such act, and they even lack the power to waive the enforcement of their rights by the state. Hillel Steiner has attempted to rescue the will theory by suggesting that under the criminal law the will theory vests rights in state officials.³² But certainly it seems odd, to say the least, to suggest that the holder of the right that I am not tortured is some state official. Steiner finds this implication unproblematic. Yet, because the issue at stake is precisely the “directionality of duties”, it goes against our basic understanding of what it is to hold a right not to be tortured to claim that this right lies with the state and not with the individual. This takes us directly to the third difficulty with the will theory of rights. In short, it fails to capture why rights are so important in moral and legal discourse, to wit, that someone’s interests are *harmed* if her right is not respected.³³ Not all rights can be explained as protections to their holders’ title to control the performance of a duty. If A beats up B very badly on the street it would be clear that A has violated B’s right to her physical integrity. Now, the reason for this is arguably that it really hurts to be beaten up like this not that he did not ask for her consent. It is therefore B’s interest in being free from this kind of pain and not (merely) his title to control the performance of A’s duty that his right protects.

The interest theory, by contrast, explains the “directionality of duties” by reference to whose interest would be affected by the violation of the duty or would be protected

³¹ Hart, *Essays on Bentham*, 184.

³² H. Steiner, “Working Rights”, in Kramer et al, *A Debate over Rights*, 250.

³³ For this way of understanding rights see Dworkin, *Taking Rights Seriously*, 198, and Fabre, *Social Rights under the Constitution*, 15.

by that right.³⁴ It therefore has no trouble explaining why the right not to be tortured lies with each individual and not with some state official. This account, however, is not without difficulties. A standard objection against this conception of rights is that it is unable to accommodate third party beneficiary cases.³⁵ Suppose A hires B to look after her aged mother (M) in her absence. Normally, we would say that A has a right against B that she would look after M. But this seems to contradict the fact that it is M who has the most pressing interest in B fulfilling her duty. This objection is designed to make two different, albeit concurrent, points. First, that the interest theory is unable to explain the distribution of rights in this simple case; and secondly, that the choice theory explains the situation cogently. After all, it would be up to A and not M to demand the fulfilment of B's duty, its enforcement by the state, or eventually to extinguish it.

I believe this objection misses a basic feature of any plausible version of the interest theory, namely, that not every interest qualifies as an appropriate basis for the attribution of a right. Indeed, if the interest that M has were of the kind that should be protected by a right, this would make the agreement between A and B morally (and legally) superfluous and, by implication, not only B would be under a duty to look after M in A's absence, but also D, E, and F would be under a similar duty. Put differently, this example does not cast doubt on the "directionality" aspect of the interest theory; rather it shows that it needs further refinement as to what kind of interests are in fact protected by rights. Just as M's interest in being looked after would not do, nor would A's interest in having some free time to go to see the new Woody Allen movie explain B's duty to look after M.

In sum, I argue that the best way to identify the right-holder is to look at whose interest is being protected by the relevant right. However, interests can do more than

³⁴ For standard formulations of the interest theory, see Raz, *The Morality of Freedom*; Matthew Kramer's "Rights Without Trimmings" in Kramer et al, *A Debate over Rights*; and Neil MacCormick, "Rights in Legislation" in P.M.S. Hacker and Joseph Raz, *Law, Morality and Society* (Oxford: Clarendon Press, 1977).

³⁵ E.g., Hart, *Essays on Bentham*, 187-188.

simply identify the right-holder. They can, in fact, help us answer the question of what must be the case for X to have a right vis-à-vis Y. To this question I now turn.

3.3 Assigning moral rights: identifying the relevant interest

Joseph Raz has influentially argued that “X has a right if and only if X can have rights, and other things being equal, an aspect of X’s well-being (his interests) is a *sufficient* reason for holding some other person(s) to be under a duty”.³⁶ I assume here that this method for assigning rights can be applied, *mutatis mutandi*, to all Hohfeldian incidents, namely, that interests explain not only claims, but also liberties, powers and immunities. In other words, X would have a right if she has an interest which is sufficiently important to hold some other person(s) to be under a no-right, a liability or a disability, respectively. Three central aspects of this proposed version of the interest theory call for further elaboration.

First, under Raz’s definition, rights do not simply correlate with duties, liabilities, etc.; they actually ground them.³⁷ Rights are considerations that operate at the level of the justification of a given institution, policy or decision. They are considerations concerning the *reasons* on which governments or other people should, or should not, act. Let me illustrate this. The right to be free from physical assault does not simply protect a sphere of personal liberty from being violated. It works as a *reason* to prohibit other people infringing this sphere by, e.g., attacking me on the street. This is important because it shows that the explanation of who has a right, precedes the determination of who owes the person a duty and what that duty is.³⁸

Moreover, the notion of interest can help us explain where the normative force that rights have in moral argument comes from. The interest theory of rights advocated here relies on the insight claimed generally by consequentialists that it matters morally

³⁶ Raz, *The Morality of Freedom*, 166 (my emphasis).

³⁷ In short, I suggest both these propositions are true. Logical correlativity and normative implication are not mutually exclusive and can perfectly be co-extensive. For an illustration of this see Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?' *Law and Philosophy* 23, no. 4 (2004), 370, fn 337.

³⁸ Raz, *The Morality of Freedom*, 184-185 and Alasdair Cochrane, "Moral Obligations to Non-Humans" (PhD LSE, 2007), 78.

whether someone's life goes well or badly for themselves. Interests, under this approach, connect the concept of rights to individuals' well-being. Individuals' well-being is, therefore, the fundamental consideration on which the rights-based argument provided in this thesis ultimately stands.

Yet Raz argues that rights should be understood as reasons of preemptory force. That is, rights are not simply considerations of a particularly weighty sort that should be subsumed in a broader overall calculus; rights *end* that particular argument by telling us what is to be done. We should not construe this proposition as suggesting that, by establishing the existence of a right we have reached the end of our enquiry about what is to be done.³⁹ As it will be clear throughout the thesis, much more argument is needed in order to examine who the bearer of the relevant right is, what is its content, its scope, and exactly who is under the relevant duty, liability, etc. Rather, the proposition that rights have preemptory force means that they work as constraints on the maximization of well-being, and allow us to accommodate the key deontological insistence on the value and separateness of individuals.⁴⁰ By way of illustration: A is sitting in the silent coach in a train to Manchester. Apart from her, all the other passengers are teenagers who have probably reserved seats in the wrong coach. The fact that A has a right to travel in a silent environment means that all the other passengers are under a duty to remain silent. This would be the case even if we would maximize the level of overall well-being by allowing the other passengers to carry on with their conversations.

Admittedly, the preemptory force of rights might create a difficulty if considered under the light of another well-extended feature of rights discourse, namely, the fact that rights tend to conflict. If we follow the interest theory of rights, conflicts of rights seem inevitable. For instance, A might have an interest in expressing her views that might be sufficiently important to be protected by a right. However, B might also have an interest in not being insulted publicly which would also warrant conferring upon her

³⁹ N.E. Simmonds, "Rights at the Cutting Edge" in Kramer et al, *A Debate over Rights*, 204.

⁴⁰ Fabre, *Whose Body Is It Anyway?*, 18-19. See also Alasdair Cochrane, "Moral Obligations to Non-Humans", 78.

a right. Provided A desires publicly to insult B their rights would clearly conflict. This would seem inconsistent with Raz's claim that rights have preemptory force. I submit this is not the case for two reasons. From the point of view of terminology, we can rescue this understanding of rights by simply suggesting that interests of the relevant type only give rise to *prima facie* rights. *Prima facie* rights exist outside of particular circumstances. However, once we have examined the concrete situation we may assign one of the parties a right. In other words, although *prima facie* rights can conflict, once a right is assigned in the specific case, that right works as a preemptory reason. From a normative perspective, interests can help us tackle conflicts of rights. In this particular situation it would seem that B's interest in not being insulted publicly outweighs A's interest in being able to do so. Accordingly, we could consistently argue that although A has a *prima facie* right to freedom of speech generally, she lacks the right to insult B in these particular circumstances. The issue of sorting out conflicts of rights might get much messier than this.⁴¹ However, this simple mechanism will generally suffice for the purposes of this thesis.

The third central aspect of Raz's version of the interest theory is that it provides a plausible criterion by which moral rights are to be assigned, a neglected question in some of the most influential accounts of rights.⁴² His definition stipulates that someone has a right not merely if she is an intended beneficiary of a duty, but only if her interest is *a sufficient reason* for holding another person under a duty, liability, etc. Three issues become immediately relevant here. In order properly to grasp the relationship that rights capture between those who hold them and those against whom they are held we need, first, to examine more closely what kind of things interests are. As Fabre suggests, there are two mistakes we can make with regards to the concept of interest: we may define interests exclusively by what their holder wants; or we may define them as things

⁴¹ A more sophisticated way of resolving conflicts between rights is probably the German-born principle of proportionality. For an influential account, see Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002), specially the Postscript.

⁴² See, for example, Hart's criticisms of Nozick and Dworkin in H.L.A. Hart, 'Between Utility and Rights', *Columbia Law Review* 79, no. 5 (1979).

that contribute to her good, irrespective of what she wants.⁴³ If we make the former mistake, we would be committing ourselves to the implausible view that a drug addict has a right that we supply him with heroin; if we make the latter, we might end up being allowed to force terminally ill people to follow painful, though life extending medical treatments. A more plausible conception of interest would rely on generally making X the final judge about her own good, though it would have to admit that in certain situations she would not be in a position to make that judgement.⁴⁴

Secondly, whether A has a right to ϕ does not merely depend on the importance that ϕ has for *her*. The fact that I have an interest in watching Lionel Messi play for Barcelona F.C. generally does not mean that someone is under a duty to provide me with tickets for a match. This is because the importance of watching a football game is arguably not *sufficiently* important to hold anyone under a duty to provide anyone else with tickets. This consideration helps us sort the problem of third-party beneficiaries outlined above. Indeed, it would hardly be the case that M's (A's mother) interest in being looked after while A is absent is a sufficient reason to hold B under a duty to do so. This explains why M lacks that right against B. By contrast, the interest that A might have in B fulfilling their contract might well be an interest that, all things considered, justifies holding B under a duty to look after M. Much more moral argument is needed in order to make this case. Yet, the point here is simply to suggest that in order to assign A the right to ϕ we need to identify an interest which is sufficiently important to hold someone else under the relevant duty, liability, etc.

Finally, this interest need not be an interest of A's. Take the following standard example I mentioned above: under most legal systems A holds, in certain situations, the power to sell some good G to C that she has stolen from B. In other words, if C did not know that the good was stolen, the transference of property rights over G would be perfectly valid. It would of course be *wrong* for A to do that, that is, she would not be under a liberty to do so; but this is besides the point. The point is rather that if A holds

⁴³ Fabre, *Whose Body Is It Anyway?*, 17.

⁴⁴ This also applies when X stands for a polity or an artificial person. On this see Chapter 3 below.

that normative power, it would clearly not be because she has an interest in selling G *herself*. That interest can hardly warrant the protection of a right. If there is some interest that explains this particular power, it has to be the interest of individuals in that society (and C in particular) in their commercial transactions on certain goods being easy and relatively secure.

This point can help us solve a well-known challenge to the interest theory of rights. Peter Jones among many others has argued that the interest theory is unable to explain powers invested in particular offices.⁴⁵ The argument goes: we normally say that a judge J has the legal power to sentence criminal offenders; however, it is unclear how his holding that right stems from an interest *she* may have in doing so. One could say that she would probably have an interest in holding that power because she receives a salary for doing so and that is her job. Few people would accept, however, that this interest is a sufficient reason for holding some other person (O) to be under a liability to have her right to, e.g., liberty modified by J.

In short, this objection fails because it conflates J's rights in her individual capacity with the rights that belong to the public office she holds, i.e., to the state. It is not individual J who has the power to sentence criminal offenders but rather it is any person occupying her office. Indeed, once she finishes work, hangs her robe, and goes home J lacks the normative power to punish the thief who tries to steal her purse in the tube. There seems to be no other way of explaining how these rights are transferred from judge J to judge Z when, e.g., J goes on holiday, or is on leave for illness and Z decides an urgent pending case. Once J is back to work it would be awkward for her to say that *her* rights have been infringed by Z. The only plausible way of explaining the situation is by saying that these powers belong to the state, and that they are assigned to a particular office rather than to a particular person. Of course some individual must occupy that office, but this hardly entails that the powers are her own. If we consider that power as belonging to the state (as an artificial person) then the interest that

⁴⁵ In Jones, *Rights*, 31-32. See, also Wenar, 'The Nature of Rights', 242. For a different response to this conceptual difficulty see N. McCormick "Rights Claims and Remedies" in M. A. Stewart, *Law, Morality, and Rights* (Dordrecht, Holland: Reidel, 1983), 165-167.

explains that power is probably not the individual interest of the office-holder, but a collective interest in the state having that legal power.

I will not try to argue for this further claim here. Rather, I will point to a specific feature of the justification for this kind of power that will be of crucial importance in this thesis. In some cases, it is not enough for X to have the power to φ , that an interest of X's would be served by the conferral of that power; X must also have the authority to φ .⁴⁶ Suppose A needs drug D to fight some illness of hers and that B knows about this illness and knows that drug D would be appropriate. Although B would be *justified* in prescribing D to A, she would not have the normative power to do so. This is not because A lacks the relevant interest in getting the drug or B lacks the relevant interest in selling it to her, but rather because B lacks the *authority* to prescribe it. Similarly, it might well be, for instance, that the state on which a particular offence was committed, i.e., the territorial state (TS) would be *justified* in punishing O. This only means that someone has a relevant interest in TS punishing O that is sufficiently important to be protected by a power. However, we may refuse to assign to TS that power because it would decide whether O should be punished, e.g., solely on the basis of a confession extracted by torture. That is, although TS would be justified in punishing O, it would lack the *authority* to do so.

3.4 Who can have rights: individual interests and the state

A final point needs to be made before we can proceed to examine the normative challenges that extraterritorial punishment raises. Under the version of the interest theory of rights endorsed here, X would have a right if and only if X is the kind of entity that can have interests. It would seem clear that human beings are the kind of beings that can have interests and that some of these interests are sufficiently important to be protected by rights. It is also quite uncontroversial that states and international institutions also are the type of entities that can have rights. Raz makes this point explicitly when he argues that X is capable of having rights if and only if either his well-

⁴⁶ Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999), 101.

being is of ultimate value or he is an ‘artificial person’ (e.g. a corporation).⁴⁷ This point, however, should not be conflated with the one about whose interest explains the rights that states have. That is, for the time being I need not take side here with either the corporate or the collective theory of group rights.⁴⁸ Irrespective of whether states have rights as a result of their being of ultimate or merely derivative or instrumental value, the fact is that the claim that they can have rights hardly needs any defence in the light of the current literature. What kind of rights states have and why they do so is the topic of the next section.

4. The normative challenges faced by an account of extraterritorial punishment

In order to understand the type of case I need to make in this thesis, I need first to identify the specific normative challenges that the issue of extraterritoriality faces. As suggested above, the account of extraterritorial punishment I will develop relies on the proposition that the *extraterritorial scope* of a X’s power to punish a given offender (O) is largely determined by the reasons that *justify* X holding this power in the first place. Accordingly, the answer to the question about the challenges lies with a significant feature of the concept of normative justification, namely, with the question regarding *to whom* we have to justify the power of a particular body to mete out legal punishment to a particular offender. Standard accounts of legal punishment have been concerned with justifying this power vis-à-vis the offender. The account of extraterritorial punishment I develop here is also concerned mainly with this issue. Yet, it deals with a particularly demanding variation of this traditional problem, namely, the need to justify the power to punish an offender by an *extraterritorial* body. This issue will be tackled in Chapters 2 and 4.

However, extraterritorial punishment has also been considered inconsistent with, or at least problematic under the light of the principle of state sovereignty.⁴⁹ This is

⁴⁷ Raz, *The Morality of Freedom*, 166.

⁴⁸ On this debate see below.

⁴⁹ See, e.g., Larry May, *Crimes against Humanity. A Normative Account* (Cambridge: Cambridge University Press, 2005), Introduction.

because sovereign states usually claim an exclusive right to regulate the conduct of individuals within their borders. Analytically, the classical doctrine of state sovereignty can be conceptualized in terms of three basic propositions. A sovereign state is, first of all, a “political authority which recognizes no superior”, i.e. that claims supreme law-making and enforcement authority⁵⁰ over a certain territory.⁵¹ Secondly, sovereignty entails the “claim [of every state] to be politically and juridically independent”.⁵² Finally, not only can each state claim independence of any political superior for itself, but each must also recognize the validity of the same claim by all the others.⁵³

This traditional account of state sovereignty as the constitutional doctrine of the laws of nations would bar any exercise of extraterritorial punishment unless explicitly authorized by the territorial state. This is entirely incompatible with how international law currently regulates the lawful exercise of extraterritorial criminal jurisdiction, which authorizes certain states or international criminal tribunals to punish certain individuals extraterritorially irrespectively of the opinion of the territorial state. Accordingly, it seems unpromising as a starting point for this enquiry. Ultimately, I will argue that a convincing account will need to justify the imposition of legal punishment also to the individuals in the state on whose territory the offence was perpetrated. However, a more nuanced conception of sovereignty is required for this purpose. The purpose of this section is, therefore, to clarify precisely what sort of normative challenge state sovereignty poses for an account of extraterritorial punishment.

There have been three main traditions of political and philosophical thought that have tried to make sense of the concept of sovereignty. For the sake of simplicity, I

⁵⁰ Martin Wight, *Systems of States* (Swansea: Leicester University Press, 1977), 23 and 129; also in Charles Beitz, *Political Theory and International Relations* (New Jersey: Princeton University Press, 1979).

⁵¹ Caney, *Justice Beyond Borders*, 150 and Wight, *Systems of States*, 129. See also article I of the Montevideo Convention and Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003), 70, 105 and ff.

⁵² Wight, *Systems of States*, 130. Sovereignty is “the idea that there is a final and absolute political authority in the political community ... and no final and absolute authority exists elsewhere” argued Hinsley in what is probably still the standard text in the field (Francis Harry Hinsley, *Sovereignty* (Cambridge: Cambridge University Press, 1966)).

⁵³ Wight, *Systems of States*, 23.

shall distinguish them under the names of Realists, Social Liberals and Cosmopolitans.⁵⁴ I will not address here this body of literature at any length; that is beyond the scope of the present enquiry. Rather, I will defend a standard version of the cosmopolitan position. My main purpose is to explain how this position accounts for certain specific rights that states hold, and which raise normative problems for the justification of the issue of extraterritorial punishment. But before going into this, I must briefly explain why I set the Realist and Social Liberal positions aside. I will examine here only a schematic version of each of them which nonetheless captures, or so I claim, their central gist.

These positions have several features in common. They are both state-centric. They portray international society as a state-of-nature situation between (generally self-interested) state-actors.⁵⁵ Realists and Social Liberals base their positions on a two-level argument. First, they assume what has been called the domestic analogy, i.e., that states in the international sphere are analogous to individuals in the interpersonal realm. The second step, however, is different for each of them. Realists use the philosophical apparatus of a Hobbesian state of nature, i.e., they claim that sovereigns are in a state of war of every sovereign against every sovereign.⁵⁶ Social Liberals, by contrast, describe it more in Lockean terms; they acknowledge the existence of international moral norms or a “law of nature that obliges every one” but are concerned with the lack of

⁵⁴ I follow here Charles Beitz in the Afterword to his *Political Theory and International Relations*, 214-215. David Held presents these trends as three historically subsequent paradigms that replace one another (see David Held, 'Law of States, Law of Peoples', *Legal Theory* 8, no. 2 (2002)). They have received, however, different names in the literature. Hedley Bull calls them Machiavellians (or Hobbesians), Grotians and Kantians (see his introduction to Martin Wight, *International Theory. The Three Traditions* (London: Leicester University Press, 1991). In the same book, Martin Wight refers to them as Realists, Rationalists and Revolutionists. Caney adds to this threefold distinction the Nationalists (Caney, *Justice Beyond Borders*).

⁵⁵ This is true of many of the classical scholars of international theory or international law. Among them are the classical works by Hobbes, Locke, Wolff, de Vattel and Puffendorf.

⁵⁶ Thomas Hobbes, *Leviathan* (Indianapolis: Hackett, 1994), 76. Standardly, Hans Morgenthau argued that there is “a profound and neglected truth hidden in Hobbes’s extreme dictum that the state creates morality as well as law, and that there is neither morality nor law outside the state” (quoted in Gerry Simpson, "The Guises of Sovereignty," in *The End of Westphalia*, ed. Thakur and Sampford (United Nations University Press, 2006) 11).

centralized enforcement.⁵⁷ Ultimately, they build their normative argument on both individuals' and states' claim to negative liberty, by which they mean the right to non-intervention or non-interference in their internal affairs.⁵⁸

Regardless of other considerations, I suggest that these two positions share a common weakness: namely, that they rely too heavily on the domestic analogy. States are portrayed in the international arena as artificial persons and they are recognized as having roughly the same capacities and rights that individuals would have in a similar state-of-nature situation. Hence, both the Realists and Social Liberals consider states as the ultimate units of moral concern for the purposes of any discussion on principles of international justice. This analogy is problematic. States, unlike individuals, are formed by a multiplicity of persons and groups who are to be considered distinct from the state and who are themselves units of moral concern. Moreover, states lack the unity of consciousness and are not organic wholes with the integrity attached to persons *qua* persons.⁵⁹ As Peter Jones puts it “[w]hen an individual sacrifices one of his desires for the sake of another of his desires, the individual who sacrifices is also the individual who gains. When a society sacrifices the good of some individuals for the good of other individuals, the losers are not identical with the gainers”.⁶⁰ Thus, while the first case is generally unproblematic, the second one can often be morally unacceptable. This point has implications for the second step of these arguments.

In the case of Realists, the state-of-nature argument standardly grounds an absolute right to self-preservation. This is not meant only as an empirical or explanatory thesis but also as a normative one. “The necessity (or ‘duty’) to follow the national interest is dictated by a rational appreciation of the fact that other states will do the same, using

⁵⁷ John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988) II, Ch. VI.

⁵⁸ Beitz, *Political Theory and International Relations*, 69-70. I follow him in his distinction between negative autonomy –justifying the right to non-intervention – and positive autonomy – that explains the right to self-determination (ibid, 92-93). While the former requires only that states do not interfere in any way in the internal affairs of other states, e.g., by punishing offences committed in their territory, the latter “requires that the internal authority of international order be changed and might support intervention by third parties in a group’s struggle for independence from foreign rule” (ibid). Only the former notion is needed to justify state sovereignty under the lines described above.

⁵⁹ ibid, 81.

⁶⁰ Jones, *Rights*, 63.

force when necessary, in a manner unrestrained by a consideration of the interests of other actors or of the international community”.⁶¹ The corollary of this is that “every Common-wealth, (not every man) has an absolute Libertie, to doe what it shall judge ... most conducing to their benefit”.⁶² A first difficulty with this position lies with the notion of national, or better state interest and how best to define it. As argued in section 3.3 above, a plausible conception of interests can be defined neither on purely objective (e.g. “physical survival, autonomy, and economic well-being”)⁶³ nor on purely subjective grounds. Realists do not provide a solution to this difficulty.⁶⁴ I have argued that, with certain restrictions, interests must generally be defined by those who hold them. But this obscures rather than clarifies the challenge that sovereignty poses for extraterritorial punishment. If states are morally entitled to pursue their national interest and each one of them is the relevant judge as to what that interest is, there seem to be no moral grounds on which they can oppose or criticize the extraterritorial application of other states’ domestic criminal law or of international criminal laws on their territory. Thus, regardless of its explanatory power in terms of how states actually behave, the realist position is unable to account for the normative challenge that the principle of state sovereignty arguably raises vis-à-vis the *justification* for extraterritorial punishment.

Besides, the realist position would make for a very poor start for our enquiry for an even more fundamental reason. In short, one may readily argue that many of the empirical premises on which the Hobbesian state of nature argument stands are simply inaccurate. That individuals are the only actors in interpersonal relations, that they are relatively equal in power, that they are entirely independent of each other, and that they cannot have reliable expectations of reciprocal compliance, are arguably false as plausible empirical descriptions applicable to states the *international* society.⁶⁵ If this is so, this undermines the normative implications of the argument, to wit, that we ought

⁶¹ Beitz, *Political Theory and International Relations*, 28.

⁶² Hobbes, *Leviathan*, 149.

⁶³ Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999), 235-237, cited in Caney, *Justice Beyond Borders*, 8.

⁶⁴ Caney, *Justice Beyond Borders*, 8-9.

⁶⁵ See Beitz, *Political Theory and International Relations*, 36. For an instructive discussion about the lack of accuracy of this assumptions on empirical grounds see pages 37-50.

to recognize in states the kind of unfettered liberties which this argument would grant individuals in that state-of-nature situation.

A similar objection may be raised against the Social Liberals' second step. Individual liberty is generally considered of moral value because we assume that each individual is in a better position than anyone else to decide what is good for her. This explains the *individual* right to non-interference in a state-of-nature situation. States, so the argument goes, may also claim a right to non-intervention on the grounds that they are also in a better position to decide what is good for them. So far, so good. However, as previously argued, states differ from individuals in that they are formed by independent units which are themselves of significant moral concern. An absolute principle of state sovereignty *qua* negative liberty (non-intervention) would thus be problematic precisely because it would allow unlimited conflict with the right to the negative liberty of individuals in that state. This is of particular relevance in a world, such as our own, in which a number of states persist in carrying out mass atrocities against parts of their own populations. Put differently, it is precisely because individuals must be respected as sources of moral concern that we should not allow all states to claim a right to non-interference analogous to that which individuals hold in a Lockean state-of-nature situation.⁶⁶

Let me clarify my position further. My point here is not that these two-level arguments are not useful as analytical or explanatory devices. The domestic analogy, for one, might be useful to examine the right of states to use force in self-defence in the light of the more familiar discussions on self-defence at the interpersonal level. But this should not be conflated with the claim that these two rights are both *justified* by the same underlying moral argument. In effect, most elaborate moral accounts on this particular issue provide a much more careful explanation of states' right to use force than simply equating their position with that of individuals in an interpersonal situation.⁶⁷ The contention I advocate is that, if ultimately grounded on this analogy,

⁶⁶ *ibid*, 81.

⁶⁷ See Jeff McMahan, 'The Ethics of Killing in War', *Ethics* 114, no. 4 (2004) and David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002).

state sovereignty can be consistently defended as a matter of principle neither on the basis of a Hobbesian state-of-nature justification, nor on the grounds of an analogy between individual and state negative liberty.

These considerations have led many scholars to deny that the principle of sovereignty is of any moral worth. In some recent work, sovereignty seems to be one of the major threats to the accomplishment of certain goals that are deemed of great value such as the protection of individual rights.⁶⁸ According to this point of view, the principle of state sovereignty necessarily contains the “unfortunate implication of providing legitimacy for the national repression of citizens, or at least impunity for tyrants”.⁶⁹ However, this conclusion is unwarranted. This line of argument seems to overlook the fact that sovereignty has often been praised for its emancipatory potential and its status as a bulwark against imperialism.⁷⁰ State sovereignty it is not an anachronistic political concept with just a long history on its back and a bunch of un-presentable moral credentials. Rather, I suggest that sovereignty can not only be made compatible with the fundamental rights of individuals; it can also be *justified* by reference to their own status as ultimate units of moral concern.

In order to provide such an account I will draw on two different sources. On the one hand, I will rely on a standard version of the cosmopolitan position. Cosmopolitanism can be succinctly defined by three basic propositions: a) individuals are the ultimate units of moral concern; b) this status of ultimate unit of moral concern is attached to every single human being; and c) this special status has global force, that is, individuals are ultimate units of moral concern for everyone, not only their fellow nationals, co-religionists, etc.⁷¹ A clarificatory remark is in order here. So defined, cosmopolitanism is not necessarily committed to advocating global institutions. Indeed, we should not conflate this set of basic moral tenets (moral cosmopolitanism) with the

⁶⁸ See, for instance, Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon, 1986), 148, and Geoffrey Robertson, *Crimes against Humanity* (London: Allen Lane, 1999).

⁶⁹ Martti Koskenniemi, 'The Future of Statehood', *Harvard International Law Journal* 32, no. 2 (1991), 397.

⁷⁰ Frédéric Mégret, 'The Politics of International Criminal Justice', *European Journal of International Law* 13, no. 5 (2002).

⁷¹ T. Pogge, 'Cosmopolitanism and Sovereignty' in Chris Brown, *Political Restructuring in Europe: Ethical Perspectives* (London: Routledge, 1994), 89-90.

issue of its proper institutionalization (institutional cosmopolitanism).⁷² As argued above, my purpose in this thesis is to examine the morality of current practices of extraterritorial punishment, not to provide a set of innovative institutions or principles that should ideally regulate this field.

On the other hand, my account will draw on the conceptual analysis of rights elaborated in the previous section. I will argue that to clarify the normative challenge that the principle of state sovereignty creates for an account of extraterritorial punishment it is necessary to identify not only the rights entailed by this principle, but also the specific Hohfeldian incidents involved. This will provide us with a great deal of clarity and precision. Moreover, each one of these incidents must be explained by reference to a particular interest. This leads us to an important analytical point. It is plausible to assume that most if not all the rights associated with the principle of state sovereignty should be conceived as group rights. There are two conceptions of group rights in the literature, collective and corporate rights. While the former are based only on a joint interest in a good that justifies the imposition of duties, liabilities, etc. upon others, and take individuals as the ultimate units of moral concern,⁷³ corporate rights are based on the attribution of moral standing to a group that is somehow separate from, and not wholly reducible to, the moral standing of the individuals who constitute the group.⁷⁴ I will present here an argument for assigning certain rights to states which is based on the collective conception. I suggest that this analytical conception of group rights is not only compatible with the cosmopolitan moral position I have endorsed, but that it also avoids the shortcomings of the Realist and Social Liberal positions.

⁷² For this distinction see C. Beitz, 'Cosmopolitan Liberalism and the States System', in *ibid*, 124-126.

⁷³ Peter Jones, 'Group Rights and Group Oppression', *The Journal of Political Philosophy* 7, no. 4 (1999) quoting Joseph Raz who, in turn, argues that, in order to be a collective right, the following conditions must be met: "First, it exists because an aspect of the interest of human beings justifies holding some person(s) to be subject to a duty. Second, the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group. Thirdly, the interest of no single member of that group in that public good is sufficiently by itself to justify holding another person to be subject to a duty." (Raz, *The Morality of Freedom*, 208).

⁷⁴ Jones, 'Group Rights and Group Oppression', 362-363.

Of the many cosmopolitan arguments underpinning the principle of state sovereignty available in the literature, I will examine here only two.⁷⁵ The first one is based on the idea of physical protection of individuals. The second one rests on the concept of self-determination or, more precisely, self-government. Each of them can be translated, I shall argue, into the language of rights and they are both ultimately based on the well-being of individuals. I will argue that together they explain some of the core features of the principle of state sovereignty without necessarily falling into any of the flaws considered above. However, each one of them accounts for different incidents. The argument based on physical security will only entail states holding a *claim-right* to territorial integrity. By contrast, the argument based on self-government will account for states' *power* to dictate legal rules and, crucially, to their holding an *immunity* against extraterritorial authorities dictating legal rules on their territory. I will therefore argue that it is this latter argument that explains the normative challenge that state sovereignty creates for the justification of extraterritorial punishment.

Let me turn, first, to the physical security argument. "One of the most common arguments in favor of sovereignty ... is that [s]tates do a reasonably good job of protecting the well-being and freedom of individual subjects".⁷⁶ This position suggests that "[t]he moral purpose of the modern state [lies on] the augmentation of individuals' purposes and potentialities, in the cultivation of a social, economic and political order that enables individuals to engage in the self-directed pursuit of their 'interests'".⁷⁷ This, of course, is grounded on the assumption that it is only within a state that individuals can enjoy sufficient physical security to act autonomously and achieve a significant amount of well-being. In Antonio Cassese's words, "[t]oday it could be maintained with greater truthfulness that without the protection of a [s]tate human beings are likely to endure more suffering and hardship than what is likely to be their lot in the normal

⁷⁵ For a good summary of the variety of cosmopolitanisms see Caney, *Justice Beyond Borders*, chapter 5.

⁷⁶ May, *Crimes against Humanity*, 10.

⁷⁷ Christian Reus-Smit, *The Moral Purpose of the State* (Princeton, New Jersey: Princeton University Press, 1999), 123.

course of events".⁷⁸ To complete this argument, however, it is necessary to bring in the assumption that there is no world state or sovereign. As Grotius argued, state sovereignty is important largely because there is no world state that can easily protect individuals from attacks by enemy and competing states or groups.

A plausible version of the physical security argument would unfold like this:

1. Individuals' well-being is of great moral worth;
2. Individuals can only enjoy a decent amount of well-being when they have some degree of physical security;
3. In the absence of a world state, states provide individuals with a significant level of physical security;
4. States can only provide this security when they are granted a right to territorial integrity.
5. Thus, this joint interest shared by individuals in a given state is sufficiently important to warrant conferring upon that state a *prima facie* right to territorial integrity.

It is worth examining the precise implications of this argument. First, the right to territorial integrity is a right that only states can claim. Yet this argument is of an *instrumental* kind, i.e., it is morally justified on the basis of individuals' well-being. As a result of this, it is not an absolute right; it is valuable only insofar as it provides individuals with a significant amount of physical security and contributes, thereby, to their well-being. The problem with this argument, however, is that it does not capture the real normative difficulty that state sovereignty creates for the *power* to punish O extraterritorially. It only provides a justification for a *claim-right* held by states against other extraterritorial bodies physically intervening on their territory. This is all a state needs to be granted in order to supply individuals with this amount of security that is assumed in 3, and this claim-right is entirely compatible with *any* form of extraterritorial punishment. Indeed, it is widely accepted that when PS wants to lawfully prosecute O

⁷⁸ Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001), 4.

for an offence she committed on TS, it has to request O's extradition and request TS's assistance for any investigatory activities on TS's territory. Put differently, the physical security argument does not give us any clue as to what the problem would be with extraterritorial law-making provided that the prosecuting state avoids sending its police to enforce a particular decision without the territorial state's consent.

Self-government constitutes the other standard justification for the cluster of rights arising from the principle of state sovereignty.⁷⁹ Its value, it has been suggested, is the value of entrusting political power over a group and its members to the group itself.⁸⁰ This proposition already has an important limit built into it: not every decision is subject to this right, but only political matters are. I cannot examine this issue here in any detail but it should suffice to note that this consideration makes room for the important liberal intuition that there are certain private matters which neither the state nor any other political authority should hold the power to regulate. An obvious example would be the choice of sexual partners. In any event, insofar as this thesis does not deal with issues of criminalization, this aspect is largely unproblematic for the account of extraterritoriality I will elaborate here. The criminal law, at least when it refers to standard cases such as murder, rape, etc. is unanimously considered a public matter. A convincing explanation of the value of this right goes as follows:⁸¹

1. Individuals' well-being is of moral worth;
2. Membership of certain encompassing groups, such as nations, has a profound and far reaching influence on individuals' lives;

⁷⁹ There are two different questions related to the right to self-determination or self-government that need not be conflated. One of them has to do with who has the right to make certain decisions on public matters? A related, although different (and possibly prior) question is who has the right to answer that first question? The answer to these two questions may overlap; however, the justification for both these answers would be different. For the purposes of this thesis, only the first question is relevant. The literature on secession, the field in which this general right has been more extensively discussed, is concerned with the second question.

⁸⁰ Joseph Raz and Avishai Margalit, "National Self-Determination," in Raz, *Ethics in the Public Domain*, 126.

⁸¹ I follow their core argument as stated in *ibid.*

3. To some significant extent, the well-being of these individuals depends on the prosperity and self-respect of the group to which they belong;
4. The prosperity and self-respect of the group is aided by, or it might be impossible to secure without, the group enjoying political sovereignty over its own affairs;
5. Hence, the enjoyment of political sovereignty by the group is an important aspect of the individual well-being of its members and, as such, sufficiently important to warrant the protection of a *prima facie* right.

As it stands, this argument has at least three important features. First, it is directly related to the question of political authority. It answers the question, “who has the right to decide?” Secondly, self-government accounts for the main features of the principle of state sovereignty as a normative *power* to dictate legal rules which are binding on a given territory, namely, it is an explanation of the basis of its jurisdictional competence. But at the same time, the interest that individuals in a given state have in enjoying political sovereignty over their own affairs explains why states also hold an *immunity* against extraterritorial authorities dictating criminal legal rules which are binding on their own territory. That is, this explains the fact that criminal rules dictated by Turkey are in principle invalid on the territory of South Africa.

Finally, this argument contains two inter-related qualifications. The right to self-government as advocated here is a collective, not a corporate right; it is based on the joint interest of individuals in TS not on the interest of TS itself. Unlike corporate rights, collective rights need not stand on the controversial assumption that states bear rights because they have *themselves* a particular moral standing. This lack of autonomous moral standing has an important implication: collective rights are not inclined to allow the moral standing of the state to displace that of individuals and sub-groups who fall within the group’s compass.⁸² As a result, they do not generally pose a serious threat to the rights of individuals belonging to the group. Secondly, this argument also stands on instrumental grounds. The power and immunity that it entails have no intrinsic value.

⁸² Jones, 'Group Rights and Group Oppression', 377.

They are valuable only insofar they contribute to the well-being of the members of that group. This right is neither absolute nor unconditional. It is limited both by the interests of non-members and by the interests of members other than their interests as members (e.g. their fundamental individual interests, or their interests as members of other relevant groups).⁸³ This means that TS's immunity against PS's dictating criminal rules on its territory could be defeated if the individuals in PS have an interest which is sufficiently important to confer upon PS the power to do so, and if this interest is sufficiently important to outweigh the interest on which TS's immunity is based. Moreover, this also means that TS's immunity can be also overridden on the basis of some fundamental interest of the individuals in TS.

To conclude, the self-government argument accounts for the specific normative challenge that the principle of state sovereignty poses for the justification of extraterritorial punishment. It identifies a particular joint interest shared by the members of TS that is sufficiently important to warrant conferring upon TS a *prima facie* immunity against extraterritorial bodies dictating criminal rules on the territory of TS. It is against this *prima facie* immunity that an *extraterritorial* authority will have to justify holding the power to punish O to individuals in TS.

5. An overview of the thesis

Having clarified the methodological framework I will use in this thesis and precised the challenge that the principle of state sovereignty raises vis-à-vis the justification for extraterritorial punishment, I shall briefly summarize the structure of this thesis. Chapter 1 presents a justification for the power to punish which is based on the interest of individuals in a given state in there being a system of rules prohibiting murder, rape, etc., in force. I will argue not only that X holds the power to punish O, but it is also at liberty to do so. In order to substantiate this latter claim I will suggest that when perpetrating a criminal wrong, O forfeits her claim-right against being punished. I will defend this argument in its own terms and suggest it has at least two significant

⁸³ Raz and Margalit, "National Self-Determination," 139.

advantages over other competing arguments available in the literature. First, it accounts for the fact that the right to punish O is a normative *power*, and not simply a *liberty* to inflict suffering upon O. Secondly, that it can accommodate the fact that both states and international criminal tribunals claim the power to punish an innocent individual (by mistake), while at the same time retaining the core intuition that it would be *wrong* for them (i.e., that they would not be at liberty) to do so.

In chapter 2 I will argue that this justification is the best suited to account for the strong intuition that the right to punish should be primarily territorial in scope. I will show that, by contrast, some of the most influential justifications for legal punishment available in the literature either entail a commitment to universal jurisdiction for any domestic offence or find it problematic to explain a state's power to punish a foreigner for an offence committed on its territory. I will also challenge the widely-held views that states are justified in claiming extraterritorial jurisdiction on the basis of the nationality of the offender (nationality principle) or that of the victim (principle of passive personality). I will argue that the standard arguments on which these principles are normally advocated either beg the relevant question they are meant to answer or simply lead to broader, and arguably less appealing rules on the extraterritorial scope of the power to punish. Of the rules of international law granting extraterritorial jurisdiction over domestic offences currently in force I will defend the principle of protection, that is, states holding extraterritorial jurisdiction over offences committed against their sovereignty, security or important governmental functions.

The following part of the thesis is concerned with international criminal laws. Chapter 3 presents a jurisdictional theory of international crimes. I argue that the defining feature of the concept of an international crime is that it warrants conferring upon *some* extraterritorial authority the power to punish their perpetrators. I submit that the main arguments available in the literature fail to account for this specific feature mainly because they are entirely unrelated to the reasons that justify meting out legal punishment to offenders in the first place. By contrast, I suggest that the argument provided in Chapter 1 allows me to explain precisely this normative implication for

standard cases of international crimes. I will use different varieties of terrorism to examine the explanatory potential of the view I endorse here. Chapter 4 provides a fresh look at the issues of international and universal jurisdiction, i.e., at the theoretical explanation for the scope of the jurisdiction of the International Criminal Court (ICC) and the proposition that *every* state should have the right to punish O for international crimes. It challenges the standard position that seeks to explain the territorial scope of the ICC's jurisdiction by reference to state consent or delegation of powers and rejects arguments for universal jurisdiction based, e.g., on the pursuit of peace, and the interests of humanity as such.

The final chapter of the thesis provides a theory of legitimate authority to try offenders. It applies Joseph Raz's influential service conception of authority to the question of what conditions a given body should meet in order to claim, itself, the power to punish O. This will enable a philosophical examination of certain charges often raised against extraterritorial prosecutions. I will examine issues such as "show trials", victor's justice, "clean hands", *tu quoque*, and trials *in absentia* or against defendants who have been abducted abroad. I will ultimately argue that although some of these considerations might undermine a particular state holding the power to punish a given offender, they are all unrelated to the fact that it purports to punish O *extraterritorially*. In other words, I will argue that although the argument for a given body's authority is necessary in order to provide a complete justification for this body holding the power to punish O, it is conceptually and normatively mistaken to consider these obstacles as bars to *extraterritorial* jurisdiction. A conclusion will summarize the central findings of the thesis and suggest possible avenues for future research.

1

An interest-based justification for S's right to punish O

1. The right to punish

In the general Introduction I have suggested that in order to explain the *extraterritorial scope* of the right to punish we need to look at the reasons that justify S holding the right to punish a particular individual in the first place. I will argue for this position in the next four chapters of this thesis. For present purposes it suffices to note that this position is common in discussions regarding other aspects of the *scope* of S's right to punish, such as sentencing severity, or the kind of penalties that might be morally warranted.¹ Deterrence, retribution and moral reform, for example, standardly lead to different normative implications in particular situations. They would deal differently, for instance, with an otherwise peaceful offender who has murdered an unfaithful partner or with a recidivist shoplifter. I will argue that this same reasoning applies, *mutatis mutandi*, to the analysis of the *extraterritorial scope* of the right to punish. This is therefore where we must start our enquiry.

In this chapter I will provide an explanation for the proposition "*S has a moral right to punish O*". But in order to do this, I first need to provide a more detailed analysis of the structure of this right. This has significant implications for the account of extraterritorial punishment I put forward. I have argued, following Hohfeld, that the proposition "S has a right to ϕ " may take the form of a claim, a liberty, a power or an immunity. Within this framework, the right to punish involves first and foremost a normative power. When an individual (O) is convicted in a criminal trial, she enters the

¹ Michael Moore goes as far as arguing that retributivism determines, in fact, also what we should punish (Michael S. Moore, *Placing Blame : A Theory of Criminal Law* (Oxford: Clarendon Press, 1997), 169-170). For critical remarks, see Leo Zaibert, *Punishment and Retribution* (Aldershot: Ashgate, 2006), chapter 6.

courtroom holding certain rights and leaves it with some of her rights altered.² Usually, she would be imprisoned, some of her property would be taken away from her, or some other burden will be imposed upon her.³ In other words, her moral boundaries are redefined. However, when we say that S has the right to punish O, we not only mean that she holds the normative power to alter O's rights in this harmful way, but also that it is *permissible* for her to do so. Yet, as argued in section 3.1 of the general Introduction, the fact that someone holds such a power to modify these rights in the relevant way does not *per se* entail that she is at liberty to do so. These notions are of a different order. Thus, a justification for this moral right would characteristically require also an account of S being at *liberty* to punish O.⁴

Finally, it would hardly make sense to say that S has a *right* to punish O if the exercise of this normative power and her liberty were not protected by certain claim-rights. First, it usually requires a claim against O and other parties interfering or resisting its exercise. Secondly, in contemporary societies individuals are not only under a duty not to interfere with the state punishing an offender; they are also under a duty to contribute financially and in some other ways to the exercise of this right.⁵ To sum up, the right to punish is a complex molecular right. I will not be able to fully address

² This normative change (criminal sanction) must not be conflated with the force exercised to enforce it. I assume, throughout, that officials of the legal system concerned are authorized (i.e. morally justified) to use force in order to enforce this decision within the territorial boundaries of the political organization they belong to. This right to use force comprises, however, only a liberty and a claim-right. Thus it is on a different level than the *power* to punish. On the right to territorial integrity see the general Introduction to this thesis.

³ As a matter of fact, many more rights are altered depending on the jurisdiction and the legal order. For example, a person's rights regarding the education of her children, some of her political rights, her right to privacy, etc. The power to alter these rights is different to the power considered here but a full account of this issue is beyond the scope of this thesis.

⁴ This is the core incident of the right to punish in Alan John Simmons, *The Lockean Theory of Rights* (Princeton, NJ: Princeton University Press, 1992), 162. For a criticism of this view, see Daniel McDermott, 'The Duty to Punish and Legitimate Government', *The Journal of Political Philosophy* 7, no. 2 (1999). However, unlike mine, McDermott's point is not that as a matter of analytical jurisprudence the right to punish *is* a power-right. Rather, he argues that "punishment requires the existence of some sort of authoritative hierarchical relationship in order to qualify as punishment" (*ibid*). This insight is captured in this thesis in Chapter 5 below and stands, I suggest, on very different considerations.

⁵ People are usually under a duty, *inter alia*, to go to court as witnesses, to hand in any evidence that a tribunal requests, to act as members of the jury.

each one of its incidents here.⁶ I will only concentrate on S's power and its liberty to punish O as these incidents arguably conform the core of this right. Yet, I will argue that all the normative work needed in this thesis will be carried out by the first of these two incidents.

According to the theory of rights I have endorsed in this thesis, each of these two incidents will have to be explained by reference to certain relevant interests of particular individuals. Thus, I will examine some of the leading justifications for legal punishment under this interest-based framework and find them wanting. The reason for this is that they either fail to identify a particular interest which would be sufficiently important to warrant the protection of a right, or because the interest on which they are based would lead to harsher and morally unacceptable practices. I will argue, by contrast, that a state S's *prima facie* power to punish O is based on the joint interest of individuals in that state in its criminal laws being in force (section 3.1.2). This is because having a system of criminal law in force constitutes a public good that benefits individuals who live under it in a certain way. Furthermore, I will argue that legal punishment of the guilty is also morally permissible. This is explained by the fact that criminal wrongdoers forfeit their claim-right against S punishing them (section 3.2). Accordingly, S not only holds a *prima facie* power to punish O, it is also *prima facie* at liberty to do so.

It is important to bear in mind that each of these arguments provides a justification only for a *prima facie* right.⁷ This means that rights are assigned in abstract, without consideration of the particularities of the context. In short, an obvious concern would be that there might be certain countervailing considerations that might, all things considered, argue against S holding, e.g., a power to punish O. Take for example the case in which O can claim a *prima facie* immunity against S punishing her. This may be because she has already been punished in another jurisdiction, or because she happens to be the head of government of another state. Indeed, it might be the case that the

⁶ A complete justification of the right to mete out legal punishment would also need to examine whether A is under a duty to exercise this particular power. In other words, whether punishment is morally required. I will not address this issue here.

⁷ Indeed, when I refer to a power or a liberty in this chapter I am in fact talking about *prima facie* powers and liberties. For simplicity, I will not repeat this formulation every time.

interest that justifies O holding a *prima facie* immunity overrides the interest on which S's *prima facie* power to punish her rests. I will not address these countervailing considerations in this thesis.

Two final points of clarification are in order. Throughout this chapter, I will distinguish between contingent and non-contingent justifications for legal punishment and stress the importance of providing a unitary, non-contingent explanation for this moral right.⁸ I use the notion of contingency here in the restricted sense of arguments that apply in *some* circumstances in which punishment seems warranted, but are unable to accommodate other standard cases. I shall provide an explanation that, I contend, is suitable for all possible scenarios in which punishment is arguably warranted. I assume that a contingent explanation is unsatisfactory even if, when it works, it is more appealing than the non-contingent one. Preferring a non-contingent argument is not a matter of personal taste. A unitary justification contributes significantly to the clarity and workability of the argument.

Finally, the argument I will present in this chapter is not a complete justification for S holding the *power* to punish O. The aim of this chapter is to identify a particular interest that is sufficiently important to warrant conferring upon S the normative power to punish O. Yet, as I suggested in the general Introduction, in order to claim that S holds the power to punish O it does not suffice that I can identify a particular interest which is sufficiently important to be protected by a right; I also need to provide an account for S having the *authority* to do so. I will provide such an account in the final chapter of this thesis. Accordingly, and for the sake of simplicity, I will assume here that S does fulfil the relevant conditions for her to have the authority to punish O.

So much for the introduction. I will present my justification for the right to punish in section 3. In section 2, I provide a definition of legal punishment.

⁸ This distinction is meant to supersede Nozick's argument against teleological justifications of punishment. In fact, I suggest that his problem with that kind of justifications is not their moral structure *per se* (i.e., that they are teleological) but, rather, that the teleological arguments he discusses (such as moral reform) are contingent. This is because he mistakenly assumes that every teleological argument is necessarily contingent. See his *Philosophical Explanations*, 372-4.

2. A definition of legal punishment

Punishment constitutes the distinguishing feature of any system of criminal law.⁹ Clarifying the concept of legal punishment is necessary to any justification of this practice mainly because of the strong tendency to conflate conceptual elements with normative ones.¹⁰ Legal punishment has been influentially defined as an evil or a deprivation of a good (1), visited intentionally *qua* evil by human beings other than the offender (2), on someone “considered” an offender (3), for his offence (4), by a human agency which is authorized by the legal order (5).¹¹ Hart noted that while assessing any definition of punishment it is important to avoid what he calls the ‘definitional stop’, i.e., “an abuse of definition ... in arguing against the utilitarian claim that the practice of punishment is justified by the beneficial consequences resulting from the observance of the laws which it secures”.¹² In other words, he warns us against using conceptual analysis to rule out one justification or the other, that is, to make a normative point. Accordingly, when punishment is defined as involving the visitation of hard treatment upon someone “for his offence” (4), this should not be construed as claiming that the *reason* we have for punishing O is that she committed an offence. This would be smuggling a normative point under a conceptual disguise. All this element involves is the purely descriptive statement that S punishes O *stating* that O has committed some criminal wrongdoing.

As a result, this definition, *pace* Hart, is perfectly consistent with utilitarian justifications. Let me explain. The standard objection against utilitarianism is that it

⁹ The U.S. Supreme Court, e.g., invokes the notion of punishment as the relevant criterion to decide whether a given sanction is criminal in nature. See *Kennedy v Mendoza-Martinez*.

¹⁰ A further problem is that the concept of punishment is also used in many and diverse contexts in our social life. It belongs, quite comfortably, in educational and religious contexts, but also in relations between friends, couples and even strangers. Some of the conceptual obscurities and problematic intuitions affecting the justification for legal punishment, I suspect, stem from the fact that it is difficult to isolate this practice from the moral intuitions or principles that work or shape punishment in other social contexts. Admittedly, it is not *always* clear one should do this, but at least it seems plausible that many of these practices are sufficiently dissimilar to merit their own set of rules governing them (on this, see P. F. Strawson, *Freedom and Resentment, and Other Essays* (London: Methuen, 1974), 19-20 and, strongly against my position here, Zaibert, *Punishment and Retribution*).

¹¹ I follow the Flew-Benn-Hart definition as stated in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon, 1978), 4-5.

¹² *ibid*, 5.

cannot help but justify punishing the innocent given certain circumstances which I will not try to specify here. Hart feared that someone might feel tempted to take a shortcut and argue that *because* utilitarianism justifies punishing the innocent, and punishment is an institution that *by definition* entails punishing the guilty, it is not punishment that utilitarians justify but something else. However, this will clearly not do. Punishing the innocent may be a *normative* difficulty, but is clearly unrelated to the *concept* of punishment that utilitarians (as well as retributivists) endorse.

Ironically, the definitional stop might have been working in the opposite direction to the one that concerned Hart. This definition seems quite well suited to accommodate consequentialist justifications such as deterrence, moral reform or rehabilitation but not some of the other arguments that have been advanced.¹³ In trying to achieve a purely analytical definition Hart overlooked a conceptual element that is at the core of the practice of legal punishment.¹⁴ By defining punishment purely as a form of external behaviour, Hart fails to distinguish between sentencing and exacting compensation. Both are deprivations of goods (evils), visited intentionally *qua* evils by human beings other than the offender, on her, for her breach of a rule, and are imposed by a human agency which is authorized by the legal order. But certainly the latter is usually distinguished from legal punishment and regulated by a different set of rules. Thus, there must be something missing.

An influential trend in the literature has argued that what is missing is the further expressive or communicative element involved in legal punishment.¹⁵ Thus, the argument goes, punishment is not only a deprivation of a good but also, and crucially, a kind of language. Punishment, in Feinberg's words, is not a mere price tag paid for

¹³ Igor Primoratz, 'Punishment as Language', *Philosophy*, no. 64 (1989).

¹⁴ Hart himself makes this mistake when he assesses the merits of the denunciatory or expressive theory of punishment. By portraying it in purely *normative* terms he ignores the crucial conceptual point on which it relies and, as a result, his conceptual definition ends up being normatively biased. See Hart, *Punishment and Responsibility*, 169-173.

¹⁵ See famously "The expressive function of Punishment" in Joel Feinberg, *Doing & Deserving. Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1974) and Antony Duff, *Punishment, Communication, and Community* (Oxford; New York: Oxford University Press, 2001). I do not rely here on Duff's distinction between expression and communication.

some already consumed good.¹⁶ It is an act of moral communication and, more precisely, of moral criticism. Punishment expresses condemnation of the crime. It also, and crucially for our purposes, communicates to individuals that the criminal law that the offender has violated is in force. And it is precisely this expressive or communicative element that punishment has and torts lack.

We must be careful, however, not to turn this conceptual point into a normative one.¹⁷ But ignoring this feature narrows *by definition* the kind of normative argument that may be used to justify legal punishment. How deeply entrenched this communicative or expressive element is in the standard practice of legal punishment is insightfully shown by Nozick's observation that punishment is visited "with the desire that the person know why this is occurring and know that she was intended to know".¹⁸ Similarly, publicity is a widely extended feature of criminal trials which simply means that punishment is visited also with the desire that society at large know that punishment is occurring and why.¹⁹

The coexistence of these two elements (a certain external behaviour and a symbolic element) is thus crucial to understanding what legal punishment is. The relationship between them, however, needs further elaboration. The position I advocate does not entail that the notion of legal punishment is constituted by an element of hard treatment and *another* element expressing censure. Rather, it is the hard treatment itself or the external behaviour in general that usually expresses this condemnation or censure. As Feinberg puts it, "the very walls of his cell condemn him".²⁰

3. A normative justification for the right to punish

My point of departure is, then, that the right to punish O is a complex molecular right. Analytically, it comprises first a normative power to change O's moral boundaries in a

¹⁶ Feinberg, *Doing & Deserving*.

¹⁷ Among scholars who consider this expressive element a defining element of legal punishment one can distinguish, following Primoratz, between extrinsic expressivist arguments (consequentialist) and intrinsic expressivism (deontological). See Primoratz, 'Punishment as Language'.

¹⁸ Robert Nozick, *Philosophical Explanations* (Oxford: Clarendon, 1981), 368.

¹⁹ On publicity see Duff et al, *The Trial on Trial. Vol. 3*.

²⁰ Feinberg, *Doing & Deserving*, 98.

way that entails visiting hard treatment or some form of burden upon her.²¹ The fact that someone holds this power *means* that someone else, O, is under a *liability* to having punishment inflicted upon her. Secondly, this right usually involves also being at liberty to change O's moral boundaries in this particular harmful way. Being at liberty to mete out punishment *means* that O lacks a *claim-right* against suffering the harm involved in legal punishment. I take it that S has a power to punish O if and only if an aspect of someone's well-being (an interest of her) is a *sufficient reason* for holding O under a liability to undergoing this kind of treatment. I also take it that S is at liberty to exercise that power if no aspect of O's well-being is a sufficient reason for holding S under a duty not to do so.

3.1 The justification for S's *power* to punish O

The purpose of this section is, thus, to identify a particular interest in O being punished that is sufficiently important to be protected by a right. Let us begin with a simple case. In Dostoyevsky's *Crime and Punishment*, Raskolnikof famously killed a pawnbroker and her sister, who had no other family or descendants. Good or evil, these two women had a right to their lives, i.e., they had an interest in remaining alive that was sufficiently important to put Raskolnikof, *inter alia*, under a duty not to kill them. Moreover, their right standardly also entailed a right to self-defence. While Raskolnikof was threatening them with his axe, this fundamental interest arguably granted them a liberty to repel his attack even at the cost of his life. On similar grounds, it would have been permissible for, e.g., Ivan and Olga, who were just passing by, to use force against Raskolnikof in order to rescue the two sisters.²² However, the problem begins once these two women are dead, for it cannot possibly follow that their interest *in being alive* can entail conferring a normative power upon third parties to inflict suffering on Dostoyevsky's

²¹ Conceptualizing this power as a *right* is not to say its exercise is discretionary. Powers can also be single rights in the sense that they can confer nondiscretionary authority. Thus, under mandatory sentencing laws judge A would have to exercise this power to sentence O whether he likes it or not.

²² For present purposes I assume that most people would accept the claim that individuals have a moral right to resist, repel, ward off or prevent otherwise irreparable unjust harm. On this see Suzanne Uniacke, *Permissible Killing : The Self-Defence Justification of Homicide* (Cambridge: Cambridge University Press, 1994), 227.

unusual hero.²³ Eloquently, both the ‘self-defence’ and the ‘defence of others’ justifications in criminal law make it clear that this suffering is permissible if and only if, *inter alia*, there is an imminent attack on someone’s rights and the act of defence a necessary means to rescue her from that attack.²⁴ The sisters’ right to life only allows this much. *Their* interest in staying alive cannot ground a right to inflict suffering upon Raskolnikof. In this type of situation punishment simply arrives too late.

How inadequate this argument is as an explanation for the right to punish is further illustrated by the fact that this interest can only explain a first order incident, i.e., a *liberty* to use force against O. It remains unclear how V’s interest in remaining alive can result in O being under a *liability* to have some of her fundamental rights altered in the way punishment requires.

My point then is quite simple. The difficulty in explaining the *power* to punish O from an interest-based perspective does not arise only from the fact that it implies inflicting harm upon a human being but, more crucially, it has to do with the fact that this suffering does not seem to be entailed by anyone’s concrete interest. At least it is clearly not entailed by a right that O herself has violated or has attempted to violate. Admittedly, this particular claim holds only insofar as the victim dies. To this it may suffice to respond that an argument for punishment that is unable to accommodate precisely the case of accomplished murder is not only contingent, but utterly unpromising. Moreover, it would lead to the absurd conclusion that if O were to commit a robbery, she could escape punishment simply by killing her victim.²⁵

²³ I assume for present purposes that the dead cannot have rights. Admittedly, this is a controversial stance to take (supporting this view see, Fabre, *Whose Body Is It Anyway?*, 22-23; against it, see Feinberg, *Harm to Others*). To challenge this view, however, it would not suffice to show that the dead can have rights. It would have to be argued that they have an interest in O being punished that is sufficiently important to confer upon S, e.g., the power to punish her. In so far as the rescuer’s liberty is grounded on V’s interest *in being alive*, this is unlikely.

²⁴ For a succinct and clear account, see Andrew Ashworth, *Principles of Criminal Law* (Oxford ; New York: Oxford University Press, 2006), 139-141.

²⁵ Extending the definition of a victim, for instance, to her family (as in *re Kurt*, ECHR, and *Barrios Altos*, ICHR among others) would not solve this difficulty because this rationale could eventually be extended to the killing of her family.

Accordingly, these simple points lead to three basic, but important, implications. First, S's power to punish O cannot be straightforwardly based on the interest of victims. This is clearly reflected in the fact that in most legal systems victims do not have the normative power to waive nor promote the exercise of the state's right to punish, at least with regards to the vast majority of offences. Thus, if we are to identify the interest that grounds this particular right, we need to look elsewhere.²⁶ Secondly, the justification for first order incidents, such as the liberty to protect V, should not be conflated with the justification for the normative power to punish O.²⁷ The *liberty* to intervene in state S for humanitarian reasons is independent from, and in fact belongs on a different level to the *power* to punish offences committed in S extraterritorially. Finally, the points made in the preceding paragraph highlight a significant advantage of the rights-based framework I advocate. Namely, that it requires not simply an argument that punishment is generally advantageous, but rather that it forces us to identify whose interest it serves and what interest this is. In Jeffrie Murphy's words, even if punishment of a person would have good consequences, the question is still what gives S the moral right to inflict it upon O.²⁸

This, furthermore, also makes it implausible to argue that this power is justified *exclusively* by reference to the interests of O. Unless one subscribes to a platonic conception of the human being, in which some sort of equilibrium between her different "parts" is intrinsically valuable, and assumes punishment would help bring about this equilibrium, it would be too cynical to argue that the suffering involved in legal punishment would be justified by its contribution to O's well-being. Yet, if the power to punish O has to be explained by taking into consideration the interests of

²⁶ This argument does not entail taking any stance vis-à-vis the rights of victims during a criminal trial. In fact, I suspect that an interest-based theory of rights will at least be compatible with granting them several procedural rights, such as the right to attend the trial, introduce evidence, be legally represented, etc.

²⁷ This is a quite common conflation in the literature on International Criminal Law. See, e.g. Robert D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', *Stanford Journal of International Law* 43 (2007), 45-46.

²⁸ Jeffrie Murphy, "Marxism and Retribution," in *Retribution, Justice and Therapy* (Dordrecht: Reidel, 1979).

third parties, surely there must be some sort of forward-looking component to its justification.

3.1.1 The interest in retribution

Even those who deny any rational justification for criminal sanctions rely in one way or another on an argument of the kind just identified. For instance, Mackie argues that retributive punishment is not based on moral reasons, but on feeling or sentiment. The justification for legal punishment is based, fundamentally, on what he calls retributive emotion. Mackie offers a biological explanation in terms of standard evolutionary theory. He begins with the advantage to species and individuals of retaliatory behaviour and feeling, and proceeds on the basis of natural selection. This process ends with the socialization and moralizing of retributive emotion.²⁹ It might well be that his explanation is descriptively correct. However, it begs the fundamental normative question. What his explanation tacitly implies, and does not argue for, is that this emotion has arisen because retaliatory behaviour and feeling are advantageous. How are these advantageous, for whom, and how much, are precisely the questions any convincing account of criminal sanctions would need to address.

There are many different retributive arguments in the literature which provide an account of this forward-looking element.³⁰ Antony Duff, for instance, has argued that the central point of punishment is to persuade the offender to accept the condemnation for her crime and, in accepting it, to repent that crime and reform her future conduct.³¹ Leaving aside the kind of state this view presupposes or what to do with offenders who will not possibly reform or even listen, it is hard to see whose interest would ground this necessity of a secular penance, and why this interest would

²⁹ John Mackie, 'Morality and the Retributive Emotions', *Criminal Justice Ethics* 1, no. 1 (1982).

³⁰ I take retributivism in a broad sense here. There is quite a bit of controversy as to precisely which doctrines are strictly retributivist. For conflicting views see, e.g., John Cottingham, 'Varieties of Retribution', *Philosophical Quarterly* 29, no. 116 (1979), David Dolinko, 'Some Thoughts About Retributivism', *Ethics* 101, no. 3 (1991), and Zaibert, *Punishment and Retribution*, chapter 6.

³¹ See Duff, *Punishment, Communication, and Community*. See also Uma Narayan, 'Appropriate Responses and Preventive Benefits: Justifying Censure and Hard Treatment in Legal Punishment', *Oxford Journal of Legal Studies* 13, no. 2 (1993), 174. For a standard criticism of this view see von Hirsch, 'Punishment, Penance and the State' in Matt Matravers, *Punishment and Political Theory* (Oxford: Hart Pub., 1999).

be important enough to justify O's liability to suffering the harmful consequences that legal punishment involves. That is, unless some further benefit is identified.

Ted Honderich, for his part, suggests that the truth in retributivism is that punishment is justified partly or wholly by grievance-satisfaction.³² This seems more plausible. However, in a case such as Raskolnikov's it is unclear whose grievance this would be. I suspect that every reader feels more grief for his fate, or for Sonia's, than for the two women. More importantly, perhaps, an argument needs to be made as to why we should protect this interest in the first place. The fact that we have this feeling does not entail that it merits the protection given by a right. Punishment cannot be valuable just because it is wanted.³³ Indeed, not many people would argue for a right to exercise vengeance upon O even if this were also deeply desired. Those who desire it must also believe it is valuable and do so only on the condition that it is valuable. This is precisely what Honderich's argument needs but fails to show.

3.1.2 The interest in having a system of criminal rules in force

The justification for this normative power I advocate is based, by contrast, on the claim that having a system of criminal law in force constitutes a public good that benefits the individuals who live under it in a certain way. This proposition rests on a conceptual and a normative claim. Conceptually, it implies that there is a necessary link between a legal system being in force and S having the *power* to punish those who violate these rules. 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.³⁴ For this to obtain, three conditions must be met: i) those who violate these criminal rules should be punished; ii) they should be punished for committing the offence; and iii) this

³² Ted Honderich, *Punishment: The Supposed Justifications* (Harmondsworth: Pelican Books, 1984), 233-234.

³³ See on this my discussion of what kind of interest merit the protection of a right in section 3.3 of the general Introduction to this thesis.

³⁴ Raz, *Practical Reason and Norms*, 171. On this, see also, H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1997). For standard criticisms, see J. M. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) and Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1978). For a very good analysis of this issue endorsing the conceptual claim defended here, see Nicola Lacey, *State Punishment: Political Principles and Community Values* (London: Routledge, 1988), Chapter 4.

punishment ought to be meted out by a body expressly authorized by *that* legal system. From the normative point of view, I will argue that having a set of legal rules prohibiting murder, rape, etc. in force contributes to the well-being of individuals by giving them a sense of dignity and security. I will argue that the collective interest of the members of a society in having a criminal law system in force is sufficiently important to put O under a *liability* to be punished.

Legal systems are commonly regarded as social institutions meant to regulate behaviour and settle disputes within a society. However, unlike other public goods, such as bridges or a water-supply system, their *existence* is not easy to establish. They do not allow people to cross over a river or get drinking water out of a tap. Laws exist in an altogether different way. Usually, we say that they exist when they are *in force*.³⁵ However, the meaning of this proposition needs further elaboration. Most people will agree that in order for a legal system to be in force it needs to enjoy some level of compliance. Albeit necessary, this is hardly a sufficient condition. British citizens may conform to a significant extent to the German criminal laws, but this hardly entails that these are in force in the UK. Moreover, the significance of this requirement should not be overstated. Joseph Raz has plausibly argued that for a legal system to be in force it is not necessary that the population at large follows the law, nor that the laws constitute valid reasons for action for the people subject to them.³⁶ Indeed, law-violations are quite common in every law-regulated society, and people usually act on extra-legal reasons (moral convictions, social condemnation, etc.). Rather, for a legal system to be in force it is necessary that people *believe* that laws are valid reasons for action, i.e., that they believe they are bound by them.³⁷ Put differently, when we say that British laws are *in force* in the UK, it is because both British citizens and external commentators generally believe that these laws are binding there. In this particular sense we may claim, for example, that laws regulating the slave trade were in force in the Roman Empire.

³⁵ See, for example, Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979), 104.

³⁶ Raz, *Practical Reason and Norms*, 171.

³⁷ *ibid.*

The existence of a legal system, however, cannot depend merely on a psychological fact. That is, not any kind of belief would do. For instance, the fact that many American “born again” Christians believe that the Laws of God are in force in the US does not entail that, as a matter of fact, this is the case. Therefore, the question we must answer is: what kind of reasons must this belief be grounded on for the legal system to be in force? To answer this question, Raz points to the role that courts –i.e. law-applying institutions– play in a legal system.³⁸ Legal systems standardly contain not only norms guiding individuals’ behaviour, but also an institutionalized way of creating laws and evaluating the conformity of that behaviour to the law. The existence of courts indicates that the legal system provides for an institutionalized way of determining legal situations. Their role mainly is to determine normative situations authoritatively and to do so in accordance with pre-existing norms which they are bound to apply.³⁹ Moreover, courts apply *legal* rules to the exclusion of other conflicting considerations (unless the laws themselves allow them to do otherwise). Following Raz, I suggest that these exclusionary authoritative judgements constitute the basis on which officials, subjects and commentators must ground their belief if we are to assert that the legal system is in force. These considerations account for the fact that the right to punish takes the form of a normative power, and not merely a liberty.

Criminal sanctions are but one type of these norm-applying decisions. They are, however, *necessary* for any criminal law system to be in force.⁴⁰ This proposition seems commonplace, but let me explain the reasons why I submit this is so. Possibly, many people would think that this is mainly because punishment *deters* potential offenders and a system can be said to be in force only if it achieves a certain level of compliance. The argument might run along the following lines. Even if moral inhibitions are

³⁸ *ibid*, 137.

³⁹ *ibid*, 134.

⁴⁰ Raz argues that although sanctions are as a matter of fact necessary for a legal system to be in force, this is not *logically* so. Provided human nature were different, he claims, it would be possible to have a sanction-less legal system (*ibid*). I cannot address this issue here. Yet, I do not need to. I can simply stipulate that this argument holds provided that human nature is not radically modified in a relevant way. I willingly accept that the argument I provide is liable to this contingency charge. But this, I suspect, is a charge no moral argument can be free from.

sufficiently strong to keep most people from committing serious crimes, whether this would hold true in a society without a machinery of criminal punishment seems more dubious.⁴¹ That individuals would not be deterred in such a society, however, does not need be so. It is arguably not clear that this minimum level of compliance with basic moral norms would *not* be achieved if, for example, there is an effective police force authorized to prevent crimes and use a ‘shoot to kill’ policy against offenders caught red-handed. This, in fact, may be more determinative than the lack of courts and prisons in ensuring *compliance* with the law. The situation of violent struggle in Iraq over the last couple of years, where courts are functioning but police prevention is not, illustrates this point neatly.⁴²

By contrast, I argue that the exercise of the *power* to punish offenders is necessary for a system of criminal law to be in force essentially because it grounds the belief that the *rules* of the system are binding. It is usually accepted that when O murders V she not only causally determines his death; she also violates the legal rule prohibiting murder or prohibiting violations of the right to life. Similarly, punishment comprises both an element of hard treatment and an element of censure which, though conceptually distinct, go together in practice. I contend that both elements are necessary to ground this belief in the bindingness of criminal laws. Expressing censure in a purely symbolic way would be perceived as mocking this rule rather than affirming its existence. Only by depriving O of some good of hers would we take the *existence* of that legal rule seriously. Punishment is therefore needed “as a means of making the standards of the criminal law *real*: as a way of stating that the meEting of those standards is a matter of duty or obligation ... rather than merely a matter of exhortation or aspiration.”⁴³ Similarly, the hard treatment element *per se* (as purely external behaviour) would not do either. To use von Hirsch’s metaphor, treating people

⁴¹ Johannes Andenaes, *Punishment and Deterrence* (Ann Arbor: University of Michigan Press, 1974), 124. He quotes some cases in which due to police strikes or breakdown of the state there was a very significant increase in the amount of offences (*ibid*, 128 and 51). Unfortunately, I cannot evaluate here the pertinence and weight of these examples.

⁴² It is also instructive to see what happened in East Timor after the Indonesian retreat.

⁴³ Lacey, *State Punishment*, 182, emphasis in the original.

'like tigers in a circus' by incapacitating them is merely like 'neutralising a risk'.⁴⁴ Such treatment denies rather than communicates the fact that their behaviour is bound by legal rules. Indeed, it would make little sense to impose rules on tigers or hurricanes. Accordingly, a response to criminal behaviour that lacks this expressive or communicative element, and thereby treats O as a pure risk, would not be able to convey the message that the system of criminal law exists.

Moreover, in order for O being punished to ground the belief in the criminal law being in force, it has to be the case that she is punished *for her offence*. By this I do not mean that O has to be in fact *guilty* of the particular wrongdoing. As it will become apparent below, it might be that she is innocent. Yet, *the reason* she is being punished must be that she allegedly has, to the relevant standard of proof required, perpetrated the offence. As Hart rightly points out, this is a conceptual not a normative point.⁴⁵ The point is that convicting an innocent individual *qua* innocent would undermine rather than enhance the belief in the legal system being in force and, with it, the sense of dignity and security of individuals living under that legal system. Moreover, even the general perception that O is being punished for some reason other than the fact that she committed a criminal wrong, would undermine the message legal punishment needs to convey to the relevant stakeholders. To illustrate, although he was eventually imprisoned, the fact that Al Capone was famously convicted for income tax evasion could have hardly contributed to the belief in that the laws against, e.g., homicide and other acts of racketeering were in force in Chicago in the 1930s. This is because, I suggest, his being punished is often perceived as an excuse to have him locked up, i.e., incapacitated.⁴⁶ Even if individuals may feel safer because O is in prison, this would not reinforce their belief that the criminal laws are in force.

Finally, in order for a criminal sanction to restore the belief in the legal system being in force, it is necessary that this power is exercised by someone expressly

⁴⁴ Andrew von Hirsch, *Censure and Sanctions* (Oxford; New York: Clarendon Press; Oxford University Press, 1993), 11.

⁴⁵ See section 2 above.

⁴⁶ On this, see my criticism of Saddam Hussein's trial in Chapter 5 below.

authorized *by that legal system*. Indeed, in most legal systems only if a court of justice sentences an offender, its subjects and external commentators would agree that this system's legal rule has been enforced.⁴⁷ Private retaliation and harms imparted by natural forces may be expressions of natural or poetic justice, but they cannot ground the belief that the relevant *legal* rule is in force. Similarly, the fact that German courts would claim the power to punish every act of arson perpetrated in Korea would hardly ground the belief in *Korea's* criminal laws against arson being in force.⁴⁸

This completes the conceptual analysis of the connection between *S* holding the power to mete out legal punishment upon *O* and *S's* criminal law system being in force. I must now turn to the normative argument on which my account relies. I contend that *S's* power to punish *O* is explained by the interest of individuals in having a criminal law system in force containing rules prohibiting murder, rape, torture, etc. I believe this interest is sufficiently important to warrant conferring the power to punish those who violate these rules. This is because, or so I claim, such a system contributes to the well-being of individuals in at least one important way. In Feinberg's words, the criminal law "not only regulates my liberty by imposing duties and extending liberties to me, it also confers rights on me against my fellow citizens and thereby protects me from them in the exercise of my liberties."⁴⁹ The fact that we *believe* that these rules are in force means that we consider not only ourselves, but also people around us *bound* by them. The criminal law, thus, contributes to our sense of being right-bearers and that the legal system takes the protection of our rights seriously. This is all I mean when I claim that it contributes to our sense of dignity and security. Admittedly, this is an empirical claim which I cannot fully demonstrate here. However, its plausibility can be convincingly defended on the basis of a few standard observations.⁵⁰

⁴⁷ This is a factual claim not a conceptual or a normative one. For an argument that this should (normatively) be the case, see Chapter 5 below.

⁴⁸ On this, see Chapter 2 below.

⁴⁹ Feinberg, *Harm to Others*, 8.

⁵⁰ This is not such a great handicap in this area. In Tallgren's words: "Any analysis [of this issue] operates ... in an area of more or less justified belief." (Immi Tallgren, 'The Sensibility and Sense of International Criminal Law', *European Journal of International Law* 13, no. 3 (2002), 590).

The benefit that a system of criminal laws being in force provides to individuals in S is hardly trivial. Consider the alternative. We would probably not want to live in a society which *only* allows for private self-defence and retaliation as responses to wrongdoing. Arguably, the situation would quickly deteriorate and individuals would end up living in constant fear,⁵¹ as living conditions in failed states tend to illustrate. Furthermore, legal punishment contributes to our well-being in a way that neither effective policing, nor a system of civil compensation can. Regardless of how many resources we allocate to policing or of whether O would be liable to pay compensation to V, if no punishment awaits those guilty of criminal wrongdoing individuals will not consider people around them bound by such prohibitions. Imagine what it would be like to live not considering people around us *bound by a system of legal rules* prohibiting, e.g., murder, rape, etc.

Moreover, a system of criminal laws being in force is arguably a necessary condition, even if not a sufficient one, to achieve a particular kind of public order. Public order is generally considered, in itself, of enormous significance to individuals' well-being. Yet, my argument does not rely on just any kind of public order. Public order could be maintained by means such as terror, as the USSR under Stalin and many other brutal dictatorships aptly illustrate.⁵² By contrast, when the criminal law operates in the way advocated here, that is, by a centralized authority enforcing rules against murder, rape, etc., it contributes to bring about a kind of order that is based on the moral significance of the rights of individuals. This particular kind of public order is quite plausibly of the utmost importance for the well-being of individuals. I suggest that the reason why this is so is precisely that, unlike public order in dictatorial regimes, it contributes significantly to their sense of dignity and security.

In sum, this feeling of dignity and security is arguably an essential component of our well-being, and possibly a precondition for leading a minimally decent life. These considerations show that there being a system of criminal laws prohibiting murder,

⁵¹ See, famously, Hobbes, *Leviathan*, Chapter 13.

⁵² Admittedly, this is a matter of degree. For even the most horrendous regimes do, as a matter of fact, enforce certain actual violations of basic rights.

rape, etc. in force is both necessary and important for individuals to enjoy this kind of good. Thus, I claim that their *interest in these rules being in force* is sufficiently important to confer upon S the power to punish O.

Three caveats are in order here. First, this justification does not rely on the claim that punishing offenders will ground a belief in not being *ourselves* victims of criminal wrongdoing. I am afraid that neither the criminal law, nor any other available social institution, would be able to achieve this. Rather, this argument relies only on the weaker claim that in the society in which we live we benefit from the fact that there is a rule prohibiting, e.g., torture, murder, rape, etc. in force. Thus, the interest we may have in *minimizing* such risks should not be conflated with our interest in having a system of rules that is binding upon individuals.

Secondly, the interest in having a system of criminal rules in force is both a necessary and a sufficient condition for the allocation of this power. Admittedly, there are many beneficial by-products of having these legal rules in force. It is often argued, for instance, that punishment enhances social cooperation. Laws against money counterfeiting, fraud and other related offences arguably contribute to facilitating trade and commercial transactions between parties. Punishment is also said to discourage certain violent reactions towards wrongdoing, such as private vengeance or self-help, to provide a public record of the wrong that has been committed, to contribute to restoring social cohesion, to appease the grievance desires of victims, and to provide the opportunity to the offender to reflect and resolve to reform.⁵³ Yet, under the argument provided here none of these other beneficial aspects of the institution of legal punishment are *necessary* to justify the allocation of this power.

Finally, this argument is not based exclusively on *my* interest alone in the system of criminal rules being in force, but rather on individuals' *collective* interest in this kind of good. As we saw in the general Introduction, collective rights are based on a joint interest that justifies the imposition of duties, no-rights, liabilities and disabilities on others. Thus, my claim here is that individuals' *joint* interest in having this set of rules in

⁵³ Lacey, *State Punishment*, 183-184.

force is *prima facie* sufficiently important (in terms of its bearing on their well-being) to hold O under a liability to have hard treatment meted out upon her.

This consideration helps me clarify the role that victims' interests play in the argument here advocated. In the previous section I argued that the interest in being *protected* against a particular wrongdoing can, at best, provide a contingent justification for S's power to punish O. And even this was incompatible with some of our central intuitions regarding the practice of legal punishment. Here I want to suggest that victims share with other individuals in S the interest in the criminal rules being in force. Put differently, their interest has no particular status in conferring upon S the power to punish O, as it is illustrated by the fact that in most legal systems victims usually lack the power to waive or promote the exercise of the state's power to punish O.⁵⁴

By contrast, it could be objected that O may legitimately complain that she does not belong to the collective whose interest warrants conferring this power. This is because, the argument goes, it is not in *her* interest to be punished. I disagree. Admittedly, O has a clear interest in not being inflicted hard treatment. But this says nothing against her (also) having a general interest in wrongdoers being punished. Moreover, the former interest is *independent* from the latter. When she arrives in prison, she arguably has an interest in the criminal rule against murder being in force on the premises. This is because, or so I claim, this rule would contribute to *her* sense of dignity and security. Put differently, O benefits *herself* from this public good and she does so irrespectively of whether she would *prefer* not to enjoy this benefit at all. As a result, she cannot claim that she is being alienated from the collective whose interests explain S's power to punish.

To conclude, I suggest that the criminal law shares the main features of what is usually conceptualized as a public good.⁵⁵ In Raz's words, "a good is a public good in a

⁵⁴ See footnote 26 above.

⁵⁵ I share with Nicola Lacey the sense that it is crucial to conceptualize the criminal law as a public good (see Lacey, *State Punishment*, Chapter 8). However, I suggest that the liberal framework advocated here does much better than her preferred communitarian one, particularly with regards to the territorial and extraterritorial scope of the power to punish. On the relevance of *belonging* to a community see my discussion in Chapters 2 and 5 below.

certain society if and only if the distribution of its benefits in that society is not subject to voluntary control by anyone other than each potential beneficiary controlling his share of the benefits”.⁵⁶ Examples of public goods are public transport or a water supply system. But public goods need not be of this sort. Other kinds are things such as living in a tolerant society, the flourishing of the arts, etc. Public goods, in short, are all sorts of goods that have the capacity to benefit individuals collectively. Admittedly, they allow that someone may not profit *herself* from this good and, also, that different people may benefit from this good to different degrees.⁵⁷ But nonetheless it does hold that what defines this kind of good is the non-exclusivity of their enjoyment.

3.1.3 The interest in reducing crime

One may legitimately wonder whether this is the most important reason we have for punishing an offender. At face value, the answer seems to be a plain ‘No’. Take deterrence, for example.⁵⁸ This theory broadly argues that punishment is justified by its consequences as a means of *protecting* individual’s rights and other valuable goods. This is achieved, standardly, by deterring potential offenders. There is a reasonable degree of consensus that, to some extent, legal punishment does deter criminal behaviour. More precisely, the claim is that “*ordinary people can sometimes be deterred by both formal and informal*

⁵⁶ Raz, *The Morality of Freedom*, 198.

⁵⁷ *ibid*, 199.

⁵⁸ I will discuss only this type of consequentialist justification. Admittedly, this means leaving aside Braithwaite and Pettit’s republican theory of punishment (John Braithwaite and Philip Pettit, *Not Just Deserts : A Republican Theory of Criminal Justice* (Oxford: Clarendon, 1990)). Although their argument has been influential, I will not be able to deal with it here. The main reason I choose to deal with deterrence rather than “dominion” is its persistent influence and popularity particularly in debates regarding extraterritorial prosecutions. This is true at the level of policy (deterrence is invoked in the preambles to the Security Council resolutions creating the ICTY and ICTR (SC Res. 827 (1993) and 955 (1994), respectively) and in the Preamble of the ICC Statute (see also *Prosecutor v Rutaganda* § 456 (ICTR) and *Prosecutor v Delalic* § 1234 (ICTY)). But it is also true at the level of theory and doctrine. See e.g. Sloane, ‘The Expressive Capacity of International Punishment’; Mark J. Osiel, ‘Why Prosecute? Critics of Punishment for Mass Atrocity’, *Human Rights Quarterly* 22 (2000); Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge ; New York: Cambridge University Press, 2007); Theodor Meron, *War Crimes Law Comes of Age : Essays* (Oxford: Clarendon Press; Oxford University Press, 1998), 196; Tallgren, ‘The Sensibility and Sense of International Criminal Law’; and Lucy Carver and Paul Roberts, ‘Penal Law and Global Justice’ (2008), paper cited with permission from the authors.

sanctions".⁵⁹ Then, is not protecting people's rights more important than re-establishing their confidence in a set of rules being in force? And, if so, should not this interest warrant the protection of a right? In effect, the interest in protecting individuals' rights is arguably stronger than the interest in having a system of rules in force (though they are not mutually exclusive). However, I submit that this interest cannot explain S's *power* to punish O.⁶⁰

In short, it does not follow from the interest that individuals have in deterring potential criminals that we should assign S a normative *power* to punish O, but rather this interest seems to warrant conferring upon S a different type of right. Let me explain. If the 'more' punishment is exacted, the stronger the deterrence effect, we should have no trouble endorsing Feuerbach's classic formula according to which the risk for the lawbreaker must be made so great, the punishment so severe, that he knows he has more to lose than he has to gain from his crime. In this light, it is at least dubious that our interest in preventing crimes explains O being under a *liability* to being inflicted legal punishment. Rather, this interest is more clearly served by a *liberty* to stop and harm O, rather than by a *power* to punish her.

There are several examples in the international sphere that illustrate this point well. NATO military intervention against Serbia, for one, had a much stronger impact on stopping the crimes being perpetrated in the former Yugoslavia against, e.g. the Albanian Kosovar population, than the establishment of the ICTY or any other threat of extraterritorial punishment.⁶¹ Similarly, President Reagan characterized the US air raid on Libya on April 15, 1986, as being a "pre-emptive action" that would provide Col. Kadhafi "with incentives and reasons to change his criminal behaviour".⁶² To put

⁵⁹ Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Oxford: Hart Pub., 1999), 1 and 33-37. They emphasize, however, that twenty years before, the overview carried out in the US by the Panel on Research on Deterrent and Incapacitative Effects of the National Academy of Science still showed some significant doubts regarding this issue (at 12-13 and 47).

⁶⁰ In this chapter I provide certain reasons against deterrence as an adequate justification for the power to punish O in its own terms. In Chapter 2, however, I will argue that deterrence is worse suited to deal with the issue of extraterritoriality than the argument advocated here (see section 6).

⁶¹ Indeed, the massacres in Srebrenica occurred two years after the creation of the ICTY, and the atrocities in Kosovo were perpetrated almost six years later.

⁶² D. J. Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004), 936.

it bluntly, then, deterrence would advocate summary executions or pre-emptive military attacks rather than costly criminal trials and long prison sentences.

Moreover, the connection between the power to punish O and deterrence must be critically examined under the light of the admittedly limited empirical data available. For it to work, deterrence depends on two separate and accumulative causal links. First, the visitation of punishment needs to result in actual deterrence of potential offenders. Secondly, the deterrence of potential offenders should cause a reduction in the overall number of offences.

The first causal link is of particular relevance for us here.⁶³ Indeed, the link between the visitation of legal punishment and the actual deterrence it achieves is significantly conditioned by the fact that deterrence is a subjective phenomenon. Accordingly, what matters is not so much the actual infliction of punishment but, rather, what potential offenders believe the threatened consequences to be and how they evaluate them.⁶⁴ Available empirical studies suggest that the relationship between actual behaviour and future consequences (offences and punishment in particular) is far more complex than it is intuitively thought, and that it sometimes conflicts with the principles that traditional deterrence has embraced.⁶⁵ Behavioural studies argue that it is not clear that potential offenders take into consideration future consequences often enough when deciding to commit an offence.⁶⁶ This is even more notorious in violent crimes, in which an emotional component is usually involved.⁶⁷

⁶³ The second link is affected by phenomena such as 'destigmatization', 'deterrence decay', mass incarceration, etc. See e.g. von Hirsch et al., *Criminal Deterrence and Sentence Severity*, 8 and Daniel Nagin, "Criminal Deterrence Research at the Outset of the Twenty-First Century," in *Crime and Justice: A Review of Research*, ed. Michael Tonry (Chicago: University of Chicago Press, 1998). On the detrimental effects of mass incarceration in the U.S. see James P. Lynch and William J. Sabol, 'Assessing the Effects of Mass Incarceration on Informal Social Control in Communities', *Criminology and Public Policy* 3, no. 2 (2004).

⁶⁴ von Hirsch et al., *Criminal Deterrence and Sentence Severity*, 6-7.

⁶⁵ Paul H. Robinson and John M. Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation', *Oxford Journal of Legal Studies* 24, no. 2 (2004), 182.

⁶⁶ On top of the standard characteristics that make potential offenders a group less inclined to think about future consequences of their conduct (risk seekers, impulsiveness, and alcohol and drug consumption), several studies include other temporary state of mind that are likely to drive out rational considerations of punishment. These include desires for revenge or retaliation, rages or angers, paranoia, manic-depression, and other personality features that would not be considered illnesses such as low

This criticism could be raised even more forcefully in the context of genocide, crimes against humanity, war crimes or other crimes committed extraterritorially. As Roberts and Carver suggest, “[r]ational calculation is especially liable to be displaced where perpetrators link criminality with personal survival or the defence of their national or ethnic identity, and where immediate group norms exert more direct influence over behaviour than phenomenologically distant international legal codes”.⁶⁸ Thus the weakness in deterring potential offenders extraterritorially is due, *inter alia*, to the limitation of resources and limited number of prosecutions, the lack of political legitimacy of most extraterritorial courts from the point of view of the targeted groups or individuals, but also to the collective nature of these crimes and the psychological pattern of the leaders.⁶⁹ Admittedly, we do not have empirical studies that actually prove these hypotheses. Yet, given the doubts that studies raise in purely domestic settings, we have good grounds to suggest that whether deterrence is achieved is a far more tenuous and complicated process than it is intuitively assumed.⁷⁰

Finally, if still committed to translate this interest into a normative power, the obvious problem that the deterrence theorist will face is its well-known inflationary character. Deterrence seems committed to the claim that 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

ability to delay gratification or lack of self-control (ibid, 179-180). von Hirsch et al, refer in this sense to the strong presence of need or even ‘desperation’ and the conscious decision not to dwell on the possibility of getting caught leading to this same results (von Hirsch et al, *Criminal Deterrence and Sentence Severity*, 36).

⁶⁷ See Stephanie Carmichael and Alex R. Piquero, ‘Sanctions, Perceived Anger, and Criminal Offending’, *Journal of Quantitative Criminology* 20, no. 4 (2004) on the relevance of anger in particular. I do not know of other studies working on the basis of other emotional states.

⁶⁸ Roberts and Carver, “Penal Law and Global Justice”, 30.

⁶⁹ See, e.g., Sloane, ‘The Expressive Capacity of International Punishment’, 72-73; Tallgren, ‘The Sensibility and Sense of International Criminal Law’, 571-572. As Drumbl suggests, “many perpetrators *want* to belong to violent groups”, and they often believe “they are acting for the benefit of the collective, not their own personal gain” (Drumbl, *Atrocity, Punishment, and International Law*, 171, with reference to Jaime Malamud-Goti, ‘Transitional Governments in the Breach: Why Punish State Criminals’, *Human Rights Quarterly* 12, no. 1 (1990)).

⁷⁰ In fact, studies do not talk about causality but rather about the weaker notion of correlation. On this and on the particular problem of simultaneity see von Hirsch et al, *Criminal Deterrence and Sentence Severity*, 17 and 20.

effect has been said to depend on the certainty, severity and celerity of the punishment.⁷¹ The problem is that it would be committed to justifying and endorsing every bit of harm inflicted, as long as it does not outweigh the harm prevented. As suggested, this reasoning would be particularly problematic in the domain of extraterritorial punishment. Accordingly, deterrence would advocate a power to punish that is entirely incompatible with the way in which this power is currently construed. It would, for instance, offer no argument against altering O's moral boundaries in ways that allow for corporal punishments, including torture. Under certain circumstances, such as the context of grave crimes under international law, it would probably warrant conferring a power to alter not only O's moral boundaries, but also those of her family and friends. To clarify, all these implications should not be construed in deontic terms. The point here is that deterrence fails to account for certain key features of the normative *power* to punish O as it currently stands, i.e., what states can *validly* do, not that it leads to morally *impermissible* outcomes.⁷² That will be the topic of section 3.2 of this chapter.

3.1.4 Three Objections

Before closing this section I will examine three lines of criticism that can be levelled against the argument I presented here. On the one hand, it may be argued that the explanation for the power to punish O I advocate stands on instrumental grounds. This would make it liable to the charge of contingency raised above against victim-based arguments. In effect, my account entails that punishment is only of derivative value. Its value depends on it contributing to the well-being of individuals. Yet, despite being instrumental, I argue that the relationship between punishing an offender and reasserting our confidence in the bindingness of a legal rule is intrinsic and necessary, not purely contingent. There are neither epistemological difficulties nor exceptions for which this justification does not hold. Whenever an offender is punished, for her

⁷¹ Bentham, Jeremy, *The Rationale of Punishment* (London: 1830), chapter VI.

⁷² On the relevance of standard practices see section 1 in the general Introduction to this thesis.

offence, and by a particular body expressly authorized by a particular legal system, this *necessarily* conveys the message that the rule of that legal system O violated is in force. Also, I suggest that these legal rules prohibiting murder, rape, etc. being in force *necessarily* contribute to individuals' sense of dignity and security. Thus, the instrumentality charge cannot ground its purported implication, namely, that an instrumental account of legal punishment will not be able to explain all the standard cases.

On the other hand, the argument advocated here would seem to collapse into a purely consequentialist account, therefore being liable to the criticisms raised in section 3.1.3 against deterrence. However, this perception is based on a mistaken understanding of the role that consequences have in the argument I have presented. We can plausibly define a consequentialist doctrine as one in which “the good is defined independently of the right” and which argues that “the right is maximizing the good as already specified”.⁷³ Deontological theories, by contrast, should therefore be “defined as non-teleological ones, not as views that characterize the rightness of institutions and acts independently from their consequences.”⁷⁴ Under the light of these rough definitions, the argument defended here does not define the good as individuals' well-being and then tries to maximize its overall level. Rather, the point is whether the interests of X, Y, and Z warrant conferring upon S the power to punish O even if, overall, that would lead to a suboptimal level of well-being. In other words, although it takes consequences into consideration, my argument does not simply add them in a broad calculation of utility, crime-reduction, or overall individual well-being.

In effect, we must be careful not to make the mistake of misrepresenting the specific interest on which the argument rests. The argument defended here does not explain S's power to punish O on the basis of an *increase* in the sense of dignity and security that individuals enjoy in S. This would admittedly lead to trying to *maximize* this sense of dignity and security. Rather, the relationship of implication works in the

⁷³ Rawls, *A Theory of Justice*, 22.

⁷⁴ Rawls adds: “all ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.” (ibid, 26).

opposite direction. 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 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, this justification is free from the harshness charge raised against deterrence. Indeed, individuals' belief in the *existence* of a rule need not entail a power to alter *any* right held by O, such as the right not to be tortured. A brutal penalty, such as boiling an offender in oil, could express that a rule against, for example, robbery is in force. And some people may even say that it would do so more convincingly than a prison sentence. However, this rights-based justification does not entail such power.⁷⁵ First, imprisonment and other more lenient penalties clearly *suffice* to communicate that a particular criminal rule is in force.⁷⁶ Moreover, when these more lenient means work, one arguably lacks the power to use a harsher one. Let me illustrate this point by reference to a different right. In a situation of self-defence in which Arnold, a trained Samurai, is coming towards Victor armed with his katana to kill him, it is usually conceded that Victor is at liberty to use a bazooka to repel the attack, provided he does not have a less harmful means at hand. However, most people will similarly agree that this liberty would not obtain had he the possibility to use a pistol with a paralyzing dart, which would be equally effective. Moreover, the fact that he can use the pistol does not make it simply a *preferable* means within the legitimate exercise of his right to self-defence. Rather, it is generally believed that in the second situation Victor would be

⁷⁵ A penalty that is too harsh, by contrast, can undermine rather than enhance the belief that individuals are right-bearers and that these rights should be respected. I suggest that would be the case, e.g., if O were tortured to death or the state were to sentence all her (innocent) family to forced labour.

⁷⁶ Admittedly, this point touches upon the question of cardinal levels of punishment: why imprisonment or fines instead of physical punishments or death? This is an extremely difficult philosophical question that is beyond the scope of this thesis. Indeed, I am not defending imprisonment or any other specific penalty *per se*; rather, my point only is that although the argument I advocate requires some level of hard treatment (sufficient to convey the existence of a criminal rule), it does not lead to disproportionate or brutally harsh penalties.

under a duty *not* to use the bazooka.⁷⁷ This is usually described as proportionality. *Mutatis mutandi*, it is clear that in order to assess the allocation of a power to punish O, it is also necessary to assess whether the means which one intends to use are appropriate, and whether there are no less harmful means available. Altering O's right to liberty, for instance, may be one such less harmful means. This explains why this argument construes S's power to punish O in a way that entails S holding the power to alter neither all of O's rights, nor, for instance, the rights of her family and friends to their personal liberty. To be clear, my position here is not, or not simply, that it would be *wrong* for S to punish O by torturing her, or by imprisoning her family. The point is, rather, that this would be for S to act *ultra vires*.

There is one final objection to consider: that my argument commits me to the view that S holds the power to punish the innocent (IN). Indeed, as I suggested above the requirement that someone must be punished *for her offence* does not mean that she has, as a matter of fact, to have committed that offence. It only means that this is the reason for which she is being punished or, in other words, that S can punish neither the innocent *qua* innocent, nor the guilty for the wrong reasons. I must admit this charge is accurate. Yet, instead of considering it a fatal objection to this account, I will suggest that with this feature lies a significant strength of the account of legal punishment I advocate. By distinguishing between S's power to punish IN and it being at liberty to do so, this account can accommodate the fact that states hold the power to punish innocent people, while at the same time being able to claim, as I will do in the next section, that punishing IN would be *wrong*. This means, in short, that IN's conviction and her sentence would be *valid*, i.e., her moral and legal boundaries would be effectively modified by S.⁷⁸ However, it would be *impermissible* for S to punish her. There is no contradiction here. As stated in the general Introduction to this thesis,

⁷⁷ Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide*.

⁷⁸ On why and under what conditions can S claim the authority to punish IN, see section 3 in Chapter 5 below.

sometimes it is possible to have a power which one is not at liberty to exercise or, in less technical terminology, a right to do wrong.⁷⁹

Admittedly, I have also argued that there are certain situations in which the wrong involved in modifying certain rights is such that it precludes the modification itself.⁸⁰ I suggest that this is not the case with punishing IN under the framework I advocate. But before arguing for this, it is worth situating this issue within my broader argument. My position is that in order for S to have the power to punish X, not only some interest of its members should be sufficiently important to confer upon S this power, but also S must have the *authority* to do so. As I will argue in Chapter 5 below, S can claim the authority to punish X only when X receives a fair trial, she is convicted after a thorough investigation and S is credibly punishing her because it is satisfied to the relevant standard of proof that X is guilty. Put differently, my account only commits me to the view that S has the *power* to punish IN when it makes a reasonable mistake.⁸¹ This removes much of the sharpness in this charge. Establishing a system of criminal laws ultimately entails accepting the possibility of punishing the innocent in some measure, at least with current levels of technology. Besides, as long as S can justify to IN why she is being punished and this justification is reasonable, her being punished would not undermine the sense of dignity and security that S's criminal laws being in force provide, even if her conviction is mistaken.

This separation between first and second order incidents, that is, between powers and liberties, explains at least two familiar implications. First, it follows that if IN can demonstrate that she was mistakenly convicted, she would be entitled to be compensated for the harm she suffered. Moreover, if her innocence can be demonstrated she should be immediately released. Yet, these new changes in her moral boundaries are not automatic. They would be the result of a further decision by a court of law, i.e., an authority expressly authorized by the legal system, restoring IN's moral

⁷⁹ A typical example is that of A's power to sell B a good she knows is stolen.

⁸⁰ See section 3.1 in the general Introduction above.

⁸¹ See section 3 in Chapter 5 below, specially my discussion of the authoritativeness of mistaken decisions (*in fine*).

and legal boundaries (when possible).⁸² Secondly, the legal power to release and compensate IN is required by the overall argument I have advocated. It would not be the case any longer that IN would be punished *for her offence*. Once her innocence has been demonstrated her remaining in prison or being censured can hardly convey the message that the criminal rule she had allegedly violated is in force. Her remaining in prison would undermine, rather than enhance the dignity and security of individuals living under that legal system. It is quite likely that a state which imprisons the innocent will be perceived as oppressive and as a threat to the rights of individuals in it.

To conclude, none of these objections actually harm the argument I have presented. It is time to tackle the remaining incident.

3.2 The justification for S's *liberty* to punish O

As suggested above, a complete justification for legal punishment does not merely need to argue that S holds the power to punish O; it must also argue that it is *right* for S to do so. In Hohfeldian terms, the purpose of this section is to argue that S is also at *liberty* to punish O. This argument can be made in two different ways. One way would be to argue that an interest of individuals in S is sufficiently important to put O under a no-right not to be punished. The other way would be to argue that O lacks herself a claim-right against having punishment inflicted upon her. In Razian terms, we can invoke an overriding consideration or a cancelling condition.⁸³

Deterrence provides an argument of the first kind. I suggest, however, that it also fails to provide a convincing justification for the *permissibility* of legal punishment. In short, the problem with deterrence is that, because of its consequentialist structure, it fails to take into consideration the value and separateness of individuals. I have argued above against deterrence as an explanation for S's power to punish O. I now claim that it is also lacking as an explanation of its liberty. The reasoning goes as follows. Because

⁸² Interestingly, states do not normally have the power to overturn convictions reached by other state's courts.

⁸³ Raz, *Practical Reason and Norms*. See also Mitchell N. Berman, 'Punishment and Justification', *Ethics* 118 (2008).

the interest of individuals in deterring future offences often overrides the interest of an innocent individual in not being punished, the *prima facie* liberty to inflict punishment upon O would outweigh O's *prima facie* claim-right against suffering that kind of treatment. This is highly problematic. For one, it means that even if O were innocent she would not be able to claim compensation for having been wrongly convicted. Moreover, a deterrence theorist would also be committed to reject prosecuting Judge J for knowingly convicting an innocent person.

I will follow, by contrast, a cancellation strategy. I will argue that O lacks a claim-right against being punished by S. There are at least two possible lines of argument for this case. I can either argue that O has *forfeited* her claim-right, or I can suggest that her general claim-right not to suffer this kind of treatment does not include a protection against legal punishment. I will defend here a version of the forfeiture argument.

Standardly, the forfeiture of a right makes reference to a right lost due to some crime or fault, breach or neglect of rules on the part of the person who is said to be responsible for it.⁸⁴ The *concept* of forfeiture is used in legal and moral discourse often enough not to warrant any kind of conceptual clarification here. The normative work forfeiture does, by contrast, needs to be carefully examined. Within the rights-based literature, Daniel McDermott provides an account of how this mechanism works that merits careful consideration.⁸⁵ He argues that when O wrongs V say, by stealing £100 from him, V suffers two losses. First, she loses her money and, secondly, she does not receive the treatment due to her as a right-holder. As a result, O incurred a *debt* for each of them. Just as she forfeited her right to £100, she forfeited her right to some moral good of hers. However, unlike the £100, O cannot restore to V the treatment she did not provide her. So in a moral community in which all members are entitled to certain benefits and burdens, “[b]y failing to provide their victims with the treatment they owe them as right holders, wrongdoers incur debts to their victims of the value of this moral good, and, as a result, they forfeit their rights to other, equally valuable, moral goods.”⁸⁶

⁸⁴ Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide*, 201.

⁸⁵ Daniel McDermott, 'The Permissibility of Punishment', *Law and Philosophy* 20 (2001), 424.

⁸⁶ He then goes to examine, as I will need to do below, which moral goods wrongdoers forfeit.

Punishment is thus a means of denying these forfeited moral goods to the wrongdoers.⁸⁷

Needless to say, I am sympathetic to this general approach. However, it seems that by using the notion of moral debt to justify O's loss of her right, McDermott is unable to explain *to whom* that debt would be owed if V dies. Admittedly, if O shoots V and V goes to hospital, O would incur a debt for hospital charges as well as other damages. *Pace* McDermott, she would also incur a moral debt for having violated V's rights. But in a Raskolnikof-type case, O's material debt is extinguished with the sisters' death. Why would O's moral debt not be extinguished precisely in the same way? McDermott's main strength, i.e., the fact that "there is nothing at all mysterious about the claim that committing a debt-generating act changes a person's moral status"⁸⁸, seems to condemn his explanation to contingency – particularly so as he explicitly rejects explaining this moral change by resorting to the idea that an offender incurs a debt towards the society in which she lives.⁸⁹

Albeit ultimately unsuccessful, this approach shows precisely the kind of explanation I need to provide. What needs elucidation is the mechanism by which O committing a wrong results in a change in her moral boundaries that makes S punishing her permissible. Before addressing this issue, though, two clarificatory points are in order. First, it is often argued that an offender forfeits some of her rights. Yet, it is very unclear what right would an offender allegedly forfeit, or better, what *type* of right this is. Most of the accounts in the literature fail to distinguish between first order and second order Hohfeldian incidents. They fail to characterize the right to punish as a power. Accordingly, these accounts need the forfeiture argument to do all of the normative work, namely, to account for O's lack of an immunity *and* a claim-right against being punished. By contrast, in this account the forfeiture argument explains

⁸⁷ This argument should not be conflated with the unfair advantage theory once defended by Andrew von Hirsch and Herbert Morris, among others (see Andrew von Hirsch, *Doing Justice : The Choice of Punishments* (New York: Hill and Wang, 1976) and H. Morris, 'Persons and Punishment', *The Monist* 52 (1968)). For criticisms, see Dolinko, 'Some Thoughts About Retributivism' and von Hirsch, *Censure and Sanctions*.

⁸⁸ Daniel McDermott, 'Debts to Society', *The Journal of Political Philosophy* 10, no. 4 (2002), 441.

⁸⁹ *ibid.*

only why the offender lacks a *claim-right* against S exercising the *power* to punish her. By definition, to argue that O lacks the claim-right against being punished by S, means only that S is at *liberty* to do so.⁹⁰

Secondly, it is important to clarify precisely what normative work the forfeiture argument is doing in my overall explanation. As discussed in the previous section, S holds the normative power to punish an individual who is in fact innocent (IN), to wit, who by definition has not forfeited any claim-right of hers.⁹¹ This is not just a normative claim but also, and crucially, a fairly accurate descriptive one. Yet, if this is the case, what does it mean to argue that S is under a *duty* not to punish IN? The implication is that, whenever possible, S should restore IN to the situation she was in before being punished, and when this is not possible she should compensate her for the wrong she suffered. Moreover, if S's judge J knew that punishing IN was wrong because she was innocent, J could herself be criminally prosecuted. By contrast, to say that S is at liberty to punish O, or similarly that O lacks the claim-right against S doing so, is to say that O is owed nothing. So if she is punished and afterwards pardoned she does not get to be compensated for the time she spent in prison.

Having clarified this, it is time to explain how the forfeiture mechanism works. This is an extremely difficult philosophical question. It is behind, for instance, most attempts at capturing what it means for O to *deserve* being punished, or to claim that punishing her is *intrinsically good*. I can only provide here a succinct explanation. In any event, this should suffice for present purposes. As it will be clear throughout this thesis, the extraterritorial scope relies on the argument I have made in support of S's *power* to punish O.

I suggest that the doctrine of forfeiture of rights simply accounts for the fact that the protection that rights provide every individual is not unconditional. Rather, this protection is usually conditional upon conduct. To give a quick example, if I arrive late at the Opera, I would probably be denied access to my seat. This means that my claim-

⁹⁰ On this, see section 3.1 of the general Introduction to this thesis.

⁹¹ Subject to S meeting the requirements for claiming authority to punish that innocent individual. On this see section 3 in Chapter 5 below.

right against being stopped at the door is not absolute; it is conditional upon me arriving on time. The penalty for being late is, in the language I have chosen, that I have *forfeited* the claim-right I had against the theatre management letting me in.⁹² This means, in short, that I am not being *wronged* by the doorman who refuses me entry; she is at *liberty* (and probably under a duty) to stop me. Accordingly, I cannot claim compensation for having missed the show, nor am I entitled to get new seats for the next performance. The only remaining question is, then, whether *this* particular limitation to my right (being refused access) is a legitimate one to impose. Analogously, we may say that individuals have a claim-right against being punished by the state. This means that the state is under a duty not to punish them, and if it violates this duty, it should (at the very least) compensate them. But this claim-right is neither absolute nor unconditional. Individuals are entitled to its protection provided they do not perpetrate a criminal wrongdoing.

The reason why I suggest this precise limitation is legitimate is disappointingly simple. I argued that legal punishment is a form of moral language that allows S to censure O and to convey to individuals in S the belief that a set of criminal rules are in force. I now contend that since O committed a wrongdoing she cannot complain about being censured for having done so. With her act, O put into question the existence of the relevant prohibition. She cannot pretend not to be strongly censured for her conduct and reminded that this prohibition is binding upon *her*. To reject this particular limitation would entail recognizing this claim-right as having a kind of unconditionality that no plausible theory of rights would be willing to endorse. This is, in short, what is meant when we say that by committing a crime, O forfeited her claim-right against suffering this kind of treatment. It is not the fact that the interest of individuals in S *overrides* O's interest in not being punished. Accordingly, this explanation has the further

⁹² This is surely not the only way in which I can forfeit this right. Shouting or misbehaving during the performance will generally entail a similar consequence. Unless, of course, it's the unorthodox, albeit popular "buuuuu" against the *regisseur*.

advantage of being able to explain precisely why it would be wrong, i.e., impermissible to punish IN.⁹³

Let me clarify my position by pointing out two important features of this argument. First, this forfeiture claim does not necessarily entail that *anyone* is at liberty to punish O for her offence. O can be said to have forfeited her claim-right *in rem*, i.e. against the world at large, or *in personam*, namely, against certain individuals or bodies.⁹⁴ Forfeiture arguments are normally construed in the former sense. Yet, as Cecile Fabre has suggested, this is too hasty. It does not follow from the fact that O has forfeited her claim-right that no one punishes her, that *anyone* can do so. Rather, a more plausible version of the forfeiture argument is that “it is no longer the case that *everyone* is under a duty not to” punish her.⁹⁵ In other words, the forfeiture argument explains why O has lost her claim-right against S punishing her; the reason why this liberty is conferred upon S (and not S2) is explained, rather, by the interest that justifies S *in particular* holding the power to punish O. This means that it would not only be *ultra vires*, but also impermissible for S2 to punish O for a theft she committed in S. If S2 were to punish O, the sentence would not only be void, but she would be entitled to compensation.

Secondly, this explanation does not lead to the implausible position that denying that O holds a claim-right against being punished amounts to denying O’s *interest* in not being punished. The fact that an interest warrants the protection of a right should clearly not lead us to conflate the two. Most probably O would still have an interest in not being punished, just as the late-comer to the Opera would keep her interest in seeing Pavarotti. The only thing she has lost, according to the view I defend, is the *moral shield* that protected this interest.

To conclude, the theory of forfeiture I propose explains precisely why S would be at liberty to punish O. I make this argument by claiming that in committing an offence, O forfeited her claim-right against being punished. If this argument is sound and, as a

⁹³ My explanation here owes a significant deal to von Hirsch in his *Censure and Sanctions*.

⁹⁴ On this distinction, see section 3.1 in the general Introduction above.

⁹⁵ Cécile Fabre, 'Killing Culpable Attackers in Defence of Others', 2008, unpublished paper cited with permission from the author, 4.

result, O cannot legitimately claim a protection to this particular interest after committing a criminal offence, it follows that she would not have a reason to complain or receive compensation for being punished by S.

4. Conclusion

In this chapter I have argued that in order to provide an explanation for the proposition 'S has the moral right to punish O' we need to distinguish between the different incidents that form this molecular right. I have only put forward here an argument for S's power and its liberty to punish O. I argued that S's power to punish O can be plausibly explained by reference to the collective interest of individuals in S in its criminal laws being in force. This is because a system of rules prohibiting murder, rape, etc. being in force constitutes a public good that contributes to their well-being. I suggested that this interest is sufficiently important to put O under a liability to being inflicted legal punishment. By contrast, I argued that standard versions of retributivism or deterrence theory fail adequately to account for the allocation of this normative power.

Moreover, I argued that S's liberty to exercise this normative power against a particular offender is explained by her having forfeited her claim-right against being punished. By definition, the fact that X lacks a claim-right against being φ ed by Y means that Y is at liberty to φ X. The forfeiture mechanism has been explained by reference to the fact that the claim-right against being punished, like almost every other moral right, is conditional upon the conduct of its holder. In particular I argued that the claim-right against being censured in the way punishment requires is conditional upon O not committing a moral wrong.

Let me close this chapter by assessing the relevance of this general argument for the purposes of my overall project and elaborate further how it is situated vis-à-vis other accounts within the literature on legal punishment. The argument I have developed is arguably a version of a hybrid or dualist justification of which the most famous and influential examples are probably those developed by Herbert Hart and

John Rawls.⁹⁶ However, it is unique in its use of the Hohfeldian analysis of rights. I will argue throughout the thesis that this argument will prove much more convincing than its rivals in the way it deals with the issue of extraterritoriality. For present purposes, however, I suggest that its reliance on Hohfeld provides it with a crucial advantage over standard dualist accounts.

On the one hand, Hohfeld's analysis accounts for the precise normative implication of each of the arguments I have presented. While my initial argument explains O's *liability* to being punished, the argument developed in 3.2 explains her lack of a *claim-right* against this (i.e., S's liberty). This cannot really be said of Hart's distinction between the general justifying aim of the institution of punishment and the right principles of its distribution. On the other hand, my analysis provides a sound criterion of how the different arguments relate to each other. The fact that liberties and powers are of a different order is an important feature of Hohfeld's analysis of rights. This means for our purposes that in some cases S would have the power to do something which she is not at liberty to do. Put differently, this argument is able to explain why states unanimously hold the power to punish innocent individuals, while at the same time maintaining that it would be *wrong* for them to do so. Finally, in the following chapters I will argue that the justification for conferring upon an *extraterritorial* body X the right to punish O depends on whether someone's interest does in fact warrant conferring upon that particular body X the *power* to punish O. Thus, distinguishing the grounds of these two incidents will allow me to address precisely what is at issue in this thesis.

⁹⁶ Hart, *Punishment and Responsibility* and John Rawls, "Two Concepts of Rules," in *Philosophy of Punishment*, ed. Robert M. Baird and Stuart E. Rosenbaum (New York: Prometheus Books, 1988). For a more recent version see von Hirsch, *Censure and Sanctions*. Unlike these three accounts, I deny that any of the considerations on which my argument rests is consequentialist in structure.

2

Extraterritoriality and the Right to Punish

“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

1. Introduction

In the previous chapter I presented a general justification for the power to punish. Chapters 2, 3 and 4 of this thesis are concerned with the extraterritorial scope of this power. While the present chapter addresses the extraterritorial application of a state’s domestic criminal rules, the following ones will deal with the power to punish crimes under international law. As a matter of law states characteristically claim the power to punish certain domestic offences extraterritorially. Under the Sexual Offences Act 2003, e.g., English and Welsh courts have the power to punish nationals or residents of these countries 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 anywhere in the world when the victim is a

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), 110. Although this quotation eloquently shows precisely what is at stake in this chapter, a point of clarification is in order. 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 while waiting for reinforcements. Moreover, he was allegedly executed for offences against Cortés and the Spaniards, not for offences against his own people. Incidentally, Cortés’ decision was heavily criticized in Spain on grounds that he 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).

French national at the time the offence took place. Most states criminalize conduct such as the counterfeiting of their currency, espionage or treason regardless of where they happen to be performed. In short, although the criminal law is usually regarded as primarily territorial in its application, these types of provisions are fairly standard in the vast majority of states. For some reason, however, the issue of extraterritoriality has not received much attention from either scholars working on the philosophy of international law or on the justification of legal punishment. I purport to address this gap in the literature and challenge some widely held views regarding the extraterritorial scope of states' power to punish O.

The extraterritorial scope of states' right to punish is ultimately governed by international law. States are free to decide whether and when they will exercise this right, but they can do so only within the constraints imposed by the international legal system. By and large, there are currently three different grounds or principles on which a state (S) can base its power to punish an offender (O) extraterritorially. These are commonly known as the principles of nationality, passive personality and protection and they rely, respectively, on whether the offence was committed by one of S's nationals, as under the Sexual Offences Act above, against one of its nationals, as in the French provision cited, or against the sovereignty or national security of that state, as with the counterfeiting of national currency.²

This chapter examines the moral foundations of this well-established legal framework and finds them lacking. By contrast, it advocates a more restricted extraterritorial scope for S's power to punish O. In section 2 I will argue that the territorial scope of S's right to punish O is determined by the reasons that justify S holding the power to punish wrongdoers generally. On this basis, I will provide an explanation for the primarily territorial character of domestic criminal law. This theory entails that although we have good reasons to warrant states extending the scope of this

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', *Michigan Law Review* 64, no. 4 (1966), 609 and Michael Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford: Oxford University Press, 2003), specially chapter 6). These 'quasi-territorial' bases of jurisdiction are not covered in this chapter.

right extraterritorially on grounds of protection (section 5), i.e., over crimes which affect their sovereignty or security, doing so on the basis of the nationality of the offender or that of the victim would be to act *ultra vires* (sections 3 and 4, respectively). Moreover, I will contend that the arguments on which both these principles are standardly grounded either beg the fundamental question which they are meant to answer or collapse into much broader claims of extraterritorial jurisdiction that few of their supporters would be prepared to endorse. In section 6 I will examine two possible lines of criticism to the framework put forward. On the one hand, I will discuss whether my theory is too restrictive and, as a result, unconvincing in a world in which crime is increasingly becoming globalized. On the other hand, I will examine whether other justifications for the right to punish available in the literature may be, overall, better suited to explaining the way in which international law regulates states' extraterritorial criminal jurisdiction.

Before going any further, three caveats are in order. First, I have suggested 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 some form of harm on her, coupled with a liberty to do so and a claim-right not to be interfered with.³ I am concerned here only with this *power* to punish offences committed extraterritorially. So defined, the power 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 he was already on its territory, not whether it was at liberty to 'arrest' him in Argentina and held a claim-right against Argentina not to 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.

³ See Chapter 1, section 1 above.

⁴ On the normative independence of these two incidents under public international law see, generally, F. A. Mann, "Doctrine of International Jurisdiction," in *Further Studies in International Law* (Oxford: Clarendon Press, 1990) 19 and 21. For a discussion on whether states have the authority to try offenders abducted abroad see section 6 in Chapter 5 below.

Secondly, this chapter examines the *grounds* on which S's courts can claim jurisdiction to punish an offender (O). It deals with the question of 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 do so. As I have argued in the general Introduction to this thesis, in order to confer a power to punish O upon S it is not enough that someone's interest would be served by the conferral of that power; S must also have the authority to punish O. Let me briefly 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 in TS.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, for example, it would normally decide on O's culpability on grounds of confessions extracted by torture. It is only the former question that will be tackled here.⁶ Yet, as I will argue throughout this thesis, it is this particular question that largely determines the extraterritorial scope of S's power to punish O.

Finally, the argument provided in this chapter is limited to domestic offences. In other words, when examining the distribution of criminal jurisdiction among states three sorts of considerations are often considered 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 chapter only examines power 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, for instance, genocide, war crimes or crimes against humanity. These will be addressed in chapters 3 and 4 below.

⁵ For simplicity, I will use throughout 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 refer to it as S.

⁶ The question of S's *authority* will be examined in Chapter 5 below.

2. The Territorial Scope of S's Power to Punish O

*"by what Right any Prince or State can put to death, or punish an Alien, for any Crime he commits in their Country. 'Tis certain their Laws by virtue of any Sanction they receive from the promulgated Will of the Legislative, reach not a Stranger."*⁷

The territorial scope of a state's criminal law is commonly regarded as a manifestation of its sovereignty. This 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.⁸ Crucially for our purposes, it also entails the normative power to punish those who violate its rules within its territorial 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.⁹ Thus, I will normally tackle the standard cases in which, for example, both the conduct of O and its result (e.g., V's death) occurred on the territory of state S. As a legal basis for criminal jurisdiction, territoriality raises little controversy.¹⁰ However –or perhaps precisely for this reason– any justification for the power to punish concerned with evaluating its extraterritorial application needs, first, to be able to account convincingly for this basic principle.

In order to account for the territorial scope of S's right to punish O I claim that we need to look at the reasons that justify S holding the power to punish O in the first place. The justification for this normative power I have proposed in Chapter 1 is based on the claim 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. This proposition involves a conceptual and a normative claim. Conceptually, it implies that there is a necessary link

⁷ Locke, *Two Treatises of Government*, §9, 273.

⁸ On this, see section 4 of the general Introduction to this thesis.

⁹ 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 Michael Akehurst, 'Jurisdiction in International Law', *British Yearbook of International Law* 46 (1972-1973), 145 and, more recently, the monograph by Hirst, *Jurisdiction and the Ambit of the Criminal Law*, chapters 3 and 4.

¹⁰ See, for example, 'Draft Convention on Jurisdiction with Respect to Crime', *The American Journal of International Law* 29, no. Supplement (1935), 480 and Brownlie, *Principles of Public International Law*, 299.

between a legal system being in force and the power to punish offenders. From a normative point of view, I suggested that having a set of legal rules prohibiting murder, rape, etc. in force contributes to the sense of dignity and security of individuals in any particular society. Ultimately I suggested that the *collective* interest individuals have in this system being in force, i.e., binding on them, is sufficiently important to warrant conferring upon S the power to punish O. However, how does this argument account for its territorial scope? This is simple: I suggest that S's normative power to punish O is justified by the collective interest of its *members* in having a system of laws prohibiting, murder, rape, etc. in force.

Someone might object, however, that this argument falls short of fully explaining the territorial scope of S's power to punish O.¹¹ By grounding S's rights on the collective interest of its members it may seem that this argument explains only why S has a power to punish those who commit an offence on its territory against a *resident* of S.¹² Put differently, it would certainly be 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, 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 holiday). Moreover, I believe it holds even if V is targeted *because* he is not a member of S. If an English football fan is killed after a match in Germany by German fans, this would certainly undermine the confidence of the people in Germany in the rule against murder being in 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

¹¹ This objection is important because, as I will argue in section 6 below, it creates a significant difficulty for one of the most influential alternative arguments for legal punishment available in the literature.

¹² For present purposes I treat nationals and permanent residents alike.

different one that I, *in particular*, am less vulnerable to being a victim of a criminal offence. Criminal laws, I have suggested, can ground the former belief, but not the latter.

Secondly, this alleged difficulty is created by a rather oversimplified answer to the question of whose interest explains S's normative power to punish O. This collective interest is also shared by individuals who happen to be in S accidentally, or for a very short period of time. The interests of temporary visitors also matter.¹³ It is the interest of every individual in S that collectively grounds S's power to punish O, not merely the interests of the nationals or members of S. To illustrate: Manuel is a Colombian national. When he travels in Italy on holiday, 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, Manuel 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 Manuel'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, there do not seem to be any grounds on which we could simply override the interest of non-residents who are temporarily in S. Of course, permanent residents arguably have a stronger interest in S's criminal laws being in force over time. For the sake of simplicity, I will keep on referring to the members of S as the holders of the relevant interest. This, however, should be understood with the caveat made in this paragraph.

These considerations, then, fully explain the *territorial* scope of the criminal law system 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

¹³ Indeed, this position is not only compatible but also required by the moderate cosmopolitan position I endorsed in section 4 of the general Introduction.

exercise their criminal jurisdictions concurrently. I suggest that extraterritorial states (PS) are under a *prima facie* disability to punish offences perpetrated in TS. This claim needs to take into consideration two relevant issues.

First, one may argue that the population in PS lacks an interest in enforcing its domestic criminal laws on the territory of TS. That would be true in most cases, but not in all. Clearly, the people living in Uruguay do not usually have an interest in the Uruguayan criminal laws being in force in Sweden that is sufficiently important to warrant conferring upon Uruguay a power to punish offences committed on Sweden's territory. To that extent, this argument entails that Uruguay itself lacks a *prima facie* power to punish O for an offence she committed in Sweden. But this explanation only provides for a conditional conclusion. Under certain circumstances, which will be explored below, individuals' living in Uruguay may have an interest in their criminal laws being in force *also* in Sweden. A standard case could be when O is counterfeiting Uruguayan currency. Hence this argument explains only why states may lack extraterritorial criminal jurisdiction in those cases in which their members lack a collective interest in their criminal laws being in force abroad.

The second issue we have to consider has to do with the interests of the members of TS. These interests may seem more robust and far-reaching. I suggest that they are not. In the general Introduction to this thesis I argued that states hold a right to self-government. This right does not merely include the power to criminalize certain behaviours. It also entails an immunity against other states dictating and enforcing their criminal rules on the territory of TS. This entails, e.g., that the UK has a *prima facie* immunity against Sri Lanka dictating criminal rules that apply on its territory. However, I also argued that this *prima facie* immunity is neither absolute nor unconditional. It is limited, *inter alia*, by the interests of non-members.¹⁴ Accordingly, the interest that explains TS's immunity does not necessarily preclude PS holding a power to punish O for crimes committed in TS. Where individuals in PS have a significant interest in their

¹⁴ See section 4 below.

criminal laws being in force in TS, TS's *prima facie* immunity can be outweighed by PS's *prima facie* power.¹⁵

To sum up, this section fully accounts for the territorial scope of TS's power to punish.¹⁶ I have shown that TS can claim a power to punish violations of its criminal laws when those violations occurred on its territory, regardless of the nationality of either O or V. Also, TS holds this right exclusively in so far as other states do not have an interest in punishing O that is sufficiently important to override its *prima facie* immunity. It is now time to turn to the extraterritorial scope of this power.

3. The Nationality Principle

The issue at stake here is whether PS has a normative power to punish O for a crime she committed on TS, on the grounds that O is a national of PS. This basis of criminal jurisdiction often comes accompanied by other considerations. Most commonly, it is provided for offences that affect the security of the state¹⁷, or that are committed against a national of PS. For the sake of clarity, I will consider cases in which the nationality of the offender constitutes the *only* basis for the criminal jurisdiction of PS. I will examine other grounds of criminal jurisdiction below, under the protective and passive personality principles.

Akin to the principle of territoriality, this basis for criminal jurisdiction is also quite uncontroversial under existing international law.¹⁸ In fact, it has been generally

¹⁵ 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.

¹⁶ I cannot examine here distribution of criminal competences within federal or multinational states such as the U.S. or the UK. Yet, I suggest that the territorial considerations that are at play internationally also apply domestically. In other words, provided that there are different legal systems in place, the argument applies to California's power to punish offences committed on its territory and its *prima facie* immunity against Texas doing so. This immunity, however, would not necessarily affect federal statutes much as in the same way that TS's immunity might not apply in cases of international crimes.

¹⁷ *United States v Bowman*.

¹⁸ See Lassa Francis Lawrence Oppenheim et al., *Oppenheim's International Law / Vol.1, Peace* (Harlow: Longman, 1992), V. Lowe 'Jurisdiction' in Malcolm D. Evans, *International Law* (Oxford ; New York: Oxford University Press, 2006), 345, and Akehurst, 'Jurisdiction in International Law'. For more cautious positions, albeit considering it uncontroversial, see Brownlie, *Principles of Public International Law*, 301-302 and Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 281.

recognized that the original conception of law was personal, and that only the appearance of the territorial state gave rise to the right to subject aliens to the *lex loci*.¹⁹ Recently, this basis of jurisdiction has been growing significantly in some states, and some lawyers even advocate making it a general basis for criminal jurisdiction in the UK.²⁰ Although many countries have self-imposed restrictions on the application 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.²¹

Before going any further, a conceptual point is in order, namely, whether this principle gives PS the power to punish its nationals, its citizens or its residents. In an important early work in this area, Donnedieu de Vabres pointed out that, historically, it was the domicile of the accused rather than her nationality which provided the basis of this type of jurisdiction.²² However, nowadays this principle is taken to mean that states have the right to prosecute their nationals. Assimilation of residents to nationals in this area has been objected as wholly undesirable and is not clearly part of existing public international law.²³ The word nationals has different meaning when used in public international law and international political theory. Lawyers mean membership of a state, not of a nation. I do not need to enter this type of debate here. The nationality principle only makes reference to membership to a state. Thus, by way of stipulation I will use nationals to refer only to the citizens of a state.

I have argued 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 claim

In article 12 b) of the ICC Statute this basis of jurisdiction stands side by side with the territoriality principle.

¹⁹ James Leslie Brierley, 'The Lotus Case', *Law Quarterly Review* 44 (1928), 155-156.

²⁰ 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', *International and Comparative Law Quarterly* 50 (2001), 961.

²¹ 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, *International Criminal Law*, 281). In others, it is only provided for certain particularly serious offences (e.g. France).

²² Henri Donnedieu de Vabres, *Les Principes Modernes Du Droit Pénal International* (Paris: 1928), 66-68

²³ 'Draft Convention on Jurisdiction with Respect to Crime', 533. The only exception to this being, plausibly, stateless persons. In the Draft Convention on Jurisdiction with Respect to Crime the only persons assimilated to nationals are aliens who "discharge ... a public function which he was engage to perform for that State" or who are personnel of a ship or aircraft of that State's flag (see art. 6).

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 outside PS's territory, but the sense of dignity and security they enjoy as a result of system of criminal rules under which they live being in force is not undermined 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 will 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 on (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?"²⁴ 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 suggest that an argument for the nationality principle is to hold water.

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 is justified by the

²⁴ Vaughan Lowe in Evans, *International Law*, 347. See also 'Draft Convention on Jurisdiction with Respect to Crime', 519.

possibility of recidivism within PS.²⁵ 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. It cannot explain why the UK would hold a power to punish a British national residing in Spain for an act she committed in Spain. 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.²⁶ But leaving this aside, the problem with it is that it has to justify the power to punish on the basis of incapacitation or, to a lesser extent, the moral reform of the offender. At the level of philosophical argument this is hugely problematic. Most legal and political philosophers reject these normative arguments as a plausible justification for legal punishment *simpliciter*. There is nothing in the extraterritorial application of criminal laws that would override these well-established moral considerations.

In a different vein, it has been claimed that nationality constitutes an 'evolution' from the 'narrow', 'self-interested' territorial purposes of the state.²⁷ The criminal law of England and Wales would now 'protect' children extraterritorially against, e.g., certain sexual offences committed by nationals or residents of these countries.²⁸ However, if the extraterritorial exercise of criminal jurisdiction by PS is justified by the extra protection awarded to these children, it is open to question on what possible grounds this right could be limited to PS's own nationals. Put differently, 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 (if victims in TS are in a particularly vulnerable position), or eventually to universal jurisdiction, but not to the nationality principle. To that extent, this argument can be readily rejected as a basis for this particular principle.

²⁵ Arnell, 'The Case for Nationality Based Jurisdiction', 961 and Lowe, 'Jurisdiction', in Evans, *International Law*, 347.

²⁶ See text to footnote 23 above and Theodor Meron, 'Non-Extradition of Israeli Nationals and Extraterritorial Jurisdiction: Reflections on Bill No.1306', *Israel Law Review* 13 (1978), 221.

²⁷ Arnell, 'The Case for Nationality Based Jurisdiction', 960.

²⁸ Sex Offenders Act 1997 s7(2).

Some further arguments try to ground this particular power on an interest other than the interests of the members of PS. For example, it has been based on the interest of O in having a fair trial, or not facing capital punishment.²⁹ 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.³⁰ But it simply does not follow from this that the state of which O is a national holds the power to punish her. Somewhat differently, the power 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 releasing her.³¹ This realpolitik argument is again 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 power 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 own power to punish O. All it can show is that TS should hold a normative power to authorize other states, such as PS, to punish O, and this is not the same as claiming that PS is *itself* justified in doing so.³²

Other 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.

²⁹ Arnell, 'The Case for Nationality Based Jurisdiction', 959.

³⁰ Indeed, I will argue that states which cannot guarantee a fair trial lack the power (authority) to punish O, regardless of what the basis of its jurisdiction is (see Chapter 5 below). I will argue there that this issue is entirely unrelated to the extraterritoriality of the prosecution. The question of capital punishment is a more difficult one that, unfortunately, is beyond the scope of this thesis.

³¹ Arnell, 'The Case for Nationality Based Jurisdiction', 960. *A contrario*, suggesting that PS has an interest in punishing O to preserve its good relations with TS, see Geoffrey R. Watson, 'Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction', *Yale Journal of International Law* 14 (1992), 68-69. My rebuttal to both arguments is the same.

³² This issue will be examined in more detail in section 6 below.

Extradition laws in many states claim at least a right not to have their nationals extradited.³³ 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 power to punish O. 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. These incidents are of a different order. If avoiding impunity is so important to the members of PS, then it should simply extradite O.

A somewhat more difficult case is that in which the offence is committed on a territory on which no state has jurisdiction (*terra nullius*). In effect, the nationality principle was argued as a basis for criminal jurisdiction when O, a U.S. national, killed V on a Guano Island.³⁴ But if we recognize PS the power to punish O in this case on the grounds that we have an interest in avoiding impunity, it does not follow that *only* the state of which O is a member has a right to punish her. Rather, the logical implication of this argument is that *any* state would have the right to exercise criminal jurisdiction over O, not just the state to which she belongs. Thus, the aim of avoiding impunity simply does not explain the nationality principle either.

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*.³⁵ This argument depends on what exactly this relationship amounts to. A first consideration that needs to be made here is that

³³ Some states, such as most European countries, go further and claim to be under a *duty* not to do so. See Christopher L. Blakesley, 'A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes', *Utah Law Review* 1984 (1984), 709.

³⁴ *Jones v United States* (1890).

³⁵ Eg. *Blackmer v United States* (1932) and *United States v King* (1976) quoted in Watson, 'Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction', 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', 522.

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.³⁶ These arguments are meant to explain why states have the *duty* to give priority to their own nationals in matters such as the protection of their interests or, at least, the right to do so.³⁷ 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. Claims of that kind will be examined below.

Alternatively, we may build this allegiance relationship under the terms of a 'mutual exchange of benefits' scheme.³⁸ 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 PS. 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 bear their burdens while abroad.³⁹ 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*.

³⁶ I borrow the expression from David Miller, 'The Ethical Significance of Nationality', *Ethics* 98, no. 4 (1988).

³⁷ On this, see standardly David Miller, *On Nationality* (Oxford: Oxford University Press, 1995); Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001); Yael Tamir, *Liberal Nationalism* (Princeton, N.J.: Princeton University Press, 1993).

³⁸ Miller, *On Nationality*, 61. This is, roughly, how fair play theories of punishment justify this power. See, e.g., Richard Dagger, 'Punishment as Fair Play', *Res Publica* 14 (2008). They too are liable to this line of criticism.

³⁹ 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 there. 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', *Law Quarterly Review* 12, no. 3 (1896), 252 and A. M. Latter, 'The Government of the Foreigners in China', *Law Quarterly Review* 19, no. 3 (1903), 316.

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 here what is PS's interest in O respecting PS's laws abroad. Certainly, the power to punish O is not based on PS's members enjoying the sense of dignity and security that their system of criminal laws provides them. O's act has not undermined PS's criminal rules or the sense of dignity and security of the people in PS in any meaningful way. Other interests that PS may put forward would collapse into unappealing justifications for the power to punish (incapacitation or moral reform), or into some form of universal jurisdiction (deterrence or retribution).⁴⁰ In other words, I contend that unless there is a specific element in the offence itself (e.g., its effects or purpose) that affects 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 at least 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 the nationality of the offender but of her residence. But leaving this issue aside, it might seem persuasive. However, I suggest that it gets its intuitive plausibility from something other than the nationality of the perpetrator or, for that matter, her permanent residence. Suppose O goes with V to the border between PS and TS, tricks her into stepping across into TS, beats her up, and then both return to PS. Would not individuals in PS have an interest in seeing O punished in order to be reassured that the laws are effectively in force? I suggest they would. Individuals *in PS* have an interest in not being tricked or forced into a position in which PS lacks the power to punish O. Their sense of dignity and security while in PS requires this. However, this has nothing to do with O's nationality or her permanent residence. The rationale for conferring PS the power to punish O would hold even if both O and V were tourists on holidays. Accordingly, this argument cannot ground the nationality principle. Rather, it seems to rest on territorial, or quasi-territorial, considerations.

⁴⁰ See section 6 below on deterrence and retribution.

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 legal right either beg the relevant question or ultimately justify the jurisdiction of PS on other more controversial grounds, such as universality or passive personality.

4. The Principle of Passive Personality

Let us now examine whether PS has the moral power 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.⁴¹ It is the only regular basis of extraterritorial criminal jurisdiction that was not included in the 1935 Harvard Draft Convention on Jurisdiction with Respect to Crime. However, it has been increasingly adopted by states.⁴² Although there currently seems to be a trend to endorse it, this trend relates to crimes under international law, such as genocide. It does not have to do with the extraterritorial application of a state's municipal criminal law.⁴³ In any event, there currently seems to be no rule under international law prohibiting this basis for criminal jurisdiction.

Does the justification for punishment outlined in this chapter endorse the passive personality principle? The question is, once again, whether the members of PS have a

⁴¹ Oppenheim says it is inconsistent (Oppenheim et al., *Oppenheim's International Law / Vol.1, Peace*, 468). It was heavily criticized by Judge Moore in the *Lotus* case, and even there the majority, which accepted that Turkey had the right to punish Mr. Demons, did not fully endorse the principle of passive personality.

⁴² The Harvard Research project (1935) contains a list of 28 states that have adopted this principle; many of them still endorse it (see *ibid*, 472). France, for example, objected vociferously against the application of this principle by Turkey in the *Lotus* case. 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 alone. France's Criminal Procedure Law provides for its criminal jurisdiction over 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*). The US has relied (partially) upon this principle in *US v Yunis* (No. 2), to try a Lebanese national for hijacking a Jordanian airliner in which US citizens were travelling, even if it had objected to Mexico exercising extraterritorial criminal jurisdiction on this basis in the *Cutting* incident of 1887.

⁴³ Lowe, 'Jurisdiction' in Evans, *International Law*, 351. See in particular, the Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergethal in the *Arrest Warrant* case, at 11.

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 individuals in PS 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 it is nothing of the kind. Advocates of the passive personality principle would need to show that, in fact, O's act puts into question the bindingness of the criminal rules in PS. This 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.

More generally, I suspect that it is not even true that German citizens abroad have an interest in the German criminal law being in force extraterritorially that would be sufficiently important to confer upon *Germany* the power to punish O in this type of cases. The reason for this is, in short, that German criminal law cannot provide abroad the benefits that justify Germany's 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 the power to punish O is explained here 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 therefore follows that PS would lack a power to punish O extraterritorially on the grounds that one of the victims is a member of PS.

But what if there is no territorial state that provides this public good? Indeed, there are several places in which no territorial system of criminal law is in force. Cases that come to mind immediately are Antarctica or some small island in the middle of international waters.⁴⁴ Would PS have a power to punish violations to her criminal rules extraterritorially in these circumstances? To answer this question we have to examine, once again, whether the members of PS have a collective interest in their criminal law system being in force in those areas where no territorial system is in force. I submit that people in, e.g. Japan, would lack an interest in their criminal law system being in force in Antarctica sufficiently important to ground O's liability to being punished. This is because the fact that a Japanese national is killed there does not seem to affect the sense of dignity and security that the Japanese enjoy in Japan. That killing, as I argued above, does not affect the Japanese rules against murder being in force. Moreover, the Japanese criminal law cannot really be *in force* in Antarctica, at least while it maintain its current legal and demographic situation. This does not mean that, absent a territorial authority, no authority should have the power to punish in Antarctica. It only entails that the fact that V is a national of PS does not seem to do any justificatory work in terms of providing PS, in particular, a power to exercise its criminal jurisdiction on *terra nullius*.

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.⁴⁵ Although they vary with regard to the duties each one gives rise to, 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 it also has a right to do so.⁴⁶ 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.

⁴⁴ See *Jones v United States* (1890).

⁴⁵ The standard arguments are made by Miller, *On Nationality*; Scheffler, *Boundaries and Allegiances*, 60, 79; Tamir, *Liberal Nationalism*, 137.

⁴⁶ This argument is also used in Cassese, *International Criminal Law*, 282.

So far, so good. However, to assert a power to punish on the basis of this proposition is a *non sequitur*. The liberty to protect V cannot *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.⁴⁷ But, to go from protection to punishment a further argument is needed. The only way in which we could meaningfully bridge this gap is to say that legal punishment is justified by its deterrent effects or eventually by incapacitation.

I have argued against deterrence as a justification for the power to punish O in the previous chapter. In section 6 below I will argue that this justification leads to assigning the normative power to punish O to every possible authority, that is, to universal jurisdiction. As for incapacitation, I doubt that it is considered a serious explanation for the moral power to punish O. As it is commonly suggested it violates O's status as a person by treating her merely as a tiger. Yet, the problem for our purposes is that it leads to the same problematic jurisdictional implications. After all, what difference does it make where O is kept as long as she is incapacitated? I argue that the right to protect one's fellow nationals does not lead to jurisdiction based on passive nationality. It collapses into a universally held power to punish O.

5. 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.⁴⁸ 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 on

⁴⁷ On the contingency of this argument, see section 3.1 in Chapter 1 above.

⁴⁸ See Christopher L. Blakesley, "Extraterritorial Jurisdiction," in *International Criminal Law*, ed. M. Cherif Bassiouni (Ardsley, N.Y.: Transnational Publishers, 1998) 54 and Jackson Nyamuya Maogoto, 'Countering Terrorism: Frome Wiggged Judges to Helmeted Soldiers – Legal Perspectives on America's Counter-Terrorism Responses', *San Diego International Law Journal* 6 (2004-2005), 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, 'Jurisdiction in International Law', 159).

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. It seems safe to argue that currently this basis for criminal jurisdiction is reasonably well established under international law.⁴⁹ 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 been reluctant to accept it. However, more and more the US and the UK have tended to come to terms with it and use it for their purposes.⁵⁰

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 in any detail. Rather, I will make my own argument for that conclusion. The reason for this is that although I disagree with the specific consideration on which they rest, I agree with the conclusion they reach.⁵¹

I have argued that the justification for PS's power to punish O is based on the collective interest of the members of PS in having a system of criminal laws *in force*. This

⁴⁹ Art. 8 of the 1883 the Institute of International Law adopted a resolution which contained the following principle (in Oppenheim et al., *Oppenheim's International Law / Vol.1, Peace*, note 28 at 470). See also the 'Draft Convention on Jurisdiction with Respect to Crime', 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 procedure penal*. 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 Manuel R. García-Mora, 'Criminal Jurisdiction over Foreigners for Treason and Offences against the Safety of the State Committed Upon Foreign Territory', *University of Pittsburgh Law Review* 19, no. 3 (1957-1958), 567.

⁵⁰ 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. I believe that *Joyce v DPP* should be understood as an example of this principle being relied upon by a British Court. Hirst rejects this understanding of Joyce (Hirst, *Jurisdiction and the Ambit of the Criminal Law*, 49). Although I disagree with him on this, this issue is beyond the scope of the present chapter.

⁵¹ On deterrence as a justification for the protective principle see Recent Developments, 'Protective Principle of Jurisdiction Applied to Uphold Statute Intended to Have Extra-Territorial Effect', *Columbia Law Review* 62, no. 2 (1962), 375. Self-defence, e.g., was articulated in the *Bayot* case by the French Court of Cassation (1923) and its decision in the *Fornage* case (1873). For a careful, though not necessarily critical, treatment of the other arguments see García-Mora, 'Criminal Jurisdiction over Foreigners'.

is because, or so I claim, this system is a public good that provides the members of PS with a relative sense of dignity and security thereby contributing 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, for example, the security and political independence of the state. I contend they do. Let me illustrate this point:

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."⁵²

This act of espionage is as harmful to Japan's interests (and those of the Japanese) as

⁵² Taken from T. Powers, 'Black Arts', *New York Review of Books* 52, no. 8 (2005).

acts of espionage against Japan on its own territory. In other words, it makes little difference where the secret message was intercepted. But then, if Japan has the power to punish those who carry out acts of espionage against Japan on its territory, it must follow that it would have to hold this power extraterritorially. 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 *in PS*. For them to be able to enjoy the thin protection that that rule being in force provides, the rule has to be binding on O irrespective of where she commits the act of espionage. Moreover, this argument does not collapse into a wider basis of extraterritorial jurisdiction. The members of PS have an interest in PS prosecuting and punishing espionage against *PS*, but not against PS2. In our example, China would be disabled from prosecuting Mr. Yardley. Finally, PS would hold this power regardless of whether TS decides to prosecute O itself or not.

It should be noted, however, that this basis of 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.⁵³ 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, such as 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 members of ETA in Spain illustrate this neatly.⁵⁴ Ultimately, however, this type of consideration does not undermine the *interest* that justifies holding the power to punish O, nor does it present a countervailing interest of sufficient entity to provide O with an immunity

⁵³ García-Mora, 'Criminal Jurisdiction over Foreigners'.

⁵⁴ On the ETA trials and its complaints see, e.g., the *Adolfo Araiç Flamarique et al.* by the Spanish Constitutional Court (1999).

against S's power. Rather, it affects the conditions that any given body (be it territorial or extraterritorial) must fulfil in order to claim, itself, the normative power to punish O. In other words, lack of impartiality affects the moral credentials of S's *authority* to punish O, not the fact that it has a valid reason to do it.⁵⁵

On the other hand, it has been argued that this type of jurisdiction lends itself to inadmissible extensions.⁵⁶ 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 grounds that it affected the "purity of the German blood."⁵⁷ Salman Rushdie's death fatwah constitutes 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 extraterritorial jurisdiction over any act against 'a fundamental interest relating to the democratic, political and economic order of the Hungarian People's Republic'.⁵⁸ As it is often said, however, the fact that PS can abuse a right it has is hardly a conclusive argument against PS holding that right in the first place. 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 that punishment provides benefits the individuals on the territory of the state where they happen to be. 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 is

⁵⁵ See Chapter 5 below.

⁵⁶ García-Mora, 'Criminal Jurisdiction over Foreigners', 583.

⁵⁷ Philip C. Jessup, *Transnational Law* (New Haven, Conn.: Yale University Press, 1956), 50.

⁵⁸ In Akehurst, 'Jurisdiction in International Law', 58.

(TS) being in force that can contribute to her sense of dignity and security.⁵⁹ 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. The issue at stake here then is not *her* sense of dignity and security. In effect, Angela Merkel herself, on a visit to Patagonia, would have an interest in *Argentina's* criminal laws being in force. This will contribute to *her* sense of dignity and security. Rather, the protective principle is explained by the sense of dignity and security that a criminal prohibition provides to the German people *in Germany* regarding their Chancellor, while she is abroad. The Germans have, themselves, an interest in making it *their* business to punish anyone who commits such an act, irrespectively of where this act takes place and of the concurrent power held by the territorial state. *Their* sense of dignity and security with regards to their Chancellor, I submit, German criminal law is perfectly able to contribute to. Finally, the reason why the Germans might have an interest in Germany punishing such act has to do with Merckel's political status, not with her nationality. They would have the same interest if their Chancellor happened to be Austrian or even Peruvian. It is the *position* V holds in PS's government that explains PS's power to punish O.

6. Two Possible Objections

Before concluding this chapter, I want to examine two possible objections to the account of extraterritorial punishment for domestic offences presented here. On the one hand, many people would find it simply too restrictive. They will 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 particularly sensitive in a world in which the forces of globalization seem to have bolstered transnational crime.⁶⁰

⁵⁹ See the section on passive personality above.

⁶⁰ E.g., Misha Glenny, *Mcmafia : A Journey through the Global Criminal Underworld* (New York: Knopf Books, 2008).

This, however, is not what this argument entails. True, it warrants putting PS under a *prima facie* disability to punish O for an offence she committed outside its territory unless it threatens its security or political independence. However, I have 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.⁶¹ I now contend that this interest would be sufficiently important to warrant conferring upon TS the normative power to authorize PS to do so. In other words, the interest of individuals in TS not only warrants conferring on TS a power to punish O for an offence she committed on its territory. It also explains TS's power to authorize an extraterritorial 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 former proposition.

Let me put this in more concrete terms. Under the argument advocated here, states 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. 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 can either provide PS with a full power to exercise extraterritorial criminal jurisdiction or subject it to certain limitations.⁶² Finally, states have a power to grant jurisdiction to foreign states for any sort of domestic crime they see fit. Thus, 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..."⁶³ However, this does not warrant PS's having extraterritorial criminal jurisdiction *per se*.

⁶¹ See the section on the nationality principle above.

⁶² Cryer argues that this regime applies to the terrorism conventions (Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005), 80-81). I will advocate a similar understanding of terrorism in Chapter 3.6 below.

⁶³ *United States v Bowman*, at 98. 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.

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 thereby accommodates what we may call internationalized criminal law, i.e., domestic criminal laws that are enforceable extraterritorially by domestic courts on the basis of an agreement.⁶⁴

It is now time to tackle a second line of criticism. The claim is that there might be other justifications for legal punishment that would be, overall, more consistent with the way in which international law currently regulates extraterritorial punishment. Accordingly, they would probably be preferred over the argument advocated here for their explanatory power. This is not the case for two reasons. First, most considerations on which these justifications rely lack any clear connection to the territorial scope of the power to punish. And secondly, they are usually unable to account for the specific considerations on which these jurisdictional bases are grounded. This is true of most consequentialist and deontological considerations such as deterrence, incapacitation, moral reform, retribution, etc. Regardless of their interplay within each theory, it is simply not true that they are more attuned with our current practices. Rather, most justifications for legal punishment tend to advocate broader jurisdictional rules than those provided for under international law today.⁶⁵ I suggest they they risk collapsing into universal jurisdiction. Moreover, I will argue below that when certain considerations are introduced to limit the extraterritorial scope of S's power to punish, these theories end up being too restrictive or in any event less attuned with some of the core features of the distribution and scope of states' power to punish as currently regulated under international law.

But first I need to show that the argument advocated in this chapter does not lead to any of these unfortunate implications. 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 system of

⁶⁴ This proposition, however, does not cover 'purely' international crimes such as genocide, war crimes or crimes against humanity. On this, see chapters 3 and 4 below.

⁶⁵ Justifications for punishment are notoriously complex and varied. I simplify here the literature in a way that takes into consideration at least some of the most relevant considerations on which contemporary justifications rely.

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 it should be clear that this is not the case. When discussing the nationality and passive personality principles 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, the members 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, 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? As argued in Chapter 1, the central claim 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. It is the protection provided that justifies the suffering inflicted upon O. Regardless of whether we can limit some of its unappealing implications by introducing deontological considerations, 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.⁶⁶ It surely seems that allowing every state to exercise their criminal jurisdiction over any given offence will contribute to the certainty of the punishment. More importantly, perhaps, it would contribute to the *perceived* certainty. It is obviously beyond the scope of this enquiry to even begin to consider how strong this extra deterrent effect would be. I suspect that will depend on the type of crimes and the type of offenders. Shoplifting and money-laundering may

⁶⁶ Jeremy Bentham, *The Rationale of Punishment* (London, 1830), chapter VI.

well be differently affected.⁶⁷ In any event, if we accept that there will be *some* extra deterrence, any justification that relies on deterrence would be committed to granting every state the power to punish O. This surely would not prove it wrong but it is hardly an implication their advocates would be prepared to endorse.

Of course, the consequentialist 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 jurisdiction for domestic offences would create between states. 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 power to punish O that is universal in scope.

This restatement is certainly more plausible, but I suggest it is ultimately unconvincing for two reasons. First, although successful in restricting the extraterritorial scope of the power 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 murder of Litvinenko, which was perpetrated in central London.⁶⁸ This by itself, casts some doubts on how successful this restatement ultimately is; the doubts grow when 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 power to

⁶⁷ 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 over this type of acts as well.

⁶⁸ For good coverage of this affair see, generally, http://topics.nytimes.com/top/reference/timestopics/people/l/alexander_v_litvinenko/index.html.

punish O means that it is up to S, and only up to S, to decide whether to prosecute O, even at the expense of creating friction with S2. Thus, the rights-based account I endorse is able to explain an 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, this confers upon S the right to decide whether or not to punish a particular offender, even when this would lead to a suboptimal level of utility. On the basis of these two considerations, the argument I advocate is 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. The central tenet of retributive justifications for legal punishment is that 'S is justified in punishing 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.⁶⁹ 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 normative 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 issue at hand.

A second type of retributivist suggests that desert is also a sufficient condition for conferring upon PS the power to punish O. I take issue with this claim; regardless of what is the precise explanation of the propositions 'S has the power to punish O because O deserves to be punished' or 'inflicting punishment to the guilty is intrinsically good', they seem to warrant the conclusion that PS should have the power to punish O irrespective 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 claim that the truth in retributivism is that punishment is

⁶⁹ McDermott, 'The Permissibility of Punishment'.

justified by grievance-satisfaction.⁷⁰ Arguably, to the victim and all those who sympathise with him it would make little difference, in terms of grievance satisfaction, just which state does in fact punish O, as long as O is effectively punished. It seems, then, that most retributivists will also be committed to defending PS's holding criminal jurisdiction regardless of where the crime was committed.⁷¹ Moreover, the nationality of both offender and victim seem entirely unrelated to the reason why PS holds the power to punish O.

In the remainder of this section I shall concentrate on two arguments that may provide a better answer to this problem: von Hirsch and Ashworth's liberal argument for legal punishment and Antony Duff's influential communitarian approach.⁷² von Hirsch and Ashworth see punishment as mainly explained in terms of censure, though their justification is supplemented by an element of deterrence. Deterrence, as we have seen, cannot help them circumscribe the scope of S's power to punish. 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;⁷³ d) the state is, so the argument goes, the only body capable of providing such public valuation of O's conduct.⁷⁴ 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

⁷⁰ Honderich, *Punishment: The Supposed Justifications*, 233-234.

⁷¹ In effect, Nozick's influential argument that punishment connects the offender with 'correct values' will be liable to this charge. See Robert Nozick, *Philosophical Explanations*. And so would be M. Moore's claim that the criminal law is to 'attain retributive justice' by 'punish[ing] all and only those who are morally culpable in the doing of some morally wrongful act'. See Moore, *Placing Blame: A Theory of Criminal Law*, 33-35.

⁷² See, respectively, Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005) and Duff, *Punishment, Communication, and Community*.

⁷³ They refer here to citizens rather than individuals (von Hirsch and Ashworth, *Proportionate Sentencing: Exploring the Principles*, 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.

⁷⁴ *ibid*, 29-31. Emphasis added.

is the business of the state rather than of private individuals. However, what it means is that they fail to explain *which* state it is the business of. 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 moral wrongs do not depend upon territorial boundaries or political allegiances. 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 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, 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.⁷⁵ My main interest is in appraising Duff's position in the light of extraterritoriality. For punishment to reach O's moral conscience, PS needs to have the moral standing to censure her for that conduct. For PS to have the relevant moral standing, it must fulfil two conditions. First, it must have the appropriate relationship to O, or to her action in question.⁷⁶ 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, sufficient 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.⁷⁷

⁷⁵ On this see the interesting exchange between Duff and von Hirsch in Duff, *Punishment, Communication, and Community*; von Hirsch, *Censure and Sanctions*.

⁷⁶ On this particular issue see my discussion of Duff's argument in Chapter 4 below.

⁷⁷ This aspect of Duff's position is discussed in some detail in Chapter 5, section 4, below.

Duff's argument does better than most of its rivals in this context. This, I believe, is because he is aware that the question about 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 wrong that ought to be criminalized. But arguably 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. Duff has recently elaborated on his explanation of when a particular body has the appropriate standing to bring O into account for her offence.⁷⁸ He mainly relies on a theoretical point about the conception of responsibility which is consistent with, but does not necessarily depend on, his normative justification for legal punishment. In short, 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. 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. She will not be accountable to "a passing stranger, or to [her] aunt, ... or to the Pope".⁷⁹ Duff uses this model to argue explicitly against a territorial conception of criminal jurisdiction. "[A]cting within a specified geographical area X' does not by itself have the normative significance that an answer to the 'as what' question requires."⁸⁰ Rather, individuals should respond 'as citizens' of a political community. His conception of a political community is not of particular interest for us

⁷⁸ Antony Duff, "Criminal Responsibility, Municipal and International," (unpublished manuscript: 2006), cited with permission from the author. See also Antony Duff, *Answering for Crime : Responsibility and Liability in the Criminal Law* (Oxford ; Portland, OR: Hart Publishing, 2007), chapters 1 and 2.

⁷⁹ Duff, "Criminal Responsibility, Municipal and International," 5.

⁸⁰ Duff, *Answering for Crime*, 44.

here. What matters is the relevance that *belonging* to this political community has for O to be accountable to a *particular state* for a criminal offence. On this basis, 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”.⁸¹

This conception, Duff admits, requires an obvious qualification, i.e., it needs to extend to visitors and temporary residents, as well as citizens.⁸² But this causes problems. Duff’s argument for O being accountable to S is that O *belongs* to that political community, that 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 some of its responsibilities and duties”.⁸³ Duff does not elaborate on this. He only stipulates that “[t]his is not to revert to a geographical principle that grounds jurisdiction in the territorial location of crime: what makes normative sense of jurisdiction is still the law’s identity as the law of a particular polity”.⁸⁴ 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. 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 grounds that O is a citizen of S, he seems committed to the claim that temporary residents and visitors are not accountable to S. This hardly seems an outcome that he would be prepared to endorse. To sum up, then, all that Duff ultimately requires for O to be accountable to S is that she receives the kind of rights and protections that S can only

⁸¹ Duff, "Criminal Responsibility, Municipal and International," 13.

⁸² Duff, *Answering for Crime*, 54-55.

⁸³ *ibid*, 54.

⁸³ Duff, "Criminal Responsibility, Municipal and International," 14.

⁸⁴ Duff, *Answering for Crime*, 55.

provide on its territory, and this looks very much like a territorial conception of jurisdiction.⁸⁵

Moreover, it seems that this is a type of territorial conception that falls short of explaining some standard instances of S's power to punish offences. On the one hand, Duff is reluctant to endorse the principles of nationality and passive personality.⁸⁶ With this goes the potential explanatory advantage over the account advocated here. On the other hand, his position would fail to explain, for example, why Scotland had the power to punish anyone (at least anyone who is not a Scottish national) for the Lockerbie incident, or why, for example, Uruguay would have the power to punish offences committed by foreigners in France against its sovereignty, security or important governmental functions (principles of objective territoriality and protection). After all, O lacks the relevant relationship to these states, and one can hardly argue that she has received any specific benefit or protection from either Scotland or Uruguay. And yet, these jurisdictional bases are not only well-established as a matter of law; they also seem based on widely held intuitions about the appropriate scope of S's power to punish.⁸⁷

Ultimately, the problem with Duff's account lies with the fact that it relies on a conceptual point regarding the nature of responsibility rather than on a normative argument about the reasons that justify a *particular* state meting out legal punishment to O. Of course I do not suggest that geographical location *per se* is of particular moral relevance. Rather, my claim is that in order to assess the extraterritorial scope of S's power to punish O we must look at the reasons that justify S *in particular* holding that power. It is the normative argument I provide in defence of that power that is sensitive to the issue of where the offence was committed.

⁸⁵ This, without even beginning to consider the situation of O, a dual 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. The account I advocate would be free from these kinds of difficulties.

⁸⁶ Duff, *Answering for Crime*, 54.

⁸⁷ In Chapter 4 I will argue, furthermore, that Duff's argument cannot properly explain why, if responsibility is relational, international crimes warrant conferring upon *every* state the power to punish O (universal jurisdiction).

7. Conclusion

The findings of this chapter are relatively straightforward. I have argued that international law theory fails to provide a convincing explanation for the existing bases of extraterritorial jurisdiction over municipal crimes. In order to examine the extraterritorial scope of states' power to punish offenders we need to look at the reasons that justify them holding that power in the first place. I argued that the justification for the power to punish advocated in Chapter 1 fully accounts for states' power to punish offences committed on their territory or against their sovereignty, security or important governmental functions. However, I have rejected the propositions that states hold an extraterritorial power to punish O on grounds of her nationality or that of the victim. Indeed, the arguments on the basis of which these jurisdictional rules are commonly defended either beg the fundamental question they are meant to answer or are committed to much broader rules than those in force under international law.

The last section of this chapter examined two possible lines of criticism to the theory of extraterritoriality developed here. I first rejected the claim that the framework put forward is too restrictive by explaining how the justification for legal punishment advocated here can accommodate collaborative efforts to tackle transnational crime through international agreements. Finally, I examined whether competing justifications for legal punishment based on other grounds have more promise in terms of being able to better explain how international law regulates extraterritorial punishment. I suggested that even refined consequentialist and deontological theories ultimately do not fare as well as the argument advocated here in accounting for certain core intuitions on legal punishment.

3

A Jurisdictional Theory of International Crimes

“Nothing is more pernicious to an understanding of [international crimes such as genocide] ... than the common illusion that the crime of murder and the crime of genocide are essentially the same. The point of the latter is that an altogether different order is broken and an altogether different community is violated.”¹

1. Stating the problem

In the previous chapter I argued that S’s normative power to punish an offender (O) for crimes such as robbery, assault, fraud, etc., is primarily territorial.² That is, I argued that PS lacks the normative power to punish O for an offence she committed on TS, unless that offence threatens its sovereignty, security, or important governmental functions (principle of protection). I also argued that neither the nationality of O nor the nationality of her victim (V) suffice to explain why PS ought to have a power to punish O that is extraterritorial in scope. Nonetheless, this general position should be qualified. I suggested that these jurisdictional rules apply only to municipal offences. They do not purport to apply to offences such as genocide, war crimes or crimes against humanity, which I shall call, for present purposes, ‘international crimes’. That there is currently such a thing as an international crime as a matter of international law is hardly controversial. Paradigmatic examples of prosecutions for this type of crimes are probably the trial of Milosevic in The Hague, the extradition proceedings against former Chilean dictator Pinochet in the UK, and the indictment of the current

¹ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1994).

² To repeat, I use for simplicity PS for the extraterritorial state that wants to prosecute O, and TS for the state on whose territory the offence was committed.

President of Sudan before the International Criminal Court. The issue at stake in this chapter is, generally, what makes a particular offence an international crime? That is, what distinguishes international offences from domestic ones? And, furthermore, is it possible to provide a cogent theory of international crimes able to accommodate, for example, genocide, war crimes, crimes against humanity and terrorism?

This chapter is therefore about identifying the specific features of international offences that explain why TS does not have an exclusive power to punish O. But this is not yet an endorsement of the thesis that international crimes warrant conferring upon states universal criminal jurisdiction. This position will be advocated in the following chapter. It is worth clarifying the division of labour I hereby advocate. In this chapter I will only argue that individuals in TS lack an interest in TS holding an immunity against extraterritorial authorities punishing O for international offences committed there. This means that at least *some* extraterritorial authority holds the power to punish O. In Chapter 4 I will provide an account of the jurisdictional rules applicable to this type of offences. There, I will argue that the International Criminal Court (in particular) and *every* state hold the power to punish O for an international crime perpetrated on TS. These questions are often conflated. I suggest, by contrast, that as a matter of philosophical argument it pays to examine them separately.

Before going any further a few points of disambiguation are in order. First, it must be noted that my aim here is not to clarify the main features of existing offences under international law. Nor it is to provide a justification for the criminalization of specific behaviours. My purpose is far more limited in scope. It has to do with identifying a specific feature or set of features that would explain why jurisdiction for these offences should be broader than the territoriality and protective principles I advocated for municipal offences. I shall concentrate on the standard cases in order to provide an intelligible rationale for the settled instances of international offences, rather than try to provide a test that will solve hard cases.

Secondly, in order to provide an answer to the question at hand I need to specify further what is in need of normative justification. After all, both domestic and

international offences can be characterized as behaviours that warrant meting out legal punishment to their perpetrators. However, there are a number of normative implications specifically attached to the notion of *international* crimes. Crucially for our purposes tribunals can hold individuals accountable even in the absence of any traditional link or *nexus* with the perpetrator, the victim, or the offence. This means that an authority *A* can punish an individual for an international crime even if the offence was not committed on its territory, against its sovereignty, or by or against one of its nationals.

Accordingly, for the purposes of the present chapter I shall use the concept of an international offence in a narrow, exclusively jurisdictional sense, as crimes that warrant conferring upon some authority extraterritorial criminal jurisdiction. In so doing, I purport to isolate this issue from other normative and legal consequences (often pressing and sensitive) commonly associated with this type of crime such as the granting of amnesties or pardons by TS, the applicability or inapplicability of statutes of limitations, or the law on state or diplomatic immunity.³ I am only concerned here with the distinct jurisdictional regime applicable to them. In short, this chapter has to do with identifying a specific feature or set of features that would explain why Belgium can legitimately claim the power to prosecute and punish two Rwandan nuns for participating in a genocide in Rwanda, but cannot prosecute and punish a single murder perpetrated in, e.g., El Salvador.

This way of framing the question might be controversial. It may be objected that by focusing exclusively on this jurisdictional aspect I am using a single normative implication to conceptualize international crimes instead of providing a sound analysis of the concept itself. In other words, and as it was put to me, that I am trying to put the

³ See the 1968 Convention on the Non-Applicability of the Statutory Limitations to War Crimes and Crimes against Humanity (adopted by G.A. Res 2391). Also, ICC Statute, articles 29 and 27(2) and, e.g., the Argentine Supreme Court decision in *Arancibia Clavel*, and the French Court of Cassation in *Barbie*. Recently, the Audiencia Nacional of Spain refused to extradite former Argentine President Maria Estela de Perón, precisely on the grounds that because the offences she was requested for were not crimes against humanity (and therefore international offences) the statutes of limitations applied and Argentina lacked jurisdiction to try her. See http://www.elpais.com/articulo/internacional/Audiencia/Nacional/rechaza/extraditar/Isabelita/Peron/elpepuint/20080428elpepuint_15/Tes (last accessed 10 January 2008).

cart before the horse.⁴ I disagree. Admittedly, this approach implies a criticism of part of the existing literature.⁵ It suggests, among other things, that it is not very productive to try to determine what humanity stands for in the notion of crimes against humanity, and rather seeks to account for a specific implication often associated with this type of offences.⁶ Moreover, this implication is arguably an important reason why these offences are referred to as *international* crimes, and why prosecutions for this type of crimes are commonly resisted and criticized.⁷ Thus, using Rawlsian vocabulary, I advocate in this thesis a *political* conception of international offences, that is, one that sees them as crimes for which *extraterritorial* authorities can legitimately intervene in what would otherwise be the domestic affairs of other state(s).⁸

The quest for a unified explanation of international crimes is an important one. For one thing, it contributes to answering the question of whether there should be a system of international criminal law at all by forcing us to clarify its normative underpinnings. Furthermore, it has become more pressing as a result of states increasingly claiming an extraterritorial power to punish offenders (O) for crimes under international law other than piracy. Genocide and crimes against humanity were the first hard cases to be decided by a court of law in the aftermath of World War II. More recently, certain sexual offences and terrorism have been at the centre of this debate. Among the arguments articulated as an explanation for the particular jurisdictional regime attached to international offences we could readily highlight the following: it has been argued that they are analogous to piracy in some specific respect; or that they are perpetrated in places where law enforcement is simply too weak; that they harm or violate humanity

⁴ I am grateful to Paul Roberts for pressing me on this issue.

⁵ Two exceptions are May, *Crimes against Humanity* and Cryer, *Prosecuting International Crimes*, 75.

⁶ For examples of this approach see David Luban, 'A Theory of Crimes against Humanity', *Yale Journal of International Law* 29 (2004) and Richard Vernon, 'What Is Crime against Humanity?' *The Journal of Political Philosophy* 10, no. 3 (2002).

⁷ See the US arguments against Belgium prosecuting Tommy Franks, or George W.H. Bush.

⁸ In *The Law of Peoples* John Rawls sketches a political conception of human rights as rights which set limits to the sovereignty of states, in that their violation constitutes a reason for other states or international bodies taking action against the violator. For a robust defence of this political conception of human rights see Joseph Raz, 'Human Rights without Foundations', *University of Oxford Legal Studies Research Paper Series* (WP 14/2007).

itself; that they shock the conscience of humankind, among others. I will divide them here into two main groups. In section 2 I shall examine arguments that claim that international offences are relevantly analogous to piracy. Section 3, examines the arguments that purport to explain them in terms of harm to humanity. Ultimately, I shall consider these two families of arguments unsuccessful. In section 4, I shall present my own jurisdictional theory of international crimes. I shall argue that what justifies making a criminal rule into an *international* criminal rule is the fact that it cannot really be in force on the territory of TS if it has to rely exclusively on it being enforced by TS. Section 5 deals with the objection that international criminal law does not need a theory of international crimes. And, finally, section 6 examines whether different variants of terrorism should qualify as international crimes.

2. Piracy-based explanations and the history of international crimes

Piracy was undisputedly the first international offence in the specific sense I use here. Pirates have traditionally been referred to as *hostis humani generis* and their actions considered cognizable by any state which gets a hold on them.⁹ Although scholars point to the slave trade as another classical example of an international offence, piracy has proved extremely enduring and influential both in theory and practice. In short, it single-handedly opened the door for the contemporary doctrine of universal criminal jurisdiction. During the 20th Century, international law produced a new generation of international offences: war crimes, crimes against humanity, genocide, and several others.¹⁰ These offences are quite dissimilar from piracy. Nevertheless, scholars, theorists and courts have repeatedly tried to explain the main features of international offences, and in particular their distinct jurisdictional regime, by reference to one or

⁹ This position on piracy as a matter of what we currently call International Law goes back at least as far as Grotius. But it has been suggested that this view goes essentially back in time until the period before Alexander (Max Radin, 'International Crimes', *Iowa Law Review* 32 (1946-1947), 41). On piracy, see generally Alfred P. Rubin, *The Law of Piracy* (Irvington-on-Hudson, N.Y.: Transnational, 1998).

¹⁰ Bassiouni, e.g., mentions torture, apartheid, hijacking, etc. See M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', *Virginia Journal of International Law* 42, no. 1 (2001).

more of piracy's specific features.¹¹ Characteristically their reasoning follows the following pattern: piracy undisputedly is and ought to be an international offence; war crimes, genocide, crimes against humanity and the like share feature 'x' with piracy; thus, they should also be international offences. I will argue that there are two different kinds of problems with these arguments. Some misguidedly link universal jurisdiction to a particular feature 'x' that piracy arguably shares with other international crimes but which cannot explain its jurisdictional regime; others, by contrast, fail to make that link altogether and argue on the basis of a *non sequitur*.

Willard Cowles provided one of the few explanations of why war crimes must be considered international offences.¹² His argument is not purely normative; rather he seems to rely also on historical and legal considerations. However, it illustrates quite well the kind of arguments this section is about. Cowles represents what I shall call for present purposes the 'scene of the crime' theory. He argues that the "origin of the jurisdiction over the war criminal must be sought in the ancient practice of brigandage."¹³ He suggests that the concept of the war criminal is a legal construction of the 20th Century. Previously, war criminals acting both in a public and a private capacity were considered brigands. And brigandism, just as piracy, "stem[s] from the fundamental fact of the lack of governmental control in the areas of their operations"; they flourish where political order and law enforcement are lacking, i.e., they characteristically grow during periods of war.¹⁴ It is in this sense that war crimes are very similar to piratical acts: in both situations there is "a lack of any adequate judicial system operating on the spot where the crime takes place" and "both the pirate and the war criminal take advantage of this fact, hoping thereby to commit their crimes with

¹¹ See, for example, *Israel v Eichmann*.

¹² In effect, as I argue in section 3 below, most of them were tailored specifically to tackle crimes against humanity. For another argument on war crimes, though far less appealing, see Thomas H. Sponsler, 'The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen', *Loyola Law Review* XI (1968-1969).

¹³ Willard B. Cowles, 'Universality of Jurisdiction over War Crimes', *California Law Review* XXXIII, no. 2 (1945), 181.

¹⁴ *ibid*, 193.

impunity.”¹⁵ Thus, he concludes, “[t]he jurisdiction, exercised over war crimes, has been of the same nature as that exercised in the case of the pirate, and this broad jurisdiction has been assumed for the same fundamental reason.”¹⁶

Cowles’ argument is historically informed, and certainly appealing. However, I suggest it is ultimately unsuccessful. The reason for this is that it relies too heavily on the pedigree of piracy as an international offence. Put differently, he is so concerned with showing that war crimes can be assimilated to piracy, that he overlooks the justification for considering piracy an international offence in the first place. I suggest it is worth paying a closer look to what is ultimately doing the justificatory work in his argument. On his view, international offences are those which are perpetrated in places where governmental control is lacking, and where offenders can expect to act with impunity. Whether this argument suffices as a *historical* reason for making piracy an international offence is questionable. Many other offences often occurred on the high seas, such as assault or murder unaccompanied by robbery, and these were not subjected to extraterritorial jurisdiction. Thus, neither the fact that piracy or war crimes are difficult to prevent and punish, nor the fact that they are committed in areas where there is insufficient presence of a state authority seem to suffice in order to understand why they were made into international offences.

Whether Cowles’ argument succeeds as a *normative* explanation of the jurisdictional regime of international offences is even more dubious. Although Cowles does not say so explicitly, his argument seems to be that where law enforcement is very weak or lacking, such as the high seas or a situation of war, the standard bases of jurisdiction for domestic offences would fail to *deter* potential offenders. This is implied by the assertion that in such contexts brigands and war criminals can hope to commit their crimes with impunity. I agree with the claim that allowing every state to punish O

¹⁵ *ibid*, 194, 217. Cowles points to other features of brigandism which, to some extent, might explain the expansive jurisdictional rules on it: “it is motivated by no public cause and ... authorized by no state”, or it “has been to a large extent international in character”, i.e., international borders are ideal for the brigand, and “bands of brigands are often made up of members of more than one nationality” (at 184, 185, and 186 respectively). But ultimately he relies on the ‘scene of the crime’ consideration to justify its particular jurisdictional regime.

¹⁶ *ibid*, 217.

would increase deterrence. However, as argued in Chapter 2 above, deterrence as a general justification for the power to punish O would collapse the distinction between municipal and international offences by providing an extraterritorial Prosecuting State (PS) with jurisdiction over both of them. As a result, Cowles' argument is not an explanation of what makes *war crimes* and *piracy* international offences.

The second and perhaps most influential version of these piracy-based explanations is the 'nature of the crime' theory.¹⁷ More precisely, it is often argued that the 'heinousness' of an offence is what justifies a state with 'no connection' at all with it holding the power to punish O. This proposition has a number of different formulations. The ICC Statute, for instance, talks about 'unimaginable' atrocities. Similarly, it has been argued that international offences are characterized by "a level of callousness that embodies the very essence of evil itself"¹⁸, or that they "shock[s] the conscience of mankind"¹⁹, that they have an "added dimension of cruelty and barbarism"²⁰ capable of "tear[ing] the roots of civilized society"²¹, and so on. The heinousness argument, however, is not used by itself to justify the particular jurisdictional rules often associated with international offences. Rather, this implication is explained also by way of analogy with piracy.²² Under this argument, it is the substantive nature of pirates' acts, i.e., its heinousness –rather than the location of the crime – that makes them cognizable by an extraterritorial authority.²³ A crucial

¹⁷ Princeton Principles, art. 1.

¹⁸ Laurence Thomas, 'Forgiving the unforgivable' in Eve Garrard and Geoffrey Scarre, *Moral Philosophy and the Holocaust* (Aldershot: Ashgate, 2003).

¹⁹ *Prosecutor v Tadic* (1995) at 57. See also, Michael Walzer, *Just and Unjust Wars : A Moral Argument with Historical Illustrations* (New York: Basic Books, 2000), 107.

²⁰ *Regina v Finta*, 818.

²¹ Christopher C. Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability', *Law and Contemporary Problems* 59, no. 4 (1996), 171.

²² Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', *Harvard International Law Journal* 45, no. 1 (2004).

²³ *ibid*, 205. For e.g. of explicit endorsements of this analogy see Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *Yale Law Journal* 100 (1991), 2557-2557 See also, 1 *Law Reports of Trials of War Criminals* 35, 42 (1947) (Brit. Mil. Ct. Almelo), cited in Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', 195. This reasoning has been followed, e.g., by the American Courts *In re Extradition of Demjanjuk* (1985). *Filartiga v Pena-Irala*, arguably the most famous case in which the U.S. claimed

advantage of this approach, Kontorovich suggests, is that by arguing that the heinousness of the crime explains the power to punish international offences on universality grounds, advocates of the piracy analogy put their opponents in the position of having to either question the heinousness of, for example, systematic torture, or concede that it should be treated like piracy.²⁴ One may well feel discouraged from trying to prove the premise wrong.

Kontorovich argues powerfully against this explanation. He correctly suggests that its heinousness could not have been the reason why piracy was considered an international offence in the first place. When similar acts were perpetrated by privateers, i.e. state-licensed pirates, they were repatriated rather than subjected to universal criminal jurisdiction.²⁵ Moreover, acts of piracy were never really considered particularly heinous. Piracy ultimately amounted to a very troublesome variety of robbery.²⁶ And although the *locus* where it was committed made it hard to prosecute, this was certainly not enough to put its heinousness on a par with offences such as state-sponsored rape or the poisoning of water supplies.²⁷

Once it is stripped from the piracy analogy, this argument seems to lose whatever it was that explained precisely why extraterritorial bodies would have the power to punish O. There is no evident connection between the heinousness of a particular crime and the scope of a state's power to punish O. And yet, it is precisely this connection that the theory needs to establish. Accordingly, this argument simply rests on a *non sequitur*.

extraterritorial jurisdiction over acts of torture is not relevant for our purposes here, as it deals with civil jurisdiction, and therefore not with the U.S.'s power to punish O.

²⁴ Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', 208.

²⁵ *ibid*, 210ff.

²⁶ See *United States v Palmer*, cited in *ibid*, 225.

²⁷ Both already mentioned by Vattel, *Law of Nations*, book III, § 145, 157. Conversely, it might have been precisely because piracy was not as heinous as murder or rape that states were willing to accept extraterritorial jurisdiction over it: "[u]niversal jurisdiction over murder would usurp this deeply felt responsibility and thus antagonize the nation with traditional jurisdiction." Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', 229 citing *United States v Furlong*. In this case, the Court argued: "Robbery on the seas is considered an offence within the criminal jurisdiction of all nations ... Not so with the crime of murder. It is an offence too abhorrent to the feelings of man, to have it made it necessary that it also should have been brought within this universal jurisdiction." (at 196-7).

3. International offences as 'crimes against humanity'

Arguably, the most elaborate arguments for international offences have been developed within, what I call here, the paradigm of 'crimes against humanity' (hereinafter CAH).²⁸ This paradigm is not necessarily focused on the legal category of crimes against humanity, as distinct from war crimes, genocide, or crimes against peace (aggression). Rather, it often implies the particular view, traceable perhaps to The Hague Convention's Martens Clause, that international crimes harm or violate humanity itself.²⁹ This purportedly explains why any state or an international tribunal would be entitled to punish their perpetrators. Interestingly, it was in the context of CAH that scholars and tribunals have been pressed to distinguish municipal from international offences.³⁰ War crimes, by contrast, entered the constellation of international offences largely uncontested.³¹ In fact, the first criterion used to internationalize CAH was precisely the 'war nexus'. That is, CAH were cognizable by an extraterritorial authority only when committed "before or during the war" and "in execution of or in connection with" war crimes or crimes against peace. In any event, CAH have now established themselves as a category of international offences in their own right and, some would argue, they could eventually become synonymous with them.³²

The CAH paradigm revolves around the notion that CAH are group crimes in the sense that they are either committed by certain groups or against them. These

²⁸ I refer here to the writings of Anupam Chander, 'Globalization and Distrust', *Yale Law Journal* 114 (2005); Adil Ahmed Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law', *Buffalo Criminal Law Review* 9 (2005); Luban, 'A Theory of Crimes against Humanity'; May, *Crimes against Humanity*; Vernon, 'What Is Crime against Humanity?' 283. Here, I will mainly concentrate on the last two.

²⁹ Preamble to the 1899 Hague Convention (II). See also *Prosecutor v Erdemovic*, §28 (29 November 1996).

³⁰ Phillis Hwang, 'Defining Crimes against Humanity in the Rome Statute of the International Criminal Court', *Fordham International Law Journal* 22 (1999); Beth Van Schaack, 'The Definition of Crimes against Humanity: Resolving the Incoherence', *Columbia Journal of Transnational Law* 37 (1999).

³¹ This has been considered one of the most underrated legacies of the Nuremberg trials. And rightly so because, at the time, there was no clear rule of international law that treated war crimes (and for that matter crimes against peace) as international offences subject to universal jurisdiction. To this, one may add the fact that the Allied power could have used other jurisdictional bases to try war the Germans for war crimes and aggression. On this see Sponsler, 'The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen'.

³² William J. Fenrick, 'Should Crimes against Humanity Replace War Crimes?' *Columbia journal of Transnational Law* 37 (1998-1999). For the view that war crimes are more appropriate as synonyms of international offences see Simpson, *Law, War and Crime*.

arguments usually rely also on the fact that they entail some egregious form of wrongfulness. I will argue that the different arguments under this account fail on two relevant grounds. First, they ultimately fail to identify a convincing rationale for making CAH cognizable by some *extraterritorial* authority. Secondly, when they do provide or point towards some answer to this question, this answer collapses the distinction between domestic and international offences by advocating extraterritorial prosecutions for both.

A first line of argument relies on the proposition that CAH are international offences because they are perpetrated by governments or government-like organizations against groups under their control. There are several versions of this argument. For the sake of clarity of exposition, I shall divide them here into three: i) the conceptual claim that PS has the power to punish O on the grounds that TS has forfeited its immunity against PS doing so; ii) the normative argument that PS's power to punish O is based on the interests of individuals in TS; and iii) the argument that this power is based on the individual interest of every single person on earth.

Let us first examine the claim that when security forces or state officials in TS perpetrate CAH against part of TS's own population, TS forfeits its immunity against other parties interfering in its internal affairs by, in particular, punishing O.³³ This claim is intuitively plausible. Why should such a state retain an immunity against this type of interference? The problem with this argument is that it fails to explain why TS has forfeited its immunity against a certain extraterritorial body, in particular, holding the *power to punish* O. It is harder to provide a satisfactory answer to this question than it might initially appear.

I will illustrate this by reference to an interpersonal example. While O attempts to kill V by shooting at her, O would arguably lack a right against third parties intervening to save V's life (by killing O if necessary). This is often explained by arguing that O forfeited her right against being attacked. However, once the threat is over (e.g. O misses her final shot or, indeed, V is dead) a third party would need a different kind of

³³ Luban, 'A Theory of Crimes against Humanity', 109.

justification to use force against O (for our purposes, by punishing her).³⁴ This is precisely the kind of argument that justifications for legal punishment provide and the question I claim this argument begs. In other words, the argument being considered can only explain why TS forfeited its claim-right against a third party intervening on humanitarian grounds to stop the perpetration of CAH on its territory or, similarly, why PS is at liberty to do so. But this does not account for TS's loss of its immunity against foreign bodies *punishing* O, let alone for *PS's power* to do so. Unless, perhaps, this power is grounded on the need to incapacitate O. It is unlikely, however, that defenders of this argument would be willing to endorse incapacitation as a general justification for the legal punishment. Moreover, this position has a further difficulty. If this were the case, then Israel, France and Italy would not have had the power to try Eichmann, Barbie and Priebecke, respectively, since when they were apprehended they hardly constituted a threat to anyone.

The second version of this argument purports to explain PS's extraterritorial power to punish O by reference to the interests of individuals in TS generally. The claim is that when CAH are perpetrated by a state or state-like entity, this is likely to affect other people in TS besides V. As a result, the international community "would have a legitimate basis for intervention so as to *protect* the larger community also likely to be harmed by the plan."³⁵ This argument is open to the criticism sketched in the previous paragraphs that the actual physical protection afforded to potential victims, either by way of deterring or incapacitating offenders, cannot withstand scrutiny as a justification for TS's *power* to punish O. It also has a further troublesome implication. Tying the power to punish O so tightly to the protection of potential victims would lead to the unacceptable consequence that if the government of TS succeeds in completely exterminating a minority that lives on its territory, i.e. if it succeeds in eliminating potential victims, then no authority (neither domestic nor extraterritorial) would have the power to punish O.

³⁴ On this see Chapter 1, section 3.1 above.

³⁵ May, *Crimes against Humanity*, 88. Emphasis added.

Thirdly, international crimes have been explained by recourse to the interests of every individual on earth. On the one hand, it is argued that CAH harm humanity in the sense that they are both crimes against our shared humanness and against humanity understood as mankind. The aspect of our humanness that is affected by CAH is our character as political animals.³⁶ Human beings, the argument goes, are political rather than social animals (e.g. ants) in the sense that we need some form of artificial coercive organization.³⁷ The problem is that politics can go horribly wrong and end up in the most atrocious crimes. Accordingly, “because we cannot live without politics, we exist under the permanent threat that ... the indispensable institutions of organized political life will destroy us.”³⁸ CAH so defined pose a ‘universal’ threat that every individual human being (mankind) has an interest in repressing. Thus, the interest that justifies making them into international offences is the “interest in expunging [them] from the repertoire of politics ... [; because] in a world where crimes against humanity proceed unchecked, each of us could become the object of murder or [persecution].”³⁹

I am sympathetic to the general claim that individuals both within TS and outside it (in PS, etc.) have an interest in O being punished for perpetrating an international offence. I disagree, however, with the particular interest on which this account relies. Indeed, it seems to rest on the proposition that every human being has an interest in CAH being punished irrespectively of where they were perpetrated, simply because anyone could be a victim of these offences. We are all hostages of some political organization, and politics can potentially always go horribly wrong. Thus, the argument goes, any state and not just TS should have the power to punish O for this type of offence.⁴⁰ However, we may readily object, we also live inevitably next to each other,

³⁶ Luban, 'A Theory of Crimes against Humanity', 110.

³⁷ *ibid*, 113.

³⁸ *ibid*, 90-91. This is explicitly similar to Richard Vernon's explanation of CAH as an “inversion of the jurisdictional resources of the state” (Vernon, 'What Is Crime against Humanity?' 242). Vernon's argument largely overlaps with many of the consideration on which Luban's argument is based. To this extent, I shall not explicitly deal with it here.

³⁹ Luban, 'A Theory of Crimes against Humanity', 138.

⁴⁰ As a matter of fact, Luban argues for vigilante jurisdiction. However, he qualifies his claim by suggesting that it might be dangerous to allow private individuals to go punishing perpetrators of crimes against humanity. Only institutions which respect the natural justice duty (which essentially entails the

and every human being could also be a victim of murder, assault, theft, etc. Moreover, the chances of being a victim of any of these municipal offences are, in a significant majority of states, far greater than those of being a victim of CAH. Thus, despite providing a rationale for conferring upon PS an extraterritorial power to punish O, in so far as this argument is grounded on the individual interest that each human being holds in not being *herself* the victim of a criminal offence, it collapses the distinction between international and municipal offences by advocating extraterritorial prosecutions for both.

The reader might find this response unfair. Clearly there is a significant disanalogy between offences committed by states or state-like organizations and those committed by individuals acting alone: while TS can prevent/punish domestic offences being perpetrated, who would be able to stop/punish TS's officials from/for perpetrating CAH against its subjects? Though I readily admit that this disanalogy holds, I dispute its purported implications. If the problem is that while some agent (TS) can prevent a single murder, no one can prevent CAH, the solution seems to be to grant some extraterritorial body the right to do so. However, and as explained above, the right to stop atrocities occurring in TS involves only a liberty to intervene on humanitarian grounds, i.e. a first order incident, not (or not yet) a power to punish those responsible for them. Ultimately, this power seems to rely on the claim that every human being has an interest in *detering* potential perpetrators of CAH. This is the only way in which the criminal law may try to "expunge these acts from the repertoire of politics."⁴¹ Nevertheless, this shows precisely why the alleged implications of the disanalogy put forward disappear. To repeat, although deterrence can explain extraterritorial prosecutions in the case of CAH, I have argued that it collapses the distinction between domestic and international offences by advocating extraterritorial prosecutions for both.

safeguards of due process of law) should have the power to exercise this right every individual holds. I think he conflates two different things. On this see section 1 in Chapter 5 below.

⁴¹ See text to fn 43 above.

On the other hand, a different consideration that purportedly explains why CAH are international offences is that they are committed against individuals on grounds of their membership to a group or population. One version of this argument, for example, justifies extraterritorial prosecutions by reference to the fact that “all women share an interest in ensuring that women are not killed solely for being women, and all Jews share an interest in ensuring that Jews are not killed solely because they are Jews”.⁴² However, few people would argue, e.g., that all ‘hate crimes’ should be turned into international offences.⁴³ The fact that V is assaulted because of being Jewish, or black, or Latino, in a quiet alley in Hamburg hardly entails, nor should it, that Germany lacks its immunity against some extraterritorial authority holding the power to punish O. Moreover, to repeat, this argument would have unacceptable implications if TS is threatening to exterminate a minority which only exists in TS.

Admittedly, this argument could be stated in more general terms. In Luban’s words, “in a world where crimes against humanity proceed unchecked, each of us could become the object of murder or [persecution] solely on the basis of group affiliation we are powerless to change.”⁴⁴ Similarly, May argues that “[h]umanity is implicated, and in a sense victimized, when the sufferer merely stands in for larger segments of the population who are not treated according to individual differences..., but only according to group characteristics.”⁴⁵ This is because this type of offence is individuality-denying. The underlying rationale behind these claims seems to be that these are crimes that could happen to people for reasons that are beyond their control. As such, it might seem plausible enough; we may all have an interest in not being victims of crimes for reasons we cannot change. Nevertheless, I think this claim misses whatever it is that we find compelling about the original statement. If V were assaulted because she is tall, or short, or pretty, this would hardly constitute a sufficient reason for triggering the extraterritorial prosecution of her attacker. Conversely, this argument

⁴² Luban, 'A Theory of Crimes against Humanity', 138.

⁴³ Furthermore, this argument implies that racially etc. motivated crimes are more serious than crimes with other motivations, or even motiveless crimes, and this is not easy to argue.

⁴⁴ Luban, 'A Theory of Crimes against Humanity', 138.

⁴⁵ May, *Crimes against Humanity*, 85-86.

seems unable to accommodate a situation in which she is attacked for belonging to a particular political party, or professing a certain religion, etc. (things she would eventually be able to change). Rather, it seems that what is doing the justificatory work here is the fact that V is a member of a vulnerable group or persecuted minority, rather than the fact that she is being targeted for reasons she cannot change. Put differently, it is the fact that she is Jewish, or black, Muslim or Albanian (in a world where these groups are persecuted) not the fact that she cannot change what she is, that matters.

May could reply that the individuality-denying element of CAH is not a *sufficient* condition for extraterritorial prosecutions. His account also requires that TS deprives its subjects of physical security or subsistence, or that it is unable or unwilling to protect them from harms to their security or subsistence, i.e., that it violates what he calls the 'security principle'.⁴⁶ However, I fail to see why a policy of ethnic cleansing directed against members of a specific minority should be an international offence, and one of mass random killings should not. May might respond by arguing that his account can deal plausibly with the latter too. The individuality-denying element is not a *necessary* feature of international offences either. Thus, the random killings policy might be considered an international offence on grounds of the group-based character of the perpetrator, rather than that of the victim.⁴⁷ May's argument is not easily defeated. However, I want to argue that, ultimately, it is philosophically unsatisfying because it fails to provide an explicit rationale for subjecting certain offences to extraterritorial prosecutions.

If we look a bit closer, this group-based argument seems to get its moral pull from the fact that it relies on the vulnerability of certain groups, or better, perhaps, on the vulnerability of certain individuals as members of these groups. Although pointing in

⁴⁶ *ibid*, 68. May relies on a particular division of labour here which needs elaboration. He contends that the violation of the 'security principle' explains why TS lacks an *immunity* against PS interfering (by punishing O), while the fact that CAH are committed against groups (or by them) (the 'international harm principle') explains why O herself lacks an *immunity* against being punished. I find this problematic. Indeed, why would one want to put such a high threshold to justify before O the harm involved in punishment when we usually accept that O would be liable to being punished for domestic offences? Rather, the crucial question seems to be not why would O be liable to being punished but why would O be liable to being punished *by PS*?

⁴⁷ Which also entails a violation of the international harm principle.

the right direction, I believe this consideration still falls short of explaining *why* these features entail that some extraterritorial authority should hold the power to punish O. It fails to explain what is the interest that members of a persecuted minority have that would warrant conferring upon *PS* the power to *punish* O without collapsing the distinction between domestic and international offences. In other words, May's account also begs the crucial question. It provides at best a fairly accurate rule of thumb as to what kind of acts are, or should be, international offences, but it fails to provide an explanation of why this is so.

4. A 'jurisdictional' theory of international crimes

In the previous sections, I have argued that most accounts of international offences cannot really explain what distinguishes them from domestic crimes in terms of allowing for some form of extraterritorial jurisdiction. Admittedly, they highlight several considerations which point in the right direction: the fact that international offences are committed by states or state-like entities, or perpetrated in places where law enforcement is particularly weak, or involve the most heinous acts committed against a vulnerable group of people. However, they all fail to connect the fundamental consideration(s) on which they rest, with a plausible explanation of why a particular state holds the power to punish O for a particular offence.

In this thesis I have argued that TS's power to punish O is justified by the interest of individuals in TS in there being a system of criminal law in force. I now contend that there are certain criminal rules that cannot be in force in TS unless at least *some* extraterritorial authority holds a concurrent power to punish O. These rules provide a foundation for international crimes. Let me illustrate this by reference to a particular crime against humanity: acts of widespread and systematic torture perpetrated in TS.⁴⁸ Plausibly, whenever systematic or widespread acts of torture are perpetrated in TS, it will necessarily be the case that TS is either responsible for perpetrating, instigating or

⁴⁸ See article 7.1 of the ICC Statute. I leave aside for the time being the requirements of them being "an attack directed against any civilian population" and the "knowledge of the attack" (*ibid*) and any further qualification stemming from art. 7.2.

allowing them, or simply unable to do anything about them. As a result, the fact that TS itself holds the power to punish this kind of act cannot really contribute to the sense of dignity and security of individuals in TS. As Geras puts it, “states and governments are themselves ... the very source of the calamities we are talking about ...; [thus, they] cannot be relied upon as the guarantors ... of last resort.”⁴⁹

Take for example the last Argentinean dictatorship (1976-1983). As is well documented, the military had significant leeway to kidnap individuals, torture them, and in most cases make them disappear.⁵⁰ Should a military squad knock on their door, there was no recourse to the police, no hope of being rescued by the authorities, nothing except the sheer use of force in self-defence. The reason for this is that these squads were not, in any meaningful sense, *bound* by a criminal prohibition against doing what they were, in fact, ordered to do as a matter of policy. In this context, individuals in Argentina could not meaningfully believe that the criminal rule against being kidnapped, tortured and killed by these public officials was *in force*. These criminal prohibitions could not contribute to their sense of dignity and security.

However, would not individuals in TS have a conflicting interest? In the general Introduction to this thesis I argued that individuals in TS have an interest that is sufficiently important to confer upon TS a *prima facie* immunity against extraterritorial authorities dictating or enforcing criminal laws on its territory. I argue now that it follows from the stated consideration that in the outlined circumstances TS would lack an immunity against extraterritorial bodies punishing O. But first a conceptual point is in order. To claim that TS lacks this immunity means that at least *some* extraterritorial authority would hold the power to punish O.⁵¹ For present purposes, I shall use these two propositions interchangeably. Having clarified that, let us now turn to the purported normative implication. I suggest that TS normally holds a *prima facie*

⁴⁹ Norman Geras, *The Contract of Mutual Indifference : Political Philosophy after the Holocaust* (London: Verso, 1998), 4.

⁵⁰ For two good accounts see Jaime E. Malamud-Goti, *Game without End : State Terror and the Politics of Justice* (Norman: University of Oklahoma Press, 1996) and Iain Guest, *Behind the Disappearances : Argentina's Dirty War against Human Rights and the United Nations* (Philadelphia: University of Pennsylvania Press, 1990).

⁵¹ On this see section 3 in the general Introduction to this thesis above.

immunity against PS punishing O for an offence she committed on its (TS's) territory. This immunity is ultimately explained by the interest of individuals in TS in foreign bodies not dictating criminal rules binding on them. This is, in part, because this is what it means for TS to be a self-governed entity. This immunity, however, is not absolute; it is limited both by the interests of non-members, and by the fundamental interests of the members of TS. I suggest that individuals in TS have a fundamental interest in there being a criminal rule in force in TS against widespread and systematic acts of torture, murder, and the like. Moreover, this interest is not only incompatible with TS holding an immunity against PS punishing O, but it also overrides the interest that explains that immunity.

To wit, the interest of, e.g., the Germans in 1939 in a foreign body not punishing O for acts of genocide on German soil is not sufficiently important to warrant conferring upon Germany an immunity against a foreign body punishing O. This is because the interest of, for instance, the German Jews and other prosecuted minorities in such a criminal rule being in force in Germany is more important than the interest of their Aryan co-nationals in being left alone. If nothing else, I suppose that the German Aryans would be able to lead a minimally flourishing life even without a right preventing foreign authorities from dictating criminal rules binding in Germany against widespread and systematic murder, whereas members of persecuted minorities would find it much harder to live a decent life in a state in which their rights not to be killed, tortured, etc. are not protected by the criminal law system.

Let me clarify further my position in three relevant respects. First, I am not suggesting that international offences are exclusively crimes committed by states. Rather, I readily admit that certain non-state actors can also commit this type of offences. In fact, in contemporary warfare most of these crimes are committed by irregular forces.⁵² In certain areas in Colombia, for example, guerrilla or paramilitary groups hold *de facto* a significant portion of the powers which are often associated with

⁵² Mary Kaldor, *New and Old Wars : Organized Violence in a Global Era* (Stanford, Calif.: Stanford University Press, 2007).

the state. They function as police officers, judges, administrative authorities, and they even collect “taxes”. Now, they also perpetrate a significant number of offences such as kidnapping and murdering political and military opponents and sympathisers, etc.⁵³ As in the Argentine situation above, I suggest that individuals living in the zones controlled by these guerrilla groups will not consider, either, that there is a criminal rule against being kidnapped or killed by these groups that is in force (binding upon them). That is, at least when such acts are performed as a matter of policy. The fact that the Colombian state provides a criminal rule against members of these groups performing such acts does not contribute in any meaningful way to the sense of dignity and security of individuals living in these areas. As a result, I suggest, individuals living in those territories have a fundamental interest in these rules being in force that overrides their interest in TS holding an immunity against a foreign body punishing O for these offences.⁵⁴

The second relevant point of clarification is that not every wrong committed on TS on a widespread or systematic scale would entail that TS lacks an immunity against an extraterritorial authority punishing O. In short, systematic and widespread traffic violations or bicycle theft perpetrated on TS do not amount, under the scheme I advocate, to international offences.⁵⁵ The reason for this is, arguably, that the interest of individuals in TS in being a self-governed state is more important than their interest in traffic regulations being binding on particular groups of individuals. I have argued that the interest of individuals in TS in it being a self-governed authority is limited by the interests of individuals outside TS, and by the fundamental interests of the individuals

⁵³ On the situation in Colombia and how the state has been unable to deal with these groups even by using drastic emergency penalty means see Manuel A. Iturralde, "Punishment and Authoritarian Liberalism: The Politics of Emergency Criminal Justice in Colombia (1984-2006)" (PhD Thesis, London School of Economics, 2007).

⁵⁴ Admittedly, someone may ask, however, whether it is really the case that the fact that some extraterritorial body would have the power to punish O would contribute to the rule against, e.g., systematic torture being in force in TS. This issue will be tackled with some more detail in the following chapter.

⁵⁵ This was, in fact, the case in Argentina during the dictatorship, and even before that. Many state officials and unofficial armed groups linked, often, to Trade Unions or other official bodies, characteristically could violate most of the traffic regulations. I shall come back to this issue in section 6 below.

in TS.⁵⁶ I now suggest that individuals in TS do not have a *fundamental* interest in these traffic regulations being in force that is sufficiently important to override their general interest in being left alone. Only violations of fundamental rights such as the right not to be tortured, killed, raped, etc. would. In cases of far milder crimes, I suspect their interest in dealing themselves with these issues prevails. This, then, clarifies the role that moral egregiousness or enormity plays in defining international offences. It would be, of course, hard to decide where to draw the line. Yet, the purpose of this chapter is only to explain *why* certain standard offences warrant conferring upon some extraterritorial authority the power to punish O, while others do not.

Comparing these values against each other might lead to further difficulties. It may be objected, for instance, that there might be some communities within a nation state who may have fewer qualms than most about foreign powers interfering. E.g. Welsh nationalists might resent English rule so much that they would prefer to have a foreign power dealing with traffic offences. Or what if ethnic minorities are disproportionately targeted for traffic violations? Would they not have an interest in a foreign power prosecuting these offences? I reject the purported normative implication underlying both these objections. Even if the Welsh would rather have any state but England prosecuting traffic violations on Welsh territory, I seriously doubt that they would have a sufficiently important interest to warrant conferring upon, e.g., Japan the power to prosecute and punish traffic violations. This is because the interest that justifies holding the power to punish O is that in having a system of criminal rules and, regardless of what their will is on this matter, these traffic rules are in force in Wales. Indeed, it is most unlikely that Japan claiming jurisdiction over traffic violations in Wales would suffice for these rules to be in force. Because Japan has no de facto territorial authority nor any police force there, it would be unlikely that these rules would have any teeth at all. Similarly, the fact that an ethnic minority is disproportionately targeted does not warrant giving an extraterritorial authority the power to punish O for an offence such as theft. In short, even if the black population is being disproportionately targeted in

⁵⁶ See section 4 of the general Introduction to this thesis.

the US, it is unlikely that they can claim a right to be tried before a Spanish or Norwegian court. All they could claim is that the US courts should *lack* the power to punish them. Ultimately, these objections only undermine, if anything, TS's *authority* to punish O; they hardly provide a good reason for an extraterritorial body being justified in doing so.⁵⁷

Third, and relatedly, not just anyone can carry out an international offence. Take genocide for example. In the vast majority of cases, when genocide is carried out in TS, TS would be responsible for perpetrating, instigating or allowing it, or simply unable to do anything about it. Therefore, if a criminal rule against genocide is to be in force on TS, TS must lack an immunity against PS punishing O for participating in this genocide. Genocide, then, should generally be considered an international offence. However, this might not always be the case. An instance of genocide might be perpetrated by an individual acting alone. David Luban illustrates this with the strange case of Abba Kovner, a poet and a survivor of the Shoah, who in 1945 attempted to poison the Hamburg water supply. Kovner claimed -it is reported- that his ultimate goal was to kill six million Germans.⁵⁸ An implication of the theory developed here is that this act does not qualify as an international offence. And this would be the case even if Kovner had succeeded. In short, the German criminal law prohibiting this kind of behaviour does not require other states holding the power to punish O for it to be in force. But then, why consider this example? The reason is that it illustrates well what does the justificatory work in the explanation I advocate. There are specific *territorial* considerations that impinge upon the reasons for making certain wrongs an international offence. This also shows that the heinousness of the crime does not seem to provide a sufficient reason as to why PS should hold the power to punish O for this offence.

It is now clear that the crucial feature of international offences is explained neither simply by the moral enormity of these acts, nor by the *locus* of their commission. Nor

⁵⁷ On this type of objections, see Chapter 5 below.

⁵⁸ Luban, 'A Theory of Crimes against Humanity', citing Tom Segev, *The Seventh Million: The Israelis and the Holocaust* (1993), 14-16.

does it come down to the fiction that they harm or violate humanity itself. Rather, the reason as to why they are international rather than municipal offences relies on the interest that normally explains S's *power to punish* O. With this fact lie three significant advantages of the explanation offered here. First, it suggests that the justification for meting out legal punishment for both domestic and international offences rests on very similar considerations. Secondly, it explains why TS lacks an immunity against PS *punishing* O, and not simply a claim-right against PS intervening militarily to stop the crimes (humanitarian intervention). And finally, it does not collapse the distinction between international and domestic offences.

The next step is to see whether this explanation can also accommodate war crimes. Let us take the crime of 'intentionally directing an attack against a civilian population as such' committed as part of a plan or policy (hereinafter 'attacking civilians').⁵⁹ Again, my argument is that a criminal rule against this war crime cannot really be in force unless the parties to an armed conflict lack an immunity against some extraterritorial body punishing O for attacking civilians. This claim, however, needs further argument. Unlike the case of crimes against humanity committed within TS, these crimes typically involve two different states which could both claim the power to punish O. As a result, their both holding criminal jurisdiction over such offences might suffice for the prohibition against attacking civilians being in force. Let us call them Attacking State (AS) and Defending State (DS) and assume that O is a pilot of the AS air force attacking civilians in DS. Arguably, the fact that AS holds the normative power to punish O for intentionally attacking civilians would not suffice for this criminal rule being in force. Again, it is highly unlikely that AS would prosecute its own pilots for an act it ordered, or allowed them to perform. But even if some prosecutions were to take place, they would hardly suffice for individuals in *DS* to consider that the pilots, or more importantly perhaps, AS's high ranking officials are *bound* by such a rule.

However, one may wonder, would not DS – and no other state – holding the power to punish O for these offences provide individuals in DS with the relevant sense

⁵⁹ Arts. 8.1 and 8.2.(b)(i) of the Rome Statute.

of dignity and security that this criminal rule being in force is normally able to provide? And if this is the case, would individuals in DS not have an interest in DS deciding *itself* when O violated this rule, thus holding a *prima facie* immunity against third-party states doing so? I suggest that this is not the case. The reason for this is, in short, that although DS can *deter* this kind of attack, it cannot provide its civilian population with the specific sense of dignity and security that a criminal law being in force provides. Indeed, DS can deter O or AS high rank officials by means of retaliation or military reprisals. It can also deploy some of its troops exclusively for the purposes of protecting its civilian population. However, it is highly implausible that individuals in DS or external observers will consider DS's criminal prohibition *binding* on AS's personnel on the basis of DS's power to punish them. As a result, *individuals in DS* will not have a valid reason to consider their dignity and sense of security protected by such a rule of criminal law being in force.

From the opposite side's perspective, I suggest that individuals in AS also lack an interest in AS (and DS) holding an immunity against third parties punishing O. On the one hand, they might have an interest in AS conducting warfare in accordance with international humanitarian law, if only to avoid being victims of reprisals and retaliation. For this purpose, it will certainly help that AS's high ranking officials and its soldiers consider themselves bound by, at least, the laws on war crimes. And on the other hand, individuals in AS usually benefit also from the legal prohibition of war crimes being in force, i.e., being binding upon DS; and this can only obtain, I suggested, if some third (extraterritorial) party holds the power to punish O for war crimes. Thus, both individuals in AS and in DS share an interest in neither AS nor DS holding an immunity against some third party punishing O for war crimes. Moreover, this explanation can easily account for the fact that under existing international law war crimes cannot be committed by servicemen against their own military, something which neither of the previous theories would be able to explain.⁶⁰

⁶⁰ See *Plix*, Dutch Special Court of Cassation, and *Motosuke*, Temporary Court Martial of the Netherlands East Indies, at Amboina. Both in Cassese, *International Criminal Law*, 48.

5. Do we need a theory of international crimes?

Altman and Wellman have argued against the project of defining certain categories of “super crimes” which would provide a compelling justification for overriding state sovereignty and would ground “international criminal jurisdiction over moral wrongs that do not cross borders”.⁶¹ They call this project the ‘received view’ and propose a different way of thinking about international criminal law. In particular, they take issue with the ‘heinousness’ requirement that the received view attaches to international offences, and suggest that extraterritorial prosecutions should potentially apply also to ordinary or municipal crimes. The central tenet of their position is that international prosecutions should be warranted in a failed state when an “accumulation of separate criminal acts [are being] committed by individuals operating solo.”⁶² From this it purportedly follows that the concept of an international offence has no part to play in a theory of international criminal law.

By contrast, Altman and Wellman provide an explanation of when and why it is justified to “pierce state sovereignty” that mirrors the justification for humanitarian intervention. They put forward certain conditions under which a state loses its right against suffering military intervention by an external authority. The threshold is established at the point where states are unwilling or unable to prevent systematic or widespread violations of individual rights.⁶³ It follows that either widespread *or* systematic violations of basic rights would suffice, by themselves, to interfere in TS’s internal affairs by punishing O. This, they argue, is the sole criterion necessary to justify extraterritorial prosecutions.

However, I suggest that it pays to look more closely at what is doing the justificatory work in their argument. If it is the “widespread or systematic” character of offences, then it should be irrelevant whether TS has become a failed state. Thus, if bicycle theft, or credit card fraud were perpetrated on a widespread or systematic basis,

⁶¹ Andrew Altman and Christopher Heath Wellman, 'A Defense of International Criminal Law', *Ethics* 115, no. 1 (2004), 43.

⁶² *ibid*, 49.

⁶³ *ibid*, 48.

then their argument commits them to the claim that those responsible for these offences would become liable to extraterritorial prosecutions. This, however, is far less appealing than their initial picture. And this arguably is precisely because bicycle theft and credit card fraud are not heinous or grave enough crimes. I suspect that the moral pull their argument has comes from the fact that TS has become a failed state, not from the fact that some offence is committed on its territory on a widespread or systematic basis.

But how convincing is this consideration as an explanation of extraterritorial prosecutions? Admittedly, PS should hold the power to punish O for a municipal offence perpetrated on the territory of a failed state (TS) if it militarily occupies TS. However, there are three difficulties with this line of argument. First, I doubt that widespread fraud in TS would warrant giving PS the liberty to occupy militarily TS. Secondly, if PS becomes an occupying power then its criminal jurisdiction becomes based on the territoriality principle, not on universality grounds as Wellman and Altman contend. And finally, if PS becomes an occupying power on TS then it would hold the power to punish O regardless of whether the relevant offence was committed on a widespread or systematic scale. That is, it would also be entitled to punish any single murder or robbery committed there.

Finally, I wonder how convincing is their explanation for the proposition that international prosecutions would be justified against *any* widespread or systematic municipal offences committed on the territory of TS. They suggest that, just as the right to interfere with an abusive parent is explained by the interest of the child, PS's power to punish O is explained by the interest of individuals in TS. Thus, the crucial question is what interest of individuals in TS justifies PS holding, in particular, the power to punish O. Altman and Wellman fail to provide an explicit answer to this question. What would be analogous to interfering with an abusive parent, they suggest, would be to intervene on humanitarian grounds on the territory of TS to stop the commission of the offences. However, and without addressing this sensitive issue, it seems utterly unconvincing to suggest that PS holds a right to intervene in TS on grounds of

systematic fraud, or widespread tax evasion. Moreover, the main problem with this argument is that while humanitarian intervention is purely prospective in nature, punishment is applied retrospectively. In other words, while the right to intervene is grounded on widespread or systematic offences *currently* being perpetrated on TS, or a substantial threat thereof, punishment could come about after these violations have stopped. Thus, this argument would not be able to explain why PS holds an extraterritorial power to punish O when the widespread or systematic offences have ceased. But what is worse, I suppose, neither would TS. In short, this justification has the unacceptable implication of making the power of *any* state to punish O conditional on these offences still being perpetrated at the time.

To conclude, then, I argue that their view of the scope of international criminal law is ultimately unconvincing. And that the reason for this is, in part, that they reject the claim that the gravity of the crime has some role to play in the justification for extraterritorial prosecutions. I am sympathetic to their underlying claim that the heinousness of a particular offence should not be taken at face value as a sufficient reason for recognizing an extraterritorial body having the power to punish O. They are right in that, at least, it should be explained what role this particular consideration plays in a general theory of international criminal law. Nevertheless, this should not be mistaken with the claim that the heinousness of the offence has no role at all to play in the argument for extraterritorial prosecutions. Their mistake is that they believe that the “received view” cannot but rely on the unpersuasive argument that international crimes are simply those which are so morally egregious as to harm humanity itself.⁶⁴ In this chapter I have clarified both what is the normative consideration that explains why certain offences warrant conferring upon *some* extraterritorial authority the power to punish O, and what is the justificatory work that the gravity or heinousness of these offences does. I submit that this suffices to account for the need of a concept of international crimes in a general theory of international criminal law.

⁶⁴ *ibid*, 50.

6. Terrorism as an International Crime

Before closing this chapter let me examine the implications of the theory of international offences I advocate for a particularly controversial case: terrorism. After 9/11, terrorism has jumped to the forefront of debates concerning international crimes. Before we go on to examine whether this category of offences should be made into international crimes, two caveats are in order. First, several authors have pointed out relevant parallels between the pirate and the terrorist as simply outlaws.⁶⁵ Gerry Simpson argues that under the current prevailing narrative, the terrorist is the new pirate.⁶⁶ For many, this means “that participating in an act of terrorism questions, and in some cases forfeits, an individual’s right to have rights.”⁶⁷ Thus, the pirate-terrorist is often situated outside the law: he is neither an enemy combatant, nor a criminal. He floats in some sort of legal black hole, as it seems to be the case with prisoners being held in Guantanamo Bay.⁶⁸ In this chapter, however, I will focus on their treatment as criminal suspects, with the relevant rights and safeguards that all criminal suspects should enjoy.

Secondly, I shall not tackle here the complicated questions of what exactly terrorism is, why it is wrong, or whether it might be permissible under certain

⁶⁵ M. Reisman, 'In Defence of Public Order', *American Journal of International Law* 95, no. 4 (2001).

⁶⁶ Simpson, *Law, War and Crime*, 159. In the words of Frey and Morris, it is sometimes argued that “[t]he terrorist differs from the criminal or gangster, who seeks wealth, power, status through illicit means; for the latter’s activity in some sense depends on civil society. By contrast, terrorist, through their relatively indiscriminate targeting of civilians, explicitly reject familiar political categories and the limitations on violence they embody” (in R. G. Frey and Christopher W. Morris, *Violence, Terrorism, and Justice* (Cambridge [England] ; New York: Cambridge University Press, 1991), 13).

⁶⁷ O’Keefe in Michael P. O’Keefe and C. A. J. Coady, *Terrorism and Justice : Moral Argument in a Threatened World* (Carlton South, Victoria: Melbourne University Press, 2002), 107 citing the overview in James M. Poland, *Understanding Terrorism : Groups, Strategies, and Responses* (Englewood Cliffs, N.J.: Prentice Hall, 1988), 5-7. The same was once argued about pirates (see Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', citing the classical treatment by De Vattel, and Vaughan Lowe, 'Clear and Present Danger': Responses to Terrorism', *International and Comparative Law Quarterly* 54 (2005)).

⁶⁸ See Johan (Lord) Steyn, 'Guantanamo Bay: The Legal Black Hole', *International and Comparative Law Quarterly* 53 (2004).

circumstances.⁶⁹ These questions are extremely controversial both as a matter of theory and as a matter of legal practice. There is arguably no standard definition of terrorism as a discrete offence under international law.⁷⁰ International treaty law seems to provide only a piecemeal approach, criminalizing certain specific forms of terrorist activities, such as hijacking of aircraft, taking hostages, unlawful acts against the safety of maritime navigation, the financing of terrorism, and so on.⁷¹ Some of them are even criminalized as war crimes or crimes against humanity.⁷² For clarity's sake, I shall use what McMahan refers to as the "orthodox definition", i.e., politically or ideologically motivated violence that is directed against civilians or non-combatants.⁷³ The issue at stake is only whether TS lacks an immunity against some extraterritorial authority holding the power to punish O for a terrorist attack committed in TS.

The standard view on this question seems to be that there are some forms of terrorism which belong in the category of municipal offences, as defined here. For example, Article 3 of the UN Convention on terrorist bombing provides that "this Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis ... to exercise jurisdiction".⁷⁴ By contrast, other terrorist acts would amount to international crimes as, for example, when they "transcend national boundaries", "are carried out with the support, the toleration, or the acquiescence of the State where the terrorist organization

⁶⁹ On this see, generally, Frey and Morris, *Violence, Terrorism, and Justice*; Ted Honderich, *Terrorism for Humanity: Inquiries in Political Philosophy* (London; Sterling, VA: Pluto Press, 2003); O'Keefe and Coady, *Terrorism and Justice: Moral Argument in a Threatened World*; McMahan, 'The Ethics of Killing in War'; David Rodin, 'Terrorism without Intention', *Ethics* 114 (2004); Samuel Scheffler, 'Is Terrorism Morally Distinctive', *The Journal of Political Philosophy* 14, no. 1 (2006); Jeremy Waldron, 'Terrorism and the Uses of Terror', *Journal of Ethics* 8 (2004).

⁷⁰ For a dissenting view on this, see Cassese, *International Criminal Law*, 120-125, and some literature in footnote 126.

⁷¹ See the Conventions on the safety of civil aviation (the Tokyo Convention of 1963 and the Montreal Convention of 1971), the New York Convention against the taking of hostages (1972), and the UN Convention for the suppression of the financing of terrorism (1999), among others.

⁷² See, e.g., article 4(2)(d) of the Second Additional Protocol of 1977 to the Geneva Conventions.

⁷³ McMahan, 'The Ethics of Killing in War', 729. For criticism of this view, see Scheffler, 'Is Terrorism Morally Distinctive', 2.

⁷⁴ There are some qualifications to this principle which are not entirely relevant for our purposes here. For a similar provision see Art. 3 of the Convention for the suppression of the financing of terrorism.

is located or of a foreign State”, they “concern (...) the whole international community”, or “are very serious or large-scale”.⁷⁵ In the following paragraphs I will defend and further clarify this rough distinction. I will also add certain caveats. For this purpose I shall distinguish, perhaps a bit schematically, between internal and cross-border terrorism on the one hand, and between state or state sponsored terrorism and terrorist acts performed by non-state actors (without the acquiescence or support of a state) on the other.

The principles that should govern a state’s criminal jurisdiction over internal terrorist acts by non-state organizations are quite straightforward. According to the general argument advocated here, TS should hold an exclusive power to punish O for a terrorist act performed on its territory. Put boldly, the struggle with terrorist organization ETA should be left for the Spanish (and eventually the French) to deal with. And them alone. Individuals in Spain lack an interest in the UK, China, etc. holding the power to punish a Basque separatist for an attack carried out in Madrid. They have an interest in *Spain* dealing with ETA. And the reason for this is precisely that some extraterritorial authority unilaterally claiming the power to punish O would not contribute in any meaningful way to the sense of dignity and security they enjoy as a result of *their* (the Spanish) criminal rule against these acts being in force. Neither would it contribute, I may add, to the sense of dignity and security that individuals enjoy in China, the UK, etc. as a result of *their* criminal prohibition of terrorism being in force. Thus, following the court in *Republic of Bolivia v Indemnity Mutual Marine Assurance*, this means that “[w]holly domestic terrorism ... needs no international action but can be left to local laws to deal with like any other criminal conduct.”⁷⁶

Nevertheless, this arguably holds only in so far the terrorist attacks do not become widespread or systematic. If this obtains, it will be again because TS is in collusion with the terrorists, unwilling or simply unable to do anything about their acts. I would then submit, with Mark Drumbl, that these offences should move from domestic or,

⁷⁵ Cassese, *International Criminal Law*, 129.

⁷⁶ at 6.

eventually, transnational criminal law to international criminal law proper.⁷⁷ Indeed, in such a context the interest of individuals in TS in this rule being in force would override their interest in handling these cases by themselves. But this conclusion should have been expected. Widespread or systematic acts of terrorism are in no meaningful sense different from widespread or systematic acts of torture, murders, attacks on civilians, etc.

I also submit that internal state terrorism, i.e. terrorist actions pursued as a matter of policy by TS officials in TS, should qualify as an international offence in the jurisdictional sense I advocate here.⁷⁸ This is, again, because individuals in TS have a fundamental interest in the criminal rules prohibiting enforced disappearances, torture, rape, and murder being in force and no prohibition of such acts could ever be in force, i.e. binding on TS's officials, unless some foreign authority holds the normative power to punish O extraterritorially.

Some people might want to argue that once state terrorism is over in TS, because of regime change or otherwise, TS should “recover” its immunity against foreign bodies punishing O for acts of terrorism performed by TS as a matter of policy. I disagree. I would argue that individuals in post-Pinochet Chile have a fundamental interest in there being a criminal rule prohibiting state terrorist acts in force in Chile, and that this criminal rule can be in force in Chile only if some foreign body holds a concurrent power to punish O extraterritorially. The force of the objection, however, lies in the question regarding how much this would contribute to the sense of dignity and security of individuals in Chile *today*, since these acts are not taking place any longer. This is a hard empirical question to answer. The damage that state terrorism can cause to a society is very difficult to measure. The sense of vulnerability and lack of

⁷⁷ Drumbl, *Atrocity, Punishment, and International Law*, 212, note 221.

⁷⁸ For a philosophical account of state terrorism, see Igor Primoratz's 'State Terrorism', in O'Keefe and Coady, *Terrorism and Justice: Moral Argument in a Threatened World*, and Jonathan Glover's 'State Terrorism' in Frey and Morris, *Violence, Terrorism, and Justice* and Scheffler, 'Is Terrorism Morally Distinctive', 11-15.

confidence in the rule of law might be persistent for vast numbers of individuals.⁷⁹ This translates into fear towards public authorities, a feeling of helplessness and lack of rights, the inhibition of certain kinds of cooperative social relations, and so on.⁸⁰ Although criminal prosecutions will certainly not suffice to undo the effects of state terrorism, I suggest that they would certainly contribute to the feeling that the criminal rule prohibiting this conduct is again in force, and with this, bring individuals new confidence in their status as right bearers, whether the Chilean state likes it or not. Moreover, this power to punish O cannot depend on the fact that Chileans, themselves, feel at risk of being kidnapped, tortured and killed by state officials. Otherwise, even the Chilean state would lack the power to punish crimes performed by the Pinochet regime. Put differently, this issue points not to the question of whether extraterritorial prosecutions should be conducted over Chilean state tortures, but to the question of whether any authority should hold the power to punish something that happened 25 years ago. As mentioned in the introduction to this chapter, this question, which closely relates to the issue of whether statutes of limitations apply to international offences, is beyond the scope of the present enquiry.

Cross-border terrorism, by contrast, would normally be considered an international offence.⁸¹ However, I suggest that this view is unwarranted. The jurisdictional rules applicable to domestic offences seem to suffice to bring about the benefits on which the power to punish offenders generally rests. Indeed, under this framework the US would hold the power to punish everyone involved in the attacks of 9/11 (on grounds of territoriality and/or protection). And so would Afghanistan. Thus, if Russia obtained custody over Bin Laden and tried him for this offence, the US and Afghanistan might consider this an intrusion in their domestic affairs, and rightly so. Similarly, the UK,

⁷⁹ For a powerful illustration, see Ariel Dorfman, *Death and the Maiden* (London : Nick Hern, 1995), where Paulina, who was systematically tortured and raped by the Pinochet's regime, reencounters the doctor in charge of overseeing her torture by sheer chance.

⁸⁰ See Waldron, 'Terrorism and the Uses of Terror' and Scheffler, 'Is Terrorism Morally Distinctive', 13.

⁸¹ This opinion has been shared by prominent international lawyers and officials such as Kofi Annan, Mary Robinson, Robert Badinter, Alain Pellet and Geoffrey Robertson (cited in Antonio Cassese, 'Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law', *European Journal of International Law* 12, no. 5 (2001), 994). For a careful defence of this claim see Mark A. Drumbl, 'Judging the 11 September Terrorist Attack', *Human Rights Quarterly* 24 (2002), 323, discussed below.

Spain, and other countries where Al Qaida cells are functioning would hold the power to punish their members on the basis of the territoriality or protective principles. This way of distributing the power to punish acts of international terrorism is not only intuitively appealing. It is also consistent with the justification for punishment advocated here. To wit, individuals in the US would have good reasons to believe that its criminal prohibition of this kind of acts is in force irrespective of Russia holding a concurrent power to punish O. Accordingly, they have an interest in the US's criminal rules applying on its territory exclusively, and this interest is sufficiently important to warrant giving the US an immunity against Russia doing so. Moreover, individuals in Russia have no interest in Russia holding a power to punish O for the 9/11 attacks that is sufficiently important to trump that immunity. Their criminal prohibition of terrorist attacks does not require that in order to be in force. Again this argument holds only in so far these offences, both by non-state actors or state-sponsored, are not carried out in TS on a widespread or systematic basis.

But many commentators would probably object to this conclusion. Mark Drumbl, for instance, suggests that international terrorism “is not a matter to be left to domestic criminal law”, but rather it is “in the interest of all humanity to prosecute”.⁸² The main reason for this is that leaving this to TS “may not be a particularly effective way to build a widespread, deep-rooted social norm that condemns terrorism in the places where disaffected individuals may be inspired to join terrorist movements.”⁸³ On the one hand, he suggests that western-style trials would do little to *deter* potential terrorists since they may have little legitimacy to affect social norms or behaviour patterns in societies where terrorism emerges.⁸⁴ On the other hand, prosecuting al-Qaeda members in domestic courts trivializes the evil of the attack.⁸⁵ Thus, he concludes, international terrorists should be brought to account before an international court.

⁸² Drumbl, 'Judging the 11 September Terrorist Attack', 323 and 338, respectively.

⁸³ *ibid*, 324.

⁸⁴ *ibid*, 348, emphasis added.

⁸⁵ *ibid*, 342.

I am unpersuaded that these arguments warrant the purported conclusion, namely, that an extraterritorial authority should hold the power to punish O to the exclusion of any domestic court. Let me take them in turn. First, it is difficult to argue that a trial in a domestic court would trivialize the evil of the offence. The trials of Barbie and Eichmann, for example, seem to have had significant symbolic power. In a similar vein, people do not seem to consider it necessary to try very serious domestic offences, such as multiple murder or rape, before international courts. Secondly, the goal of deterring potential terrorists would not lead, as Drumbl seems to believe, to extricating the power to punish O from domestic authorities. Afghanistan and the US holding the power to punish Al Qaeda militants might have some deterrent effect. Even if this would not maximize that effect, I am unpersuaded that this consideration suffices as an argument *against* them holding that power. Moreover, maximizing that effect would probably lead to summary executions rather than international trials.⁸⁶ Finally and perhaps most significantly, Drumbl seems to undermine the central tenet of his argument himself. In effect, he argues that “[h]owever foreign [Pashtuns’] customary set of laws may seem to many Westerners..., in order for terrorism to be viewed by Pashtuns as a repugnant social norm to be stamped out, it will be (sic) have to be constructed as deviant and repugnant conduct throughout all elements of Pashtun society.”⁸⁷ Thus, Drumbl wants to have his cake and eat it. He wants to have a court formed essentially by judges of the same community (political, ethnic or otherwise) from where the alleged perpetrators come from, which would apply the set of local rules recognized by *that* community, and he wants to call this an international court. Finally, Drumbl wants this court to perform a trial that will satisfy both Western standards and the Pashtun society. I am afraid this is not something that would be easily achieved.

To sum up, creating the conditions that would make terrorism a form of unacceptable, criminal behaviour in the relevant communities where members of these

⁸⁶ As for example executing terrorists driving in Yemen. On this, see Lowe, "Clear and Present Danger": Responses to Terrorism' and Chapter 2 above.

⁸⁷ Drumbl, 'Judging the 11 September Terrorist Attack', 349.

organizations are usually recruited should certainly guide the policy towards terrorism. However, this neither leads to the claim that *only* an international court should hold the power to punish O, nor does it mean that this aim excludes the interests of other relevant stakeholders. In short, I argue that although the U.S. population may have an interest in, for example, the Afghan local authorities prosecuting and punishing members of terrorist organizations plotting attacks abroad, or recruiting volunteers, they also have an interest in their respective criminal laws against terrorist attacks being in force. Thus, I argue that cross-border terrorism, state-sponsored or otherwise, should not be categorized as an international offence in the sense advocated here, unless it becomes widespread or systematic.⁸⁸

7. Conclusion

This chapter relies on three propositions. First, what is in need of normative elucidation about international crimes is their particular jurisdictional regime, i.e., the fact that some extraterritorial authority holds the power to punish O. Secondly, that in order to provide a convincing explanation for this normative fact we need to look at the reasons why authorities (states and international tribunals) hold the power to punish an offender in the first place. And third, that the reason why states hold the power to punish offences is that this contributes to the sense of dignity and security of individuals living there.

On this basis, I argued that international crimes are simply those offences for which a criminal rule cannot be in force on the territory of TS unless at least some extraterritorial authority holds a concurrent power to punish O. This is because whenever, for example, crimes against humanity are committed on the territory of TS, that state must either be responsible for perpetrating, instigating or allowing them, or simply unable to do anything about them. As a result, the fact that TS itself criminalizes this kind of act cannot really contribute to the sense of dignity and security of individuals in TS. Put differently, the interest of individuals in TS in its criminal

⁸⁸ An interesting hard case might be the first and second Intifada against Israel.

prohibition being in force requires that TS lacks an immunity against some extraterritorial court punishing O.

I further clarified this position in two respects. First, I argued that although non-state actors can also carry out international offences when they hold *de facto* a significant portion of the powers which are often associated with the state over a certain territory, enormous crimes by individuals acting alone would not normally qualify as international crimes (even if they amount to genocide). Secondly, not every wrong committed in TS on a widespread or systematic scale would warrant conferring upon an extraterritorial authority the power to punish O. International offences need to reach some threshold of gravity. I defended this view against the objection that the heinousness often attached to international offences should not play any role in the justification of extraterritorial or international prosecutions.

The last section of this chapter examines whether terrorism should qualify as an international crime. I argued that instances of purely domestic acts of terrorism should not be made into international offences, unless they are perpetrated on a sufficiently widespread or systematic basis. By contrast, I suggested that acts of state terrorism should warrant conferring upon an extraterritorial authority the power to punish their perpetrators. Finally, I argued that the jurisdictional rules applicable to domestic offences suffice to deal with acts of cross-border international terrorism, such as the 9/11 attacks.

4

Extraterritorial jurisdiction for international offences

*"There are also those who think that an act of cruelty committed, for example, at Constantinople may be punished at Paris for [the] abstracted reason that he who offends humanity should have enemies in all mankind ... as if judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between men."*¹

*"To pursue the outlaw and knock him on the head as though he were a wild beast is the right and duty of every law-abiding man."*²

1. Introduction

In this chapter I shall provide a philosophical argument for universal criminal jurisdiction (henceforth UJ). I shall contend that both individual states and a particular international tribunal, the International Criminal Court (hereinafter the ICC) should have the normative power to punish O for international crimes regardless of where the offence was committed, or of the nationality of both offender and victim.³ The literature on universal jurisdiction is vast, even unmanageable. However, many specialists complain about its 'under-theorization'.⁴ Universal jurisdiction is arguably the most difficult case for a theory of punishment like my own, which is based mainly on territorial considerations. This is because it not only entails conferring criminal jurisdiction in the absence of any link or *nexus* between the prosecuting body and the

¹ Cesare Beccaria, *On Crimes and Punishments* (Indianapolis, Ind.: Hackett Pub. Co., 1986).

² Frederick Pollock and Frederic William Maitland, *The History of English Law* (Cambridge: Cambridge University Press, 1898 [1911]), 569-579, cited in Cowles, 'Universality of Jurisdiction over War Crimes'.

³ I do not distinguish here conceptually between universal jurisdiction, commonly exercised by states, and international jurisdiction, normally claimed by international or internationalized tribunals. On this see section 2 below.

⁴ Leila Nadya Sadat, 'Redefining Universal Jurisdiction', *New England Law Review* 35, no. 2 (2001) and Anthony Sammons, 'The "Under-Theorization" Of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts', *Berkeley Journal of International Law* 21 (2003). See also Theodor Meron, 'International Criminalization of Internal Atrocities', *The American Journal of International Law* 89, no. 3 (1995), 563.

crime. In addition, and crucially, it entails providing an argument that accounts for *every* state and a particular court created by some of them holding the power to punish O extraterritorially. These are the specific normative issues that the argument I shall develop here will concentrate upon. Accordingly, I shall leave aside other sources of difficulties that affect both territorial and extraterritorial authorities alike such as, for instance, whether criminal trials are an appropriate response to mass atrocities in general.⁵

The structure of the chapter is relatively straightforward. In section 2, I shall argue that the justification for legal punishment advocated in this thesis endorses the proposition that *every state* should hold a power to punish international offences that is universal in scope.⁶ Moreover, I shall argue that the normative account I offer in this thesis is better suited than any alternative account available in the literature to explain not only the peculiar normative features of UJ, but also to reconcile this explanation with a more comprehensive account of extraterritorial punishment. Section 3 examines the case for the International Criminal Court holding UJ. I will take issue with the standard arguments that purportedly account for the scope of its power to punish O and argue they are theoretically flawed. I will also suggest that under a more plausible normative account the jurisdiction held by the ICC as a matter of law is unduly restricted at the bar of justice. Finally, section 4 will handle a handful of objections raised against this ‘pure’ form of extraterritorial punishment. I will conclude that although some of these objections do raise significant obstacles to the principle of universal jurisdiction, none of them is capable of rebutting the case I made in the first two sections.

To the reader, I suspect, this way of organizing my argument might seem strange. Indeed, in the previous chapter I argued that international crimes are those for which at

⁵ This distinction has rarely been acknowledged in the literature. See, e.g., Meron, 'International Criminalization of Internal Atrocities'; Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity'; Tallgren, 'The Sensibility and Sense of International Criminal Law'; and Drumbl, *Atrocity, Punishment, and International Law*.

⁶ Provided it satisfies the conditions to claim, *itself*, legitimate authority. These conditions are set in Chapter 5 below.

least *some* extraterritorial authority should have the power to punish O. Would it not be natural to examine the case of a global criminal court holding this kind of power first? The case for individual states holding UJ would seem harder, and better left till last. The problem with this approach, however, is that the ICC is not a global criminal court. Rather it is a treaty body created in virtue of an agreement between a certain number of states. As a matter of law, treaties can only create rights and obligations for their parties.⁷ As a matter of fact, three of the biggest powers in the international community (the U.S., China and Russia) not only are not parties to this treaty but perceive the ICC as a threat. By contrast, these states (and many others) are arguably not, at least in principle, against individual states holding UJ over international crimes. Thus, it is far from clear that the argument I provided in Chapter 3 would lead to the ICC holding UJ to try O for an international crime. Rather, and according to the leading explanation available in the literature, the scope of the ICC's criminal jurisdiction is to some extent dependent on the jurisdictional scope of its state-parties.

The same two clarificatory remarks I made in Chapter 2 hold here. First, I am concerned only with the *power* to punish O, not with the liberty or claim-right to obtain custody over her extraterritorially. This entails assuming also throughout this chapter that either the defendant (O) is present on the territory of the state that claims jurisdiction over her at the point when it wants to exercise its power, or the court which claims a right to try her has to request her extradition. And secondly, I will only examine here the *grounds* on which individual states or the ICC can claim jurisdiction to punish O. This is not the same as the particular conditions that each concrete institution should meet in order to claim, *itself*, this normative power. An argument for this purpose will be provided in Chapter 5 below.

⁷ See, e.g., article 26 of the Vienna Convention of the Law of Treaties; see, also, Brownlie, *Principles of Public International Law*, 592.

2. The case for states' universal criminal jurisdiction

In this section I shall argue that under current non-ideal conditions individual states ought to be granted UJ over international crimes. This is a normative claim and it is the main claim I will defend here. But first, a conceptual point is in order. I understand UJ as the power of some entity (in this case PS) to punish O irrespective of where she perpetrated her offence and of the nationality of both O and V. Moreover, a crucial feature of the regime of UJ is that *every* state can claim this power.

2.1 A conceptual point

Ian Brownlie famously warns against conflating the proposition that every state holds a power to punish crimes under international law with the principle of universality. Universality, he claims, is only about individual states holding the power to punish certain crimes under their *domestic* law, for which international law recognizes every state's criminal jurisdiction.⁸ Anne-Marie Slaughter clarifies his position as follows: "[t]he principle of universality... is a *procedural* device by which international law grants all states jurisdiction to punish specified acts that are independently crimes under [their] national law."⁹ Piracy is allegedly the paradigmatic example because, they contend, it has traditionally been defined and prosecuted under domestic law.

This distinction seems to challenge the framework defended here. However, I suggest it does nothing of the kind. Rather it is useful as it forces us to distinguish between conceptual and normative philosophical issues and these, in turn, from issues regarding specific institutional arrangements. But let us deal with things one at a time. I must first explain what we *mean* by UJ. This is a conceptual issue. I suggested that UJ consists in PS holding an extraterritorial power to punish O irrespective of where she had committed the offence or her nationality or that of V. This definition is uncontroversial enough and is, in fact, consistent with Brownlie's position.

⁸ *ibid*, 303.

⁹ Anne-Marie Slaughter, 'Defining the Limits: Universal Jurisdiction and National Courts', in Stephen Macedo, *Universal Jurisdiction : National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia, Pa.: University of Pennsylvania Press, 2004), 169, 319, quoting Brownlie.

As a separate question we will need to determine whether certain crimes, such as those covered in my previous chapter, warrant conferring upon states UJ to punish O. We can examine this issue both as a matter of normative argument or as a matter of international law. Brownlie and Slaughter's claim is that UJ refers to offences provided for under domestic criminal law *as a matter of law*. Accordingly, if we consider this as a technical statement about a particular set of institutional arrangements regarding UJ, this position (whether it is right or wrong) is irrelevant for our purposes here. My objective is, rather, to explain why certain offences *should* warrant UJ. And this is a philosophical issue of a normative kind.

If, by contrast, we are to consider their statement as a *philosophical* claim about what moral powers states have at the bar of justice, they are both conflating the conceptual question I have identified with the normative one, and begging the latter. By advocating such a restrictive conceptual definition of UJ they rule out a normative possibility *as a matter of definition*. Yet, they do not provide any *normative* argument as to why UJ applies only to crimes provided under PS's domestic criminal laws. I do not suggest that their claim is subject to this kind of criticism. But it follows from this that their objection does not really undermine the conceptual framework advocated here which states that UJ applies to international crimes.

The same criticism can be made against Bassiouni's exact opposite proposition that universal jurisdiction should not be conflated with the universal reach of extraterritorial national jurisdiction.¹⁰ The concept of universal jurisdiction he advocates, which is contained in Principle 1 of the Princeton Principles on Universal Jurisdiction, is that of "criminal jurisdiction *based solely on the nature of the crime*, without regard of where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction".¹¹ I am obviously very sympathetic to this definition. However, I believe Bassiouni is also smuggling a normative point into a conceptual one. In other words,

¹⁰ Bassiouni, 'The History of Universal Jurisdiction and Its Place in International Law', in *ibid*, 42.

¹¹ *ibid*. Emphasis added.

whether universal jurisdiction is based solely on the nature of the crime is a normative claim for which he needs to argue, not part of its definition.

To repeat, then, universal criminal jurisdiction is, for present purposes, the power of an authority to punish O for an offence committed extraterritorially, irrespective of where she perpetrated her offence and of the nationality of both O and V. This *concept* of UJ applies equally to individual states and to international criminal tribunals. This statement does not mean though, or not yet, that the powers that each of these hold are normatively grounded on the same considerations. So far I commit myself to the former view, not to the latter.¹²

2.2 An argument for states having UJ over international crimes

As a matter of public international law, it may be argued that UJ is probably, but not unambiguously part of customary international law.¹³ Judges Higgins, Kooijmans and Buerghenthal's joint separate opinion in the *Arrest Warrant* case is arguably one of the most authoritative statements on this. They argued that "[t]here are certain indications

¹² Similarly see Reydam's, *Universal Jurisdiction : International and Municipal Legal Perspectives*. We should not conflate the question asked in this chapter with that regarding the distinction between the narrow notion of universal jurisdiction, which entails that only the state where the accused is in custody may try her (called *forum deprehensionis*), and a broad notion also called absolute or pure universality, which entails that S can prosecute O even if she is not at the time in the forum state. This distinction should neither be treated as a conceptual question, but as a normative one. What is at issue is not what is the *meaning* of universal jurisdiction, but rather what is the scope of states' power to punish O, or the conditions under which PS is in a position to exercise this power. The relevance of this consideration will be examined in Chapter 5 below.

¹³ Bassiouni argues that it cannot be inferred solely from existing state practice and *opinio juris* that universal jurisdiction is part of customary international law, but he contends that the cumulative effect of state practice, *opinio juris*, general principles of law and opinion by publicists does in fact suffice to make it into a rule of CIL (Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 148-149). Cassese on his part considers that UJ is warranted for certain offences under CIL (Cassese, *International Criminal Law*, 293-295). Higgins, starts her section on this matter by stating that "International law permits the exercise of jurisdiction in respect of certain offences against the international community." (Rosalyn Higgins, *Problems and Process : International Law and How We Use It* (Oxford: Clarendon Press, 1994), 56). Finally, the authors in Oppenheim's *International Law* recognize that "[t]here are now very few writers who deny absolutely the right of a state to punish aliens for crimes committed abroad." However, that statement refer both to universal jurisdiction and also to certain cases in which jurisdiction is justified on the basis of the protective principle (Oppenheim et al., *Oppenheim's International Law / Vol.1, Peace*, 467, and 469 on international offences). Cryer concludes that the "level of support is sufficient to suggest that the customary case for universal jurisdiction over core crimes can be made" (Cryer, *Prosecuting International Crimes*, 93).

that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful.”¹⁴ In any case, UJ seems to be largely uncontroversial with respect to certain offences such as genocide, war crimes and crimes against humanity, even if there is also agreement that it is only very seldom exercised by states.¹⁵

For our purposes, however, this basis of jurisdiction needs to be defended on very different grounds. I have suggested that the extraterritorial scope of PS’s power to punish O is dependent on the justification for PS holding that power in the first place. In Chapter 1, I argued that the normative power to punish O is based on the collective interest of individuals in PS in having a system of criminal laws in force. This is because having a set of rules prohibiting murder, rape, etc. in force contributes to their sense of dignity and security. In Chapter 2, however, I argued that this justification is, in principle, against the extraterritorial application of domestic criminal rules, except on grounds of protection (that is, except when PS’s power to punish O is based on the interest of individuals *in PS* in having there a system of criminal laws in force extraterritorially). The reason for this is threefold. First, individuals in TS have an interest in TS being a self-governed entity that is sufficiently important to warrant conferring upon TS a *prima facie* immunity against extraterritorial authorities punishing offences committed on its territory. Secondly, individuals in TS lack an interest in PS holding such a power because PS’s domestic criminal laws cannot be in force on the territory of TS. Finally, I argued that individuals *in PS* lack an interest in PS punishing offences committed on TS.

However, as we saw in Chapter 3, there are certain criminal rules which cannot be in force in TS unless at least *some* extraterritorial authority holds a concurrent power to punish O. The reason for this is that whenever one of these crimes is perpetrated in TS, it will be necessarily the case that TS is either responsible for perpetrating, instigating or

¹⁴ See paragraphs 45-46. It must be noted, though, that of the judges who addressed this matter in the Arrest Warrant case, four were against the existence of UJ and five explicitly in favour. There is some degree of expectation regarding what would be the ICJ’s decision in the *Certain Criminal Proceedings in France (Republic of the Congo v France)* case.

¹⁵ See Slaughter, ‘Defining the Limits: Universal Jurisdiction and National Courts’, in Macedo, *Universal Jurisdiction*, 170.

allowing it, or simply unable to do anything about it. As a result, the fact that *TS* criminalizes this kind of acts cannot really contribute to the sense of dignity and security of individuals in *TS*. I have called these offences international crimes. I now want to argue that, as a matter of normative argument, *every single state* should have the extraterritorial power to punish *O* for her offence on *TS* irrespective of the nationality of *O* and *V*.

Take widespread or systematic torture. The first limb of my argument was made in my previous chapter. I argued there that *TS* lacks a *prima facie* immunity against extraterritorial authorities punishing *O* for an international crime committed on its territory. This is because individuals in *TS* have a *fundamental* interest in there being a criminal rule in force in *TS* against widespread and systematic acts of torture. This interest is not only incompatible with *TS* holding an immunity against *PS* punishing *O*, but it also overrides the interest that explains that immunity. This explanation, however, does not yet amount to an argument for *UJ*. What I need to explain in particular is why *every state* would hold the power to punish *O*.

I have already identified what the relevant interest is that, I argue, explains *PS*'s power to punish *O*. It remains for me to argue here who the holder of this interest is in these particular cases, and what the implications of this are for establishing who the holder of the relevant *power* to punish *O* must be. In short, I suggest that there are many people in different parts of the world who share a collective interest in there being a system of criminal rules prohibiting, *inter alia*, acts of widespread or systematic torture. This is hardly controversial. Furthermore, I claim that their interest is sufficiently important to warrant conferring upon every state the power to punish perpetrators of this crime against humanity extraterritorially. But let us go one step at a time.

This interest is shared, in the first place, by many individuals in *TS*. If such a crime is perpetrated on its territory, they would have an interest in the perpetrators being punished for their offence, and by an extraterritorial authority explicitly authorized to do so. That is, individuals in whose state international crimes are being perpetrated

have a fundamental interest in the criminal rules that provide for these offences being in force. But so would, I suggest, individuals in other states in which similar international crimes are being perpetrated. The fact that O is punished, for her offence in TS, by an authority expressly authorized by the international legal system would not only ground the belief in that such a criminal rule is in force in TS. It would similarly be able to ground the belief that this rule is in force also in TS2, where these crimes are also being perpetrated. This explains the usual claim that whether or not Pinochet was punished for widespread or systematic torture committed in Chile is not merely a matter that affect the interests of the Chileans. The Chileans may have, admittedly, many reasons for claiming *priority* to try and punish Pinochet. Yet, whether or not he was punished affected the interests of other people around the world. In particular, I suggest it affected their interest in the existence of this international legal rule being expressed and communicated by assessing his compliance with it.

Finally, I submit that this argument also accounts for conferring the power to punish O upon states in which individuals are not particularly uneasy about *them* becoming victims of widespread or systematic torture such as, for example Switzerland. Admittedly, the Swiss will generally not be too concerned about becoming victims of these international crimes; but my argument nowhere requires such a demanding threshold. First, as long as there are certain individuals in Switzerland, such as refugees, who will benefit from there being a rule against widespread or systematic torture in force, this would suffice to confer upon *Switzerland* UJ over these offences. Several criminal prohibitions protect only a portion of any state's population or protect people differently. It might be plausibly argued that the legal prohibition of rape protects women and men differently. This does not necessarily mean that women's interest in there being a rule against rape in force does not suffice to confer upon S the power to punish O.

But even if there are no refugees or members of any minority who will clearly benefit from such a rule being in force, this would not be fatal to my argument. And this is because, as argued above, Switzerland's power to punish O does not need to rely

solely on the interest of the Swiss. It can also be grounded on the interest of individuals in TS, TS2, TS3, etc. This joint interest, by itself, might be all things considered sufficiently important to warrant conferring upon every state (including Switzerland) a power to punish O that is extraterritorial in scope. Admittedly, this position suggests that PS's power may be grounded exclusively on the interest of people outside PS. Yet, there is nothing in the account of rights I defend here that precludes assigning B a right on the basis of an interest explicitly held by C.¹⁶ An example at the interpersonal level would clarify this point. B would normally be at liberty to stop C when she is trying to escape with D's purse. B's liberty in this example is arguably based, *exclusively*, on the interests of D. Moreover, D's interest warrants conferring not only B this liberty, but arguably everyone who is in a position to stop C (namely, F, G, H, etc.). The same could be argued about PS's power to punish O.

It could be argued, of course, that this need not be the case in the international society. In short, individuals in Chile might take issue with *Spain* prosecuting Pinochet. They would probably feel even more strongly about this if it were Bolivia, or Argentina doing so. There are two lines of reply to this objection. First, that this objection does not really address the issue at stake in this chapter. That is, it does not really claim that individuals in Chile and in several other states lack an interest in there being a rule against widespread or systematic torture in force. It does not even argue that the interest that Chileans might have in Pinochet not being punished would override the former interest in that rule being in force. Rather, it points to the question of whether *a particular country* should be put under a disability to punish Pinochet. This is an issue that has to do with PS's *authority* (or standing), not with the specific interests that justify conferring upon it the power to punish O. In the following chapter I will argue that the question of PS's authority has little to do with the *extraterritorial* scope of PS's power.

Moreover, if Argentina were to prosecute Pinochet for a crime committed on its own territory against a Chilean national (such as the assassination of General Prats and his wife in Buenos Aires in 1974), individuals in Chile would probably take issue with it

¹⁶ See section 3 of the general Introduction to this thesis.

too. And yet, the fact that individuals in TS take issue with PS punishing O is generally not a sufficient reason to hold PS under a disability to punish O. As the example of the murder of General Prats shows, Argentina's power to punish O rests on considerations which are independent from the opinion of Chilean nationals. Similarly, I claim here that the power to punish Pinochet is not grounded exclusively on the interest of Chileans. As long as this suggestion is sound, I do not see why *their* taking issue with PS punishing Pinochet would be of crucial normative relevance.

There is an obvious qualification to the general position advocated thus far. It might be that under certain circumstances, as for instance in the case of an incumbent head of state, or head of government, the interests of individuals in TS are sufficiently important to confer upon O a *prima facie* immunity against PS's power to punish O. It might well be, also, that their interest would outweigh the interest of individuals in TS, TS2, etc. in O being punished. I seriously doubt that. Yet this illustrates well how strong the interest-based theoretical framework I advocate is. On the one hand, it can accommodate the concern raised by biased states by referring to the conditions that PS should satisfy in order to have the authority to punish O. And secondly, it shows exactly where the difficulty lies in this type of cases. Namely, it depends on carefully examining the interest that explains PS's power versus the interest that explains O's immunity. Sorting out this question is beyond the scope of this thesis. However, showing the way in which this could be done should dispel any anxiety that the initial objection might still generate.

To conclude, the world lacks a centralized governmental institution that can provide a system of criminal justice that is in force extraterritorially on TS, TS2, PS, etc. In this context, I suggest that the collective interest of these individuals in a rule against widespread or systematic torture being in force on the territory of TS, TS2, etc. warrants conferring upon *every state* the power to punish O. This is required, at least, if these criminal rules are to provide any meaningful sense of dignity and security to them. In the absence of a centralized mechanism of distribution of criminal competence for

this kind of offences, UJ provides us with the closest we can get to these rules having any real sense of bindingness.¹⁷

2.3 Competing arguments for UJ

My claim here is not just that I can provide a convincing account of states' power to punish international crimes on universality grounds. I suggest that the argument developed here fares much better as a normative explanation of UJ and extraterritoriality in general than alternative ones available in the literature. Several of these arguments hardly resist careful philosophical scrutiny. Among the arguments most often relied upon are the claims that extraterritorial punishment is justified as a means to enhance peace,¹⁸ to fight against impunity by closing the gap in law enforcement¹⁹ thus eliminating safe heavens by giving perpetrators of atrocities no place to hide.²⁰ Some of these arguments are clearly question begging. To say that the justification for punishing O is to fight impunity is tautological. It is precisely why it is important to fight impunity that this argument needs to explain. Retributivists have been traditionally concerned with this problem. By contrast, other considerations in this list point towards deterrence. Ultimately it is the fact that eliminating safe heavens would (allegedly) provide individuals with greater incentives to refrain from committing this kind of offence that would be doing the normative work. I will briefly address these two kinds of justification below.

But first, let me consider the argument that purportedly explains PS's power to punish O by reference to the enhancement of peace. There are, in short, at least two fundamental problems with this argument. The first is that it provides only a contingent justification for PS's power to punish O.²¹ In situations in which criminal trials will *not*

¹⁷ On this see section 4.3 below.

¹⁸ See, e.g., Preamble of SC Resolution 827 by which the International Criminal Tribunal for the Former Yugoslavia was created.

¹⁹ Princeton Principles, 24.

²⁰ Bruce Broomhall, 'Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law', *New England Law Review* 35 (2000-2001), 406; Kenneth Roth, 'The Case for Universal Jurisdiction', *Foreign Affairs* 80, no. 5 (2001), 153.

²¹ On the problem with contingent justifications for legal punishment see Chapter 1 above.

enhance peace, for example because peace has already been secured, advocates of this justification would have to argue against carrying them out. Secondly, even if we expect the criminal law to have a deterrent effect, it does not follow that it would deter the continuation of ongoing hostilities *per se*. International criminal law essentially prohibits certain forms of warfare, but it does not necessarily criminalize the use of military force *per se*. Thus, even if its premise were right, this argument fails to lead to its purported conclusion.

In an article entitled ‘The “Under-Theorization” of Universal Jurisdiction’, Anthony Sammons provides a more elaborate account of UJ.²² He suggests that the justification for UJ is not merely a question of explaining S’ power to punish O. Indeed, “[m]any commentators and jurists incorrectly seek to divorce the assertion of universal jurisdiction from the principles of state sovereignty.”²³ He provides an account of UJ tailored specifically to address this difficulty. On his view, UJ is mainly an interference with another state’s domestic jurisdiction which must, therefore, be explained by reference to the principle of state sovereignty. Sammons sees sovereignty as largely analogous to private property: states have a bundle of rights over their territory, including the rights to political autonomy, non-interference and territorial integrity.²⁴ Among these rights, sovereignty includes the right to pass criminal laws, prosecute and punish offenders.²⁵

This analogy, he claims, is also useful to understand that sovereignty is not unlimited, but rather presupposes a certain level of respect for neighbours and their equivalent rights within their own territories. It is a feature of his account that sovereignty can be transferred to other states or to the international community. This is how, for example, the Allied powers exercised some form of sovereignty over German territory after WW2, including the right to prosecute and punish certain criminal

²² Sammons, ‘The “Under-Theorization” Of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts’.

²³ *ibid*, 127.

²⁴ *ibid*, 117.

²⁵ *ibid*, 124.

offences. Thus, his account of UJ relies on explaining how it is that TS's sovereignty is transferred, at least in part, to the international community.²⁶

Sammons argues that the main reason why states have the right to make certain criminal rules subject to universal jurisdiction has to do with the fact that TS has become *terra nullius*.²⁷ This was the case with pirates, who acted beyond the reach of any single state's jurisdiction. Alternatively, this may be the result of the breakdown of the criminal law system or its lack of capacity to prosecute a particular type of crimes or group of perpetrators. As an example he cites the case of Rwanda which, after the events of 1994, appealed to the Security Council to create an international tribunal because its government felt it did not have the capacity to deal with them itself.²⁸ Thus, he contends that any state that derogates from certain essential norms such as the prohibition of genocide, torture, etc. transfers a portion of its sovereignty to the international community as a whole.²⁹

Sammons' account is complex and points to a relevant gap in the literature on UJ. I suspect that an important source of its appeal rests on the fact that it allegedly explains why UJ should be regarded as a subsidiary mechanism for certain types of very serious offences. Moreover, unlike other accounts Sammons explicitly addresses the challenges raised by the principle of sovereignty. I wonder whether he can consistently maintain this subsidiary character and whether his sovereignty-based explanation suffices to justify PS holding a *power* to punish O that is universal in scope. But first, an analytic point is in order. I find Sammons' explanation of the transference of a portion of TS's sovereignty to the international community unconvincing. To start with, we need to distinguish cases in which TS *authorizes* PS to exercise its criminal jurisdiction on its territory from those in which extraterritorial punishment is exercised against TS's will. In Chapter 2 above, I argued that the justification for TS's power to punish O also entails TS holding a normative power to authorize a specific extraterritorial body to

²⁶ *ibid*, 125.

²⁷ *ibid*, 128.

²⁸ *ibid*, 131.

²⁹ *ibid*, 137.

punish her.³⁰ But this is hardly a justification for UJ. UJ, rather, entails PS punishing O for acts committed in TS irrespective of the authorization of TS, and usually against its will. Thus, the fact that TS becomes *terra nullius* can only explain why TS *forfeits* its immunity against PS refraining from punishing O for an offence she perpetrated on TS, but not yet why PS, *itself*, holds a power to do so. This point is not just a matter of analytic rigour. It has normative implications.

I suggest that the fact that TS became *terra nullius* does not suffice as a justification for UJ to punish O. Let me explain. When X forfeits a right of hers, she can forfeit her right *in rem*, i.e. against the world at large, or *in personam*, namely, against certain individuals or bodies.³¹ According to the general understanding about the rules that apply on *terra nullius*, TS would forfeit her immunity only *in personam*. As discussed in section 3 of Chapter 2 above, under the standard conception of *terra nullius*, it is not the case that *every* state has the power to punish O. Only the state of nationality of the offender or that of the victim would be empowered to do so. Although I disagreed with this position, this is immaterial for present purposes.³² The point is that even under the standard account regarding the laws applicable on *terra nullius*, not all states automatically earn a power to punish offences committed there on universality grounds. They need to be able to point to an interest that justifies *their* holding the power to do so in particular.³³ In the final analysis, Sammons makes a mistake which is the mirror image of the one he identifies in the literature. That is, he discusses universal jurisdiction *only* with regard to the issue of sovereignty, failing to grasp that he needs, crucially, an argument that accounts for specific states holding the power to punish O.

Finally, I submit that Sammons' scheme commits him to more than he would willingly admit. In short, his argument does not seem to be limited, necessarily, to the most serious offences such as genocide, crimes against humanity, aggression, slavery,

³⁰ This arguably explains why the Allies exercised jurisdiction in Germany after WW2 (at least over domestic offences). To wit, it was because Germany in its capitulation had explicitly authorized them to do so. A similar case could be made, to some extent, with the case of Rwanda he cites.

³¹ On this distinction see the general Introduction to this thesis.

³² I suggested that PS does not have the power to punish O on *terra nullius* if it is not on grounds of protection.

³³ On this see also Hirst, *Jurisdiction and the Ambit of the Criminal Law*, 217.

etc.³⁴ The nature of these offences and the identity of their perpetrators would function, in his account, as a sort of threshold below which intervention by way of extraterritorial criminal jurisdiction would be unwarranted. Nevertheless, his argument does not lead to this conclusion. The reason for this is that this is not what TS becoming *terra nullius* would entail. It might well be that whenever systematic rape, torture or even genocide are perpetrated on the territory of TS, this country becomes something similar to an empty island, or Antarctica in terms of its government lacking an immunity against extraterritorial states having criminal jurisdiction over it. Yet, when a certain territory becomes *terra nullius*, it lacks not only an immunity against foreign bodies punishing a genocide that occurred there, but also an immunity against PS punishing *domestic* offences perpetrated there, such as robberies, assaults, etc.³⁵ In sum, the notion of *terra nullius* on which his argument rests, can explain neither PS's *power* to punish O nor can it limit UJ to international crimes.

I have suggested throughout this thesis that the extraterritorial scope of PS's *power* to punish O is dependent upon the reasons that justify PS holding that power in the first place. Allow me to bypass here deterrence as a general justification for UJ. Most of the difficulties I have with deterrence have been aired in previous chapters. Most relevantly, I have argued: i) that it would advocate summary executions rather than criminal trials, and ii) that it would entail the prosecuting state having universal criminal jurisdiction for both international and domestic offences.³⁶ This last objection also holds for standard accounts of retributivism with the possible exception of Duff's communitarian justification for legal punishment. To his general account I now turn.

When he put forward his theory of punishment, Duff was arguably concerned with the problems created neither by international criminal law nor by extraterritoriality. Only recently has he addressed these issues in some detail.³⁷ Thus, I will concentrate first on his general argument for punishment and, subsequently, I will examine his

³⁴ Sammons, 'The "Under-Theorization" Of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts', 132.

³⁵ See Chapter 2, section 3 above.

³⁶ See Chapters 1 and 2 above, respectively.

³⁷ Duff, "Criminal Responsibility, Municipal and International".

account specifically tailored to the issue at hand. In Chapter 2 above, I argued that Duff's general argument faced some difficulties with regards to the power to punish domestic offences committed abroad. I now want to claim that the main shortcoming of his general justification for legal punishment is in the area of international crimes. Duff sees punishment as a secular penance whose main purpose is to communicate censure to moral agents (O). He is therefore concerned with being able to reach the offender's moral conscience. One of the conditions for this punishment to reach O's moral conscience is that PS needs to have the *moral standing* to censure her for that conduct. For this to obtain PS should, first, have the appropriate relationship to O, or to her action in question. This implies that there is a political community on behalf of which punishment is imposed. Secondly, PS must not have lost that standing as a result of some (wrongful) previous dealing with O. It is only the first condition that matters for us here.³⁸

As suggested in Chapter 2 above, 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 every state would have the moral standing to censure O and as a result he would end up advocating UJ for both domestic and international offences. By contrast, if he uses a thick notion of political community, he seems committed to rejecting UJ altogether. No community other than that to which O belongs would be able to communicate with O in the relevant sense.³⁹ The question of what suffices for a group of people to be a political community in Duff's terms is one of the most controversial aspects of his account.⁴⁰ For us, what matters is that, depending on what constitutes a political community, his initial approach seems doomed to advocate either UJ for any type of offence, or preclude UJ completely.

³⁸ For a fuller explanation of Duff's position, see Chapter 2, section 6 above. This second condition will be examined in Chapter 5 below.

³⁹ This creates, I have suggested in Chapter 2.6, other issues concerning offences committed by foreigners on the territory of TS.

⁴⁰ Most recently, von Hirsch and Ashworth, *Proportionate Sentencing: Exploring the Principles*, Chapter 7.

His more recent approach to this issue may solve this initial inadequacy.⁴¹ As explained in Chapter 2, Duff elaborates on the idea of moral standing by resorting to a relational notion of criminal responsibility. He argues that “O is responsible for her offence *as a citizen to S*”.⁴² This approach, he concedes, would be incompatible with UJ. Thus, he needs to explain how it is that this reasoning does not apply to other offences such as genocide, war crimes or crimes against humanity. Or, better, why it is that O would be responsible for such offences simply *as a moral agent and to the whole of humanity*. He leaves aside the issue of “genuinely international wrongs” and concentrates only on cases in which the wrong is committed within a particular state and against its members.⁴³ For present purposes, I shall follow his line of argument although I am not persuaded that the case of UJ for war crimes or aggression is as straightforward as he presents it.

Duff contends that both on principled and pragmatic grounds TS, the political community to which O belongs, has the power (standing) to bring O to account for an international offence she perpetrated in TS.⁴⁴ This, as it stands, is broadly non-controversial. Rather, we want to see how it is that he extends this power (standing) to PS. First, he claims that “if the wrong is serious and persistent enough, and if the [territorial] state radically fails in its duty to prosecute and punish such wrongdoing, it may become in principle legitimate for others ... to intervene, and may become practicable for them to do so”.⁴⁵ I take it from Duff’s argument that the seriousness of

⁴¹ A caveat is in order. Duff in his paper only considers the case of an international tribunal, not of individual states. His explanation for this is that individual states exercise UJ as a way of ‘filling the gap’ left by the absence of an effective international criminal court (Duff, “Criminal Responsibility, Municipal and International”). I will not take issue with this position. Most arguments for UJ usually explain the power to punish O on universality grounds by claiming that it belongs to the international community as a whole, and then explain why it is that states are entitled to act, individually, on behalf of that community.

⁴² See Chapter 2 above.

⁴³ Duff, “Criminal Responsibility, Municipal and International,” 18.

⁴⁴ I have argued above that his explanation for the extension of this ‘standing’ to the state on whose territory the offence was committed is unconvincing. See Chapter 2 above.

⁴⁵ Duff, “Criminal Responsibility, Municipal and International,” 18. On this see also Altman and Wellman, ‘A Defense of International Criminal Law’; May, *Crimes against Humanity*.

the offence and its persistence are both necessary and sufficient conditions for an extraterritorial state to intervene legitimately.

This, however, hardly constitutes an explanation for PS's power *to punish* O on universality grounds. In effect, this argument seems to get its moral pull from the fact that it is both legitimate and practicable for states to *stop* or *prevent* these wrongs. But, as I have repeatedly argued throughout this thesis, the power to punish O does not follow from the liberty to defend V. Indeed, if based on the liberty to protect individuals in TS, this 'right to intervene' would be contingent on the serious wrongs still being committed (persisting) at the time of the intervention. This means that there would be no extraterritorial punishment for these wrongs when they have already ceased. This seems artificial. Moreover, this explanation sits very uncomfortably with Duff's own justification for the power to punish O, namely, providing the conditions for a secular penance.

Ultimately, Duff needs to explain why it is *every* state's business to punish O for, say, an act of genocide she carried out on TS. He presents two possible answers to this question. First, PS would act on behalf of the political community in TS.⁴⁶ Although he is not too clear about how convincing he himself finds this claim, this line of argument seems unpromising. In effect, he does not explain why it is that PS has the *standing* (in his terms) to act on behalf of the political community in TS. And this is problematic for his account. If an extraterritorial state could simply act on behalf of the political community in TS, this would completely undermine the necessary relationship he so carefully tries to build between O and TS, and on which TS's own standing is based. Thus, this answer can be readily rejected. His second answer relies on the following proposition: PS should have "jurisdiction over (and only over) those crimes whose perpetrators must answer not to this or that particular political community, but to humanity itself".⁴⁷ Admittedly, this proposition makes his relational account of criminal

⁴⁶ Duff, "Criminal Responsibility, Municipal and International," 20.

⁴⁷ *ibid*, 21.

responsibility compatible with UJ for certain offences. However, it is worth examining this argument more closely.

Duff rejects any suggestion that these offences harm or victimize humanity “as a whole”.⁴⁸ This position, he rightly contends, is too artificial. An individual living in Mexico would not be harmed or victimized *himself* in any meaningful way by a genocide committed in Korea. By contrast, his account relies on the following analogy: in the same way we say that crimes are public wrongs, i.e., that they are kinds of wrongs that *properly concern* the political community as a whole, certain offences such as crimes against humanity are wrongs that *properly concern* the whole humanity as such.⁴⁹ But this analogy begs the fundamental questions. First, it assumes that the reasons why a single homicide is the *exclusive* business of the political community to which O and V belong are clear enough. Furthermore, it assumes that these reasons similarly explain (by analogy) why an act of genocide is *not* the exclusive business of that political community but, rather, the business of humanity as a whole.

I am not persuaded that Duff can explain the former issue convincingly. In Chapter 2 I argued that Duff’s citizenship-based explanation cannot account convincingly for TS’s power to punish foreigners who perpetrate an offence on its territory. Yet, the latter proposition seems even more mysterious. If we are to consider an act of genocide the business of humanity as a whole, a further explanation is warranted. Duff claims that these wrongs are everyone’s business “simply in virtue of our shared humanity with their victims (and with their perpetrators)”.⁵⁰ Yet, if we accept that we all belong to “that broadest of human communities”⁵¹, then I wonder what is precisely the normative work that *belonging* to a community – whatever that community may be – does in his explanation. Put differently, even if we accept that we share our human condition, the question subsists of how that makes it *every state’s* business to punish O for an act of genocide but not for a single homicide, or rape

⁴⁸ *ibid*, 21-22.

⁴⁹ *ibid*, 22; *emphasis added*.

⁵⁰ *ibid*, 22.

⁵¹ *ibid*, 21.

committed extraterritorially. This, Duff does not explain. And it is, I suspect, precisely what he needs to explain.

To sum up, the problem ultimately rests with the fact that Duff treats the question of PS's 'standing' as being separate from the question regarding the reason why punishment is visited upon O.⁵² His relational notion of criminal responsibility has no evident connection with the question of what particular interest warrants giving PS the power to punish O and, crucially, whose interest this is. I suggest this latter issue is what does the justificatory work all along. Take an example of his I already cited above: university X has itself the power to sanction one of its lecturers (L) for neglecting her classes because the members of X have an interest in the classes being up to the required standard that is sufficiently important to warrant conferring upon X disciplinary powers over L. By contrast, university Y lacks the power also to sanction L because the interest that *its own* members have in lectures being up to a given standard is not important enough to warrant Y the power to sanction L. This same reasoning applies also to states and their criminal laws. Thus, I suggest these are the questions we need to answer to provide a theory of UJ; *contra* Duff, whether the notion of responsibility, criminal or otherwise, is necessarily relational does not seem to do any *normative* work.⁵³

3. The jurisdiction of the ICC

It is time to examine the ICC's jurisdictional scope. In order to take up this task, however, two caveats are in order. First, as I have argued in the general Introduction to this thesis, my aim is to examine the moral justification for the rights of existing institutions and their scope, not about devising or clarifying the rules that should govern a different, ideal institutional arrangement. Secondly, the ICC is not a global criminal court. Rather, it is a treaty body that was created as a result of an agreement

⁵² Interestingly he explicitly admits that "it bears directly on [it]". (ibid, 14).

⁵³ On S's 'moral standing' see section 4 in Chapter 5 below.

between a certain number of states.⁵⁴ As the international law on treaties makes it clear, treaties create rights and obligations only vis-à-vis their parties.

Under the Rome Statute, the ICC has jurisdiction over O if either the state on whose territory the offence was committed or the state of which the offender is a national are a party to the Statute, or if either of the two explicitly accepts its jurisdiction in a particular case.⁵⁵ Moreover, the ICC can have jurisdiction over an offence irrespective of where it was committed or of the nationality of both O and V if it is referred to the Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter.⁵⁶ Finally, jurisdiction of the ICC over an offence is 'complementary' to domestic criminal jurisdiction.⁵⁷ This means that the ICC's jurisdiction will be triggered only if "the [s]tate which has jurisdiction over it ... is unwilling or unable genuinely to carry out the investigation or prosecution".⁵⁸ As it stands, the jurisdiction of the ICC may seem unduly restricted. In effect, its power to punish O has a narrower extraterritorial scope than that of individual states.⁵⁹

The leading strategy to explain the jurisdictional scope of the ICC relies on the idea that "[j]urisdiction is given to the ICC by a delegation of traditional Westphalian jurisdiction by the member states".⁶⁰ According to this view, which I shall term the 'delegation argument', the ICC is not a state and therefore has no 'interests' of its

⁵⁴ Rome Statute of the International Criminal Court (hereinafter the Rome Statute or ICC Statute).

⁵⁵ Article 12 ICC Statute.

⁵⁶ Article 13 ICC Statute. Under the same provisions, the Security Council can also prevent the ICC from investigating or prosecuting an offence temporarily. Article 16 ICC Statute.

⁵⁷ Preamble and article 1 to the ICC Statute.

⁵⁸ For different scenarios see Article 17.1.(a), (b) and (c) of the ICC Statute.

⁵⁹ Yet, some of the offences included in the Rome Statute, arguably, do not warrant universal jurisdiction for individual states under international law. On this, Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', *Law and Contemporary Problems* 64, no. 1 (2001). For a conflicting view see Michael P. Scharf, 'The ICC's Jurisdiction over Nationals of Non-Party States: A Critique of the U.S. Position', *Law and Contemporary Problems* 64, no. 1 (2001), 79-80.

⁶⁰ Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', 200. See also Diane F. Orentlicher, 'The Future of Universal Jurisdiction in the New Architecture of Transnational Justice' in Macedo, *Universal Jurisdiction*, 217; Diane F. Orentlicher, 'Politics by Other Means: The Law of the International Criminal Court', *Cornell International Law Journal* 32 (1999); Scharf, 'The ICC's Jurisdiction over Nationals of Non-Party States: A Critique of the U.S. Position'. Accepting this framework but arguing that the delegation argument cannot legally ground the provisions on jurisdiction contained in article 12 of the Rome Statute, Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States'.

own.⁶¹ What justifies its power to punish O is the *consent* of states which authorized it to exercise jurisdiction over certain offences when committed on their territory or by one of their nationals. In this section I shall argue that this framework is inadequate to explain both the jurisdiction the ICC actually has as a matter of law, and the jurisdiction it ought to have as a matter of normative argument.

But before examining this issue, I need to consider an objection famously put forward by the U.S. government and defended by some prominent officials and academics.⁶² They suggest that scope of the ICC's power to punish O, as it stands, is illegitimately broad. More precisely, they argue that the ICC lacks the power to punish nationals of non-party states even if their offence is committed on the territory of a state party, or a state which consented to the jurisdiction of the court on an *ad hoc* basis. This is mainly a legal claim. But the argument on which it is grounded is in part a normative one. The legal argument has already been addressed in the relevant literature.⁶³ I shall concentrate here on its normative force.

The claim is that the ICC's jurisdiction over nationals of non-party states is incompatible with the theory of delegation of powers. In short, states can delegate to an international tribunal neither their universal nor their territorial power to punish O. Madeleine Morris presents the most elaborate version of this argument. She first argues that because there are significant differences between national courts and an international tribunal, we cannot assume from the fact that UJ can be exercised by the former, that it can automatically be delegated to the latter.⁶⁴ Her problem with this delegation is that the ICC Statute purports to bind non-party states.⁶⁵ Some scholars flatly reject this claim. The ICC Statute, they suggest, does not impose any obligation

⁶¹ Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', 49.

⁶² See *ibid* and David Scheffer, 'Opening Address at the Universal Jurisdiction Conference at the New England School of Law', *New England Law Review* 35, no. 2 (2001). For a political statement of this position, see William K. Lietzau, 'International Criminal Law after Rome: Concerns from a U.S. Military Perspective', *Law and Contemporary Problems* 64, no. 1 (2001).

⁶³ Orentlicher, 'Politics by Other Means: The Law of the International Criminal Court', and Scharf, 'The ICC's Jurisdiction over Nationals of Non-Party States: A Critique of the U.S. Position'.

⁶⁴ Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', 29 and ss.

⁶⁵ *ibid*, 14.

upon non-party states; it only binds individuals.⁶⁶ The problem with this rebuttal, Morris suggests, is that the ICC would not simply assess the individual culpability of a particular defendant; it quite often would have to adjudicate on the lawfulness of official acts of states.⁶⁷

This, in itself, does not suffice as an argument for her position. She needs to explain why it is that states cannot delegate that power they hold *to the ICC*. To explain this, Morris draws on principles related to the legal institution of assignments. In a nutshell, her argument is that as a matter of principle PS can delegate to the ICC a right it has against TS if and only if this does not prejudice TS's position.⁶⁸ And in fact, she suggests that delegating the power to punish nationals of non-party state to an international tribunal would prejudice the position of non-party states. This assertion is based on three claims. First, the ICC, unlike an individual state, can only provide "a diminished availability of compromise outcomes in interstate disputes". Secondly, its verdicts would have a higher political impact on the state of which O is a national than those reached by a national court. And finally, its decisions would have a much greater role in shaping the law, and would provide for impediments to the diplomatic protection of nationals.⁶⁹ Therefore, she concludes, states lack the power to delegate to the ICC their territorial or universal jurisdiction over non-party states' nationals.⁷⁰

Michael Scharf has responded to this argument by claiming that states simply lack the right (an immunity) against the ICC (or other states) deciding on the lawfulness of acts committed by their officials extraterritorially.⁷¹ He does not provide any explanation for why this is so. But this proposition is on the right track. For TS to hold an immunity against the ICC punishing one of its nationals, individuals in TS would

⁶⁶ Orentlicher, 'Politics by Other Means: The Law of the International Criminal Court', 490; Scharf, 'The ICC's Jurisdiction over Nationals of Non-Party States: A Critique of the U.S. Position', 75.

⁶⁷ Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', 14.

⁶⁸ *ibid*, 51.

⁶⁹ Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', 45.

⁷⁰ Analytically, the argument should be that non-party states have an *immunity* against states parties to the ICC delegating their power. The relevance of this analytical point will become clear in the next paragraphs.

⁷¹ Scharf, 'The ICC's Jurisdiction over Nationals of Non-Party States: A Critique of the U.S. Position', 75.

have to have an interest sufficiently important to warrant putting *the ICC* under a disability to do so. In this thesis I have argued that quite the opposite is true. Individuals in TS would normally have a collective interest in a system of international criminal rules being in force. But even if they lacked such an interest (because, *arguendo*, it would not contribute to *their* sense of dignity and security), I have suggested that individuals in other states (TS2, etc.) have a significant interest in these rules being in force. For these rules to be binding also upon TS's state officials, it is necessary that extraterritorial authorities have the power to punish those who violate them. And this certainly covers the ICC.

In other words, the reasons why Morris holds that TS's position would be prejudiced by the ICC having jurisdiction over acts committed by its nationals may well be reasons for which individuals in TS, and crucially, in TS2, TS3, etc. would have an interest in prioritizing *the ICC* exercising its criminal jurisdiction over individual states. To wit, the ICC would not try to find a negotiated outcome; it generally decides on O's culpability or lack thereof. It would not accept diplomatic protection of nationals and it would probably have a bigger impact on S's domestic politics and on the development of international criminal law. These considerations seem to provide individuals with stronger reasons to believe that international criminal laws are in force than the imposition of legal punishment by PS.

Someone may argue that my answer begs the relevant question. Would not individuals in non-state party S, which is involved in an air campaign against a terrorist group in S2, have an interest in the actions of S being immune from the jurisdiction of the ICC? For example, if they want their national security enhanced, would they not want their government officials to act free from the threat of being prosecuted by the ICC? The obvious response to this question is that the interest individuals in S may have in their collective security is not sufficiently important to confer on S the liberty to perpetrate war crimes while doing so. In fairness, defenders of this immunity against the ICC do not advocate that S should be able to do anything it considers that fits its own interests in order to pursue their goals; rather, their contention is that

extraterritorial authorities and in particular the ICC should not have the power to decide whether the chosen course of action was lawful or not.⁷²

The problem with this approach is that it considers these two as separate, unrelated questions. Yet, they are nothing of the kind. If officials of state S are to be considered bound in any meaningful sense by the rules of international criminal law, it is not enough that S alone holds the power to prosecute and punish them. Rather, if these rules are to be in force at all, some extraterritorial body would need to have jurisdiction over them. As Morris suggests the ICC would be in a privileged position to claim this power. Put differently, one cannot consistently argue at the same time that S's personnel should be bound by the rules of international criminal law and that S should have an immunity against the ICC exercising jurisdiction over acts of its nationals. It is simply not true that S can validly claim an immunity against the ICC punishing its nationals for an international offence perpetrated on the territory of a state party. Therefore, it follows that states can validly delegate their territorial jurisdiction (and their universal jurisdiction) to the ICC.

Having dealt with this objection, I will take issue with the whole 'delegation' framework. Admittedly, this approach would seem generally compatible with the normative claims made so far in this thesis. In Chapter 2 I argued that the interest individuals in TS have in there being a system of criminal laws in force in TS warrants conferring upon TS the normative power to authorize an extraterritorial body to punish O for an offence she committed there. This would include authorizing not only foreign states, but also regional and international tribunals. Earlier in this chapter, I argued that individual states hold a normative power to punish O for an international crime that is universal in scope. As with their territorial jurisdiction, states would then hold the normative power to *authorize* the ICC to exercise universal jurisdiction for international offences on their behalf.

This delegation framework would successfully explain most aspects of the jurisdictional scope the ICC has as a matter of law. States would be able to delegate

⁷² Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', 53.

their territorial criminal jurisdiction to the ICC, and they would also be entitled to delegate their universal jurisdiction. Furthermore, because it is *their* powers they are delegating, they have the power to authorize the ICC to exercise them under certain conditions. This would explain the ICC having UJ only upon the condition of the UN Security Council referring the case to the Prosecutor, and would also be able to account for the principle of complementarity. There is, however, an exception to this general compatibility. Defenders of the delegation theory would have difficulty explaining the jurisdiction over nationals of states parties for offences committed on the territory of non-party states (nationality principle). If my argument in Chapter 2 holds water, a consistent account would have to admit that states lack the power to delegate the power to punish a national of theirs for offences she committed outside their territory. To this extent, the rule provided in article 12 (b) of the Rome Statute would be unwarranted.

Nevertheless, the problems with this normative framework as an explanation for the scope of the ICC's power to punish O cut deeper. I suggest that it is based on an unconvincing version of the domestic analogy. To wit, the delegation argument identifies wrongly those whose interest ultimately explains the ICC's power to punish O. Take the power of the ICC to punish O for an international crime perpetrated on a non-party state by a national of a non-party state. For the delegation argument to do any justificatory work, the power held by the ICC would have to rely on the power held individually by the state parties. Let me illustrate this. In Chapter 2 I argued that TS could delegate to PS the power to punish O for an offence she perpetrated in TS. That delegation was needed to empower PS because the reason for conferring upon TS the power to punish O does not itself warrant conferring upon PS the power to do so. Individuals in PS lack an interest in PS punishing O for an offence she committed in TS, and the interest of individuals in TS in having a system of criminal rules in force does not, *per se*, warrant conferring upon PS the power to do so. Delegation, then, is crucial for PS holding the normative power to punish O in this scenario.

However, this does not obtain in the case of the ICC. Rather, the collective interest (held by individuals in different parts of the world) that justifies each individual state holding UJ *also* warrants conferring a power to punish O upon the ICC. Put differently, the delegation argument seems to rely heavily on the claim that, unlike states, the ICC has no interests of its own.⁷³ Therefore, its criminal jurisdiction is dependent upon states delegating their powers to it. As we saw, however, the power of a state to punish an offence committed on its territory is grounded on a specific collective interest of individuals in that state. It is not grounded on an interest of the *state* itself. States do not have interests of their own.⁷⁴ We talk about the interests of the UK or of Sri Lanka only as a shortcut to refer to the interests (usually of a collective nature) of *individuals* in the UK and Sri Lanka respectively. It is ultimately individuals' interests (taken singly or collectively) that have moral worth. Thus, both the power of individual states and the power of the ICC to punish O must be explained by reference to the interests of these individuals. By resting on an unconvincing use of the domestic analogy, the delegation argument simply obscures this important insight.

By contrast, in section 2.2 above I argued that individuals in TS1, TS2, PS1, etc. have a collective interest in there being a legal system in force prohibiting genocide, crimes against humanity, war crimes, etc. For this to obtain, I suggested, it is necessary that states have UJ over these crimes. Thus, it is the collective interest of these individuals that warrant conferring upon every individual state the power to punish O irrespective of where she perpetrated her offence or the nationality of both O and V. This same collective interest warrants conferring UJ upon the ICC.

This alternative explanation is less controversial than it may initially seem. For example, despite being an advocate of the 'delegation argument', Scharf explicitly recognizes that "the drafters [at the Rome Diplomatic Conference] did not view the consent of the state ... as necessary ... to confer jurisdiction on the court. Rather, they adopted the consent regime as a limit to the exercise of the court's inherent jurisdiction

⁷³ See text corresponding to footnote 61 above.

⁷⁴ On this, see section 4 of the general Introduction to this thesis.

as a politically expedient concession to the sovereignty of states in order to garner broad support.”⁷⁵ I do not mean to suggest that this concession was not politically necessary to establish the ICC. Rather, my claim is that the delegation argument does no *normative* work in the justification for the scope of the ICC’s power to punish O. But not only this, if the jurisdiction of the ICC is grounded on the collective interest of individuals worldwide in there being a system of international criminal laws in force, then there are reasons to criticize the scope of this jurisdiction for not being broad enough. That is, if we take into consideration the interests of individuals worldwide and we admit that millions of individuals living in different parts of the globe have an interest in there being a criminal law system that prohibits, *inter alia*, genocide, war crimes and crimes against humanity in force, then it must follow that the ICC should have the normative power to punish O whether or not the UN Security Council refers the situation.

4. Objections to UJ

I have argued that both individual states and the ICC should have UJ over international crimes. In this last section I shall tackle some objections raised against this position. The literature on this issue is vast, making any treatment at best partial. I shall respond here only to a handful of challenges. Before doing so, however, a caveat is in order. Many of the objections raised against it suffer from one or more of the following flaws. First, sometimes purely contingent objections are presented in the guise of general arguments.⁷⁶ Take the often flagged ‘*tu quoque*’ or ‘clean hands’ objection. Kissinger complains that Spain – which holds one of the broadest stances on UJ – was itself tainted by transgressions committed during its Civil War and under Franco’s regime and has done very little about it.⁷⁷ Thus, how would it have the power to punish abroad

⁷⁵ Scharf, 'The ICC's Jurisdiction over Nationals of Non-Party States: A Critique of the U.S. Position', 77 citing Philippe Kirsch & John T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', *American Journal of International Law* 93, no. 2 (1999).

⁷⁶ Against contingent justifications for punishment see Chapter 2, above.

⁷⁷ Henry A. Kissinger, 'The Pitfalls of Universal Jurisdiction', *Foreign Affairs* 80, no. 4 (2001), 91. This might be about to change with Baltasar Garzón’s new investigation on these crimes. See,

what it has failed to punish at home? This might or might not be a strong argument. However, it misses the point; for it does not undermine UJ *per se*, but rather it is only an argument against *Spain* itself holding that right.⁷⁸

Secondly, some arguments claim to undermine UJ while, in fact, they only advocate certain limitations upon its exercise. The reason for this is that they concern the conditions that any particular body should meet in order to hold the power to punish O (i.e., the authority to do so), with the interest that accounts for a particular body holding that power. Take for example the issue of trials *in absentia*. All that a complaint against trials *in absentia* can do is suggest that the presence of the accused is a condition that every trial should meet in order for PS to hold a normative power to punish O on universality grounds. But showing that PS holding that power has certain normative limits (stemming, *inter alia*, from individuals' right to due process) does nothing to show that PS lacks that normative power.⁷⁹

Most significantly, perhaps, several arguments raised against UJ are ultimately objections against *any* state punishing O – including TS. In other words, they fail to address the core aspect of UJ, namely, its extraterritoriality.⁸⁰ Take again the issue of trials *in absentia*. Whether a judicial authority ought to hold the power to punish O *in absentia* does not or not clearly depend on whether O committed the offence on its territory or not. To sum up, then, whenever an objection is liable to one or more of these flaws, it simply fails to undermine the case for UJ made here.

http://www.elpais.com/articulo/espana/Garzon/investigara/represion/franquista/abrira/fosa/Lorca/elpepuesp/20081016elpepunac_6/Tes (last accessed, 10 January 2008).

⁷⁸ This challenge will be examined in more detailed in Chapter 5, section 5, below.

⁷⁹ This charge will be addressed in section 6 of Chapter 5 below. Similarly, see the charges raised in George P. Fletcher, 'Against Universal Jurisdiction', *Journal of International Criminal Justice* 1 (2003); Madeline Morris, 'Universal Jurisdiction in a Divided World: Conference Remarks', *New England Law Review* 35, no. 2 (2001), 352-354 and Alfred P. Rubin, 'The International Criminal Court: Possibilities for Prosecutorial Abuse', *Law and Contemporary Problems* 64 (2001), respectively. Most of the concerns expressed therein, and their normative implications will be addressed in Chapter 5 below.

⁸⁰ Admittedly, UJ entails also a lack of nationality link between, both O and V, and PS. However, because I have argued that both the nationality of O and V should have no relevance as to whether PS should have the power to punish O, I portray here UJ under the light of pure extraterritoriality.

4.1 UJ criminalizes political decision-making

In a polemical paper, Henry Kissinger complains that UJ means submitting international politics to criminal procedures. Heads of state and senior public officials, he suggests, should not be equated with pirates, hijackers and other similar outlaws.⁸¹ Let us appraise Kissinger's claim. I do not think his argument implies that there is something fundamentally disanalogous between heads of states and hijackers that warrants that only the latter should be subject to the criminal law. In effect, if a head of state is uncontroversially liable for ordering the murder of his wife, why would he not be liable for ordering a genocide? Rather, I believe this argument points to the complicated debate regarding the relationship between criminal liability and politically motivated behaviour. In effect, the distinction between crime and politics is a tough one, and one that is beyond the scope of this thesis.⁸² Far from trying to untangle the intricacies of this issue here I shall point out, rather, that this objection has a logical flaw.

Indeed, the issue it raises is whether a particular instance of conduct (e.g., systematic torture of alleged terrorists) should be criminalized or, by contrast, considered merely a political decision. As pointed out in other parts of this thesis, I cannot address here issues of criminalization in any depth. My point here is that questions about criminalization of particular conduct should not be conflated with the question of *who* should have the power to punish O for them. Kissinger conflates these two separate questions and reasons through a *non-sequitur*. From a premise that ultimately objects to torture being criminalized *simpliciter* when ordered by certain state officials, he concludes that an *extraterritorial* authority (PS) should lack the power to punish torturers on grounds of UJ. However, if his premise is convincing it must follow that neither TS nor the state that employs O should have the power to punish O for these acts. I am not sure that that Kissinger is really committed to the view that, for example, the US under Barack Obama would lack the power to punish acts of torture

⁸¹ Kissinger, 'The Pitfalls of Universal Jurisdiction', 87.

⁸² For a brief discussion of some of the issues that arise from this discussion see Stanley Cohen, 'Crime and Politics: Spot the Difference', *The British Journal of Sociology* 47, no. 1 (1996), 1.

committed by its own troops in Abu Graib. But even if he were, his is not an argument against PS exercising *universal* jurisdiction over O.

4.2 UJ risks becoming a tool against political adversaries

Another common ground for concern stems from the possibility of states using criminal trials as foreign policy tools to prosecute adversaries or advance their national interests.⁸³ In Kissinger's words "[t]he Pinochet precedent, if literally applied, would permit the two sides in the Arab-Israeli conflict, or those in any other passionate international controversy, to project their battles into the various national courts by pursuing adversaries with extradition requests."⁸⁴ This, some add, would be particularly problematic due to the lack of judicial independence in many countries.⁸⁵

This argument has significant normative pull but I suggest it is ultimately unconvincing. First, this objection is liable to the flaw of contingency, i.e., it takes issue with certain states (i.e., political adversaries) exercising extraterritorial jurisdiction over O, not every state. Moreover, it is not always the case, and I am unpersuaded about how plausible this is in international relations, that states have tried to take international political conflicts to their own domestic criminal courts. Criminal trials are slow, costly, burdensome and arguably unsatisfying in the context of heated political disputes. Negotiations, reprisals, and ultimately war have proven far more popular. Thus, I suggest the risk is overstated.

Secondly, this objection also fails to address extraterritorial punishment *per se*. In short, it would undermine both TS and PS exercising their criminal jurisdiction against a political adversary. That is, it would also undermine Syria's power to punish offences committed by Israeli soldiers *in Syria*. Ultimately this is because, again, this charge affects not the interest on which the justification for punishing O rests, but the conditions that any given body should allegedly satisfy in order to hold the power to do

⁸³ Morris, 'Universal Jurisdiction in a Divided World: Conference Remarks', 354.

⁸⁴ Kissinger, 'The Pitfalls of Universal Jurisdiction', 92.

⁸⁵ Morris, 'Universal Jurisdiction in a Divided World: Conference Remarks', 353.

so (its authority). As I will argue in my next chapter, this issue is unrelated to the extraterritorial scope of S's power to punish O.

4.3 UJ is just an expensive taste for elites

Arguably, the most damaging objection to extraterritorial punishment on grounds of universality is the supposedly negligible effect it has on the lives of the very individuals whose interests seem to ground this power. In David Luban's words, "the enterprise of occasionally putting perpetrators on trial—even leaders like Milosevic and Kambanda—seems more like a publicity stunt than a commitment to humanitarian legal values".⁸⁶ This objection implies that, as a matter of fact, it is unrealistic to believe that a system of international criminal rules will ever provide individuals with any real benefit. No such system can succeed unless states are willing to yield some of their most treasured attributes. As Alfred Rubin puts it, most people argue that the U.S. are not willing to have alleged misdeeds of its military and civil leaders defined by people with no interest in the turmoil an arraignment would cause in the American political system. But would any state be willing to do so?⁸⁷ This does not only apply to state officials; "when people are willing to die for a cause, send their children to die for it, and pay for the effort in supplies and other ways, the notion that international supervision will limit atrocities is unrealistic in the absence of the full panoply of world government."⁸⁸

If this objection is viewed in terms of the capacity of extraterritorial punishment to *deter* future offences then I have expressed my sympathy for this claim in Chapter 1 above.⁸⁹ Yet, the putative strength of a system of international criminal laws as a deterrent of atrocities is not a matter that should concern us, for deterrence plays virtually no part in the justification I advocate. This objection does challenge the view I have defended here, though. It claims that international criminal laws cannot contribute

⁸⁶ Luban, 'A Theory of Crimes against Humanity', 130.

⁸⁷ Rubin, 'The International Criminal Court: Possibilities for Prosecutorial Abuse', 164.

⁸⁸ *ibid*, 157.

⁸⁹ In fact, despite the fact that there are no empirical studies to prove this claim the literature seems confident in that its deterrent effects are negligible. See, e.g., Sloane, 'The Expressive Capacity of International Punishment', 71-75; Drumbl, *Atrocity, Punishment, and International Law*, 169-173; and Tallgren, 'The Sensibility and Sense of International Criminal Law', 569-579.

to the dignity and security of individuals worldwide in any meaningful sense. This would be very damaging for my position. In Chapter 2 I argued that because PS holding a power to punish O for a robbery she committed on TS can contribute neither to the sense of dignity and security of individuals in PS or TS, PS lacks that power.⁹⁰ Similarly, if this objection is sound I must reject the claim that both individual states and the ICC should have UJ.

To respond to this, I would suggest that conferring upon PS the power to punish O extraterritorially is capable of contributing to the sense of dignity and security that *international* criminal rules provide individuals worldwide and that, for this to obtain, both individual states and the ICC must have UJ. This might seem unwarranted today. But let me clarify exactly what the position I defend is. I have argued in this chapter that if a system of international criminal law is in force, it would contribute to the sense of dignity and security of millions of individuals worldwide, including those on the territory of TS. The claim that not many people on earth currently feel any extra sense of dignity or security stemming from international criminal rules being in force does not undermine my argument entirely.

First, we should not take this proposition at face value. There seems to be some empirical evidence that in practice the fact that an extraterritorial authority claims jurisdiction to punish O can have a non-negligible impact on the ground. The likelihood of accountability, albeit extraterritorial, seems capable of having some effects. When Colombia threatened the guerrilla and the drug-trafficking cartels with extradition to the US to face charges there, this generated a bloody wave of terrorist attacks, kidnappings, etc., designed to make the Colombian Government step back. For those belonging to such organizations it made a huge difference whether they would be in prison in Colombia or abroad.⁹¹ But also it might make a difference for those being targeted by these groups. There have been some indications that the opening of an investigation by the International Criminal Court has changed things on the ground

⁹⁰ See Chapter 2 above, sections 3 and 4.

⁹¹ As one may imagine, their privileges (which in some cases amounted directly to escaping from prison) would have been rather different.

both vis-à-vis those responsible for international offences and the vulnerable, targeted minorities in Sudan and DRC.⁹² Finally, there might be some clear exceptions to this general objection such as the situation of prisoners of war in *certain* armed conflicts. Albeit circumstantially, this shows that the empirical assumption on which this objection rests is far less certain than its advocates admit.

Moreover, it is not even clear that if this objection were empirically accurate today it would lead to rejecting UJ. The fact that individuals do not have a sense of being right bearers and that the criminal law protects their rights might not be so much a consequence of the *impossibility* of this system doing anything meaningful for them, but rather a result of it not being in force *yet*. International criminal law is arguably still in its infancy, and few people will deny that it has a long way to go before becoming established as an institution in both international and domestic life.

The objector, however, may push the point further by suggesting that international criminal law will never be able to provide the benefits that domestic criminal law systems create for individuals. I will have to concede that much. PS would usually have difficulties in investigating or obtaining custody over O. Moreover, TS will often refuse to collaborate with these investigations by, among other things, not disclosing information, refusing access to witnesses, facilities, and victims, not extraditing defendants, etc. It would be pointless to reason on different assumptions. Nevertheless, this does not mean that a system of international criminal law can achieve nothing. Even if the level of convictions would be low, as is admittedly the case in every *domestic* criminal law system, and even if it faces difficulties and limitations, many individuals would benefit from a system of international criminal laws coming of age. Indeed, such a system of criminal law would provide them with some sense of being right bearers and that these rights are protected by criminal laws. Moreover, this is a feeling of security that many domestic systems of criminal law will not be able to provide.

⁹² See, e.g., Suliman Baldo, *The Impact of the ICC in the Sudan and DRC* (<http://www.peace-justice-conference.info/documents.asp> 2007 [last accessed, 10 January 2008]) and the Report of the International Center for Transitional Justice in *id.*

Thus, my conclusion on this issue is rather thin. I suggest that we have good reasons to recognize the ICC and individual states having the power to punish O on universality grounds as this would contribute to the sense of dignity and security of many individuals in many different parts of the world. This is not in fact such a controversial stance to take. In an otherwise rather pessimistic paper about the benefits that international criminal laws can provide, Sloane suggests that “[o]ver time, punishment by [extraterritorial] criminal tribunals can shape as well as express social norms”.⁹³ And he adds, “the international sentencing process can reinforce and vindicate those norms even if it cannot, alone, realistically be expected to deter or fulfil retributive aspirations held by each affected local constituency”.⁹⁴ This arguably suggests that the argument advocated here is perhaps the best suited for this task.

5. Conclusion

This chapter closes the section of this thesis on international criminal law. In chapters 3 and 4 I have presented an argument to the effect that both individual states and the ICC should have, at the bar of justice, the power to punish O for an international crime irrespective of where it was perpetrated, and of the nationality of either O or V. Chapter 3 argues that an international crime is simply one whose prohibition cannot be in force on the territory of TS unless at least some extraterritorial body has the power to punish O. In Chapter 4 I have argued that the interest of individuals in TS, TS2, TS3, PS, etc, i.e., of every individual in a situation of vulnerability vis-à-vis this kind of crimes, warrants conferring upon every state and the ICC UJ to punish O. Finally, I have defended this proposition against the claims that UJ simply criminalizes political decision-making, that it risks becoming a tool against political adversaries, and that it is simply an expensive taste for elites of no consequence to the individuals who should benefit from it.

⁹³ Sloane, 'The Expressive Capacity of International Punishment', 85. He refers only to “international” tribunals, but I think it is more accurate to include domestic ones acting on universal jurisdiction too. Drumbl reluctantly seems to admit that this is a function that extraterritorial punishment can perform rather well, even in mass atrocity situations (Drumbl, *Atrocity, Punishment, and International Law*, 176).

⁹⁴ Sloane, 'The Expressive Capacity of International Punishment', 85.

5

Legitimate Authority and Extraterritorial Punishment

1. Legitimate Authority and the Right to Punish

The question in this thesis so far has been when a particular body is justified in meting out legal punishment extraterritorially to an offender. Chapters 2 and 4 explained, respectively, how the interest-based justification for the power to punish O advocated here accounts for different extraterritorial bodies (PS and the ICC) being justified in punishing O for domestic and international offences. However, as I argued in the general Introduction to this thesis, identifying an interest that is sufficiently important to confer upon S this normative power does not suffice as a complete explanation for the allocation of such power. S would normally have to fulfil certain conditions such as, quite plausibly, not decide on a defendant's (D) culpability on the basis of confessions extracted by torture.¹ In other words, it is not enough for S to have the power to punish O, that someone's interest would be served by the conferral of that power; S must also have the authority to do so. In the general Introduction I illustrated this point by way of a simple example. A needs prescribed drug D to fight some illness of hers and B knows about this illness and knows that drug D would be appropriate. I suggested that although B would be *justified* in prescribing D to A, she would not have the normative power to do so. This is not, or so I claim, because A lacks the relevant interest in getting the drug or B lacks the relevant interest in selling it to her, but rather because B lacks the *authority* to prescribe it. The same can be argued in respect of PS. In order for it to claim the power to punish D, it must satisfy certain conditions. This chapter provides a philosophical account of these conditions.

¹ Although along the thesis I have been using O as an alleged offender (i.e., an offender found guilty by a body with the relevant authority), in this chapter I use the notion of a defendant. The reason for this is, in short, that it captures better the fact that D has not been convicted yet.

Although this is obviously an important question for any theory of criminal justice, it may seem of particular importance for a theory of extraterritorial criminal law. This is because defendants, victims, and third parties characteristically tend to question the authority of the court deciding the case. In effect, the authority of the International Military Tribunal at Nuremberg and Tokyo was objected to on the basis that it was nothing more than victor's justice and that the Allies had also committed war crimes during the war (*tu quoque*). Similarly, in the case against Pinochet, Spain's standing was questioned on the grounds that it had failed to prosecute the crimes of the Franco era. I will call this the issue of 'clean hands'. Italy and France have often been criticized for trying offenders *in absentia*. Certain trials, such as Saddam Hussein's, bear the charge of being show trials or 'trials by ambush'. And, finally, sometimes offenders are brought before the Court after being abducted abroad (e.g. Eichmann). I shall examine each of these claims here and assess their normative force and implications.

This chapter is intended to do two things. First, it will complete my general theory of extraterritorial punishment by explaining when a particular body (S, PS, the ICC or one of their organs) satisfies the minimum requirements to hold, itself, the power to punish D. I will argue that this question is ultimately about whether S can claim the *authority* to do so. Moreover, in order to substantiate this claim I believe it is worth referring to what is arguably one of the most elaborate philosophical accounts of authority available in the literature: Raz's service conception. In sections 2, 3 and 4 I will provide a general account of the authority of criminal courts.

Secondly, this account of authority will show that none of the challenges often raised specifically against extraterritorial bodies punishing D has anything to do with the *extraterritoriality* of the prosecution. Rather, they rely on different considerations which affect both territorial and extraterritorial bodies alike. This is crucial for my purposes because it shows, against what it is commonly believed, that the issue of the *extraterritorial* scope of S's power to punish is entirely separate from the specific considerations on which S's *authority* is based. As I have suggested in previous chapters, the extraterritorial scope of S's power to punish D rests on the reasons that justify S

meting legal punishment to D, to wit, on the interest on the basis of which this power is explained, and on whose interest it ultimately is. In sections 5 and 6 below, I will examine some of the most relevant challenges against extraterritorial prosecutions. But before going into any of this a caveat is in order.

We must not conflate the question of what conditions *S* should satisfy in order to have, *itself*, the authority to punish D, with the justification for the need to confer upon *some* authority the power to punish D. While the former question has to do with what gives *S* authority over a particular issue, the latter justifies the need for having some sort of *centralized* authority to deal with it in the first place. These questions are analytically independent from each other. Indeed, regardless of whether we consider that we need a centralized authority or that we should allow individuals to decide themselves on whether D should be punished, we might still require that they both satisfy certain conditions in order to exercise that prerogative legitimately.

Admittedly, few would argue that we would be better off if each individual, rather than the state, held the power to punish D for an offence. Yet it is worth clarifying why this is so. The obvious objection to vigilante jurisdiction is the risk of potential abuse.² However, that risk would be significantly tamed by imposing strict conditions for the exercise of that power. We may require that trials remain public, that provision for defence counsel be adequate, that stringent rules of evidence be adhered to, that sentencing guidelines be provided, etc. These limitations are perfectly compatible with conferring upon any interested party the power to punish D. Quite possibly vigilante jurisdiction will still be resisted on the grounds that “it is unreasonable for Men to be Judges in their own Cases”.³ Yet, this does not argue in favour of having a centralized authority but rather suggests that *V* should not be allowed to try D herself. Moreover,

² See, e.g., Luban, ‘A Theory of Crimes against Humanity’, 106, who in fact does conflate these two questions. See also Locke, *Two Treatises of Government*, Second Treatise, §13, 275 and J. Gardner, ‘Crime: in Proportion and in Perspective’ at Andrew Ashworth and Martin Wasik, *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford: Oxford University Press, 1998).

³ Locke, *Two Treatises of Government*, § 13, 275.

as Locke suggested, “if he that judges, judges amiss in his own, or any other Case, he is answerable for it to the rest of Mankind”, i.e., he is liable to punishment himself.⁴

By contrast, I suggest that the main reason why we should have a *centralized* authority is the need for coordination and cost-reduction. I cannot offer here a full defence of this claim. Rather, I shall simply suggest that it would be too onerous on individuals to have to carry themselves the costs of investigating, trying, and executing the sentence.⁵ This position will play an important role in the explanation of some of the issues I will address below, so it is worth keeping this background claim in mind.

2. The service conception of authority and the power to punish

“A command is when a man saith do this or do not do this yet without expecting any other reason than the will of him that said it.”⁶

Joseph Raz’s influential service conception of authority may help us explain and justify what conditions any given body should meet in order to hold legitimate authority to decide whether D should be punished. It is beyond the scope of this thesis to provide an adequate defence of this well-known position.⁷ However, I suggest that Raz’s highly influential conception is clearly the best suited to account for the legitimate authority of courts in the context of adjudication of criminal cases, both territorial and extraterritorial. First, it readily distinguishes between the reasons that underlie the basis of A’s authority and those which account for the scope of its power. While the whole of this thesis has been concerned with the latter issue, this chapter deals only with the former. Secondly, and as I will argue below, it links A’s authority to it having an epistemic advantage; thereby, it captures the fundamental insight that we normally

⁴ *ibid.*, § 13, 276.

⁵ It must be noted that this argument is independent of my particular justification for the right to punish and, thus, it would be compatible with other justifications, such as deterrence, retributivism, etc.

⁶ Hobbes, *Leviathan*, ch. 25.

⁷ For a good introduction to the issue of authority and a good example of the relevance of Raz’s version of the service conception in current debates see S.J. Shapiro, ‘Authority’ in Scott Shapiro and Jules L. Coleman, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002).

accept the authority of courts because they are in a much better position than any of us to decide a particular case, and this is due to their better knowledge of the facts and the applicable law. This is under most accounts a central aspect of the criminal process. Finally, the argument provided in this chapter does not need to rely on the service conception as an argument to explain *all* instances of authority, political or otherwise. By narrowing its application to the authority of courts I simply bypass one of the main sources of resistance with which the service conception has met, i.e., its lack of interest in democratic procedures.⁸

The issue of authority presents us with both a normative and a theoretical question.⁹ The normative question is, ultimately, on what grounds can we justify subjecting one's judgment to that of another person, in our case by allowing *her* to decide whether D should be punished (and how much). The theoretical one is about the implications of recognizing *A* as an authority on a given matter, i.e., how the existence of an authoritative decision affects the reasoning or decision-making of others.¹⁰ The service conception rests on three central theses, the first two of which provide an answer to the normative or moral question, and the third, to the theoretical one. The Normal Justification Thesis (hereinafter NJT) argues that the normal reason why a person ought to subject his will to that of another person is that he "is likely better to [conform] with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow reasons which apply to him directly."¹¹ This normative claim has a limit built into it. Thus, the Dependence Thesis states that in order for directives to be authoritative, they "should be based on reasons which already independently apply to the subjects of the directives

⁸ See, e.g., Thomas Christiano, 'The Authority of Democracy', *The Journal of Political Philosophy* 12, no. 3 (2004) and Shapiro, 'Authority', 431-439. Ultimately I assume that the other considerations on which authority is often said to rest, e.g., consent, identification, etc., are not suitable to the issue at stake here.

⁹ Joseph Raz, 'The Problem of Authority', *Minnesota Law Review* 90 (2006).

¹⁰ Joseph Raz, 'Authority and Justification', *Philosophy and Public Affairs* 14, no. 1 (1985), 3.

¹¹ Raz, *The Morality of Freedom*, 53; Raz, 'The Problem of Authority', 1014.

and are relevant to their action in the circumstances covered by the directive".¹² Finally, the Pre-emption Thesis (hereinafter PT) provides an answer to the theoretical question identified above; it maintains that "the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them".¹³ As I shall explain below, the answers to the moral and the theoretical questions are deeply interconnected.

But let us start from the beginning. The service conception rests on a particular understanding of practical reason.¹⁴ It suggests that in any given circumstances individuals ought to act on reasons that apply objectively to them. Regardless of whether I am driving, playing chess, or adjudicating in a criminal case the reasons I may have for not speeding, avoid loosing my rook, or convicting D only if she is proven guilty beyond reasonable doubt apply to me independently of my will, or my perception of these reasons. With this in mind, it is only natural that the normal reason why a person ought to subject his will to that of another person is that he is likely better to conform with reasons which apply to him if he accepts the directives issued by that authority than if he tries to follow these reasons directly (NJT). Thus, when playing chess one would be better off listening to Kasparov's advice than trying to figure out the right move by oneself. And this is arguably why we recognize Kasparov as an authority in chess. Accordingly, the service conception suggests that the normal function of legitimate authority is to mediate between people and right reasons that

¹² Raz, *The Morality of Freedom*, 47 and *Ethics in the Public Domain*, 214. This is not the only limitation that applies to the service conception. Authorities are also limited by the kind of acts they can or cannot regulate (Raz, 'Authority and Justification', 14). Moreover, in his latest restatement of the service conception, Raz places a significant emphasis in what he calls the Independence Condition, i.e., that "the matters regarding which the [NJT] is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority" (Raz, 'The Problem of Authority', 1014). I work on the assumption that empowering an authority to decide whether D should be punished or not (and if she is, how much) poses "no threat to the authenticity of one's life, or to one's ability to lead a self-reliant and self-fulfilling life" (Raz, 'The Problem of Authority', 1016) and that, as a result, it satisfies the Independence Condition.

¹³ Raz, *The Morality of Freedom*, 46.

¹⁴ Again, I cannot defend this approach here. For critical remarks see Heidi M. Hurd, *Moral Combat* (Cambridge: Cambridge University Press, 1999).

apply objectively (and independently of the authoritative directives) to them, and enhance their conformity with these reasons. Authority is ultimately grounded on epistemic advantage.¹⁵ This dissolves one of the traditional concerns with accepting an authority; authorities are not an arbitrary denial of one's capacity for rational action, but rather a device through which one can achieve more effectively one's capacity for rational action.¹⁶ In Raz's words, "the primary value of our general ability to act by our own judgment derives from the concern to conform to reasons, and that concern can be met in a variety of ways."¹⁷

It has been often objected, however, that the NJT provides only a prudential reason for accepting someone's authority, and does not yet explain why we are bound to do so. The standard example goes: even if as patients we would comply better with reasons that apply to us by following the doctor's advice than by relying on our own judgment, this does not entail *per se* that we are under a duty to follow her advice (or that the doctor has authority over us).¹⁸ This proposition, however, is only partially correct. For while it is true that doctors lack authority to oblige patients to follow certain medical treatment, they do have authority to prescribe them certain medications. Admittedly, the NJT cannot explain this difference of treatment. In both situations we would comply better with the reasons that objectively apply to us by following the doctor's advice than by following reason directly. But why should we rely on the NJT to explain this difference? I suggest that it is a mistake to suppose that the service conception relies on it to explain the *bindingness* of an authority's decisions. On the contrary, Raz has argued that we are under a duty to accept an authoritative directive "where a substantial good is at stake, a good that we have moral reasons to secure for

¹⁵ Raz, *Ethics in the Public Domain*, 214.

¹⁶ Raz, 'The Problem of Authority', 1018.

¹⁷ *ibid*, 1017.

¹⁸ Kenneth Einar Himma, 'Just 'Cause You're Smarter Than Me Doesn't Give You a Right to Tell Me What to Do: Legitimate Authority and the Normal Justification Thesis', *Oxford Journal of Legal Studies* 27, no. 1 (2007), 124.

ourselves and for others but that can in the circumstances be best secured by yielding to a coordinating authority.”¹⁹

It seems, then, that the objection misunderstands the normative work that the NJT does within the service conception. The NJT explains only why we recognize, doctors as the relevant authority to prescribe certain drugs, or engineers as authorities regarding whether we can build certain buildings, or certain courts of law as authorities empowered to adjudicate on matters of criminal liability. The bindingness of their decisions, by contrast, depends on other considerations, which are contained in Raz’s answer but which it pays to explicate further. In short, the service conception relies on two further positive arguments to explain the *bindingness* of an authority’s decision: first, that there are things we have an interest in, an interest which is important enough to warrant the protection of a right; and secondly, that the best way to serve this interest is to empower an authority. It is only when these two conditions *and* the NJT are satisfied that we have a moral case for considering the decisions of A binding.

Before moving on to the theoretical question identified at the outset, that is, what the implications of recognizing *A* as an authority on a given matter are, two further points are in order. First, under the service conception, for a certain body to hold legitimate authority it must have some *de facto* authority. Admittedly, “in most cases the normal justification cannot be established unless the putative authority enjoys some measure of recognition and exercises power over its subjects.”²⁰ The main reason for this is that if *A*’s authority relies on the fact that it is capable of solving certain coordination problems and of providing a particular good, it must have some degree of recognition by its peers and obedience from those subject to it. A powerless authority simply cannot secure the relevant good at stake, be that a system of criminal laws, the reasonable regulation of certain pharmaceutical products, or whatever. Moreover, this helps to explain why states are natural candidates to claim the authority to punish *D* and it provides a sensible evaluative threshold for extraterritorial authorities, such as

¹⁹ Raz, 'The Problem of Authority', 1016. See, similarly, Raz, *The Morality of Freedom*, 100.

²⁰ Raz, 'Authority and Justification', 21; Raz, *The Morality of Freedom*, 56.

governments in exile or international tribunals, and for domestic non-state institutions such as tribal authorities, belligerent movements, etc.²¹ In the remainder of this chapter I shall assume that the relevant body satisfies that requirement.

Secondly, *A*'s authority is limited by the kind of reasons on which she may or may not rely in making a decision. To repeat: directives must be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive in order to be binding (Dependence Thesis). This is a moral thesis on how authorities must use their powers. It follows from it that in order for a decision reached by a given state *S* (or one of its organs) on whether *D* should be punished or not to be authoritative, it must be based on the reasons that apply to individuals whose interest explains conferring upon this particular body the power to punish *D*. In simple terms, I have argued that individuals in *S* have an interest in punishing those who violate *S*'s criminal rules.²² As a result, this requirement rules out decisions reached primarily for other reasons, such as political expedience, economic interest of a certain kind, vindictiveness, hate, etc.²³ This explains why a verdict reached through bribing or threatening the jurors can claim no authoritative force even if it is accurate.

As suggested above, the answer to the theoretical question identified at the outset, namely, what are the implications of saying that *S* has legitimate authority to try *D*, rests with the Pre-emption Thesis (PT). That is, "the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them".²⁴ Thus, Raz argues that authoritative decisions work as

²¹ I am happy to accept that, in certain circumstances, a body different from the state would be able to hold the power to punish *D* at least if, e.g., it is authorized by the state, like the Gacaca in Rwanda, or if the body acts *de facto* as the state. However, I submit that we should accept its authority to punish *D* only as long as *A* satisfies the relevant conditions outlined below. Gacaca proceedings seem unpromising in this sense.

²² This does not mean they are, as a matter of fact, guilty. For a detailed explanation of this proposition see Chapter 1 above.

²³ See, e.g., Duff, *Answering for Crime*, 186 and cases cited in fn 143 and 144.

²⁴ Raz, *The Morality of Freedom*, 46 This is arguably one of the most controversial aspects of Raz's service conception. For a review on some of the criticisms, see Shapiro, 'Authority', 411-413.

second-order reasons that pre-empt the subject from relying on the first-order, background reasons that apply to her independently. The reason for excluding other background reasons is that an authority cannot succeed in improving our conformity with reason and solving coordination problems if it does not pre-empt our background reasons, i.e., if individuals have to rely on their own judgment of the merits.²⁵ I cannot offer here a proper defence of the PT nor even of Raz's notion of exclusionary reasons.²⁶ Rather, I shall only concentrate on its explanatory potential for the account of extraterritorial criminal justice defended here.

Briefly put, the PT explains the difference between saying that S is justified in punishing D (as per Chapters 3 to 5) and claiming that S has the *authority* to do so. The former proposition means that someone has an interest which is sufficiently important to put D under a liability to having punishment inflicted upon her; the latter means that S's decision on this matter should be treated as binding by others.²⁷ This entails, first, that individuals in S must abide by the court's decision. That is, for example, they are not supposed to go to the local Mob asking for justice after the state sentenced the defendants too leniently.²⁸ And most relevantly for our purposes, it also follows that if S satisfies the requirements of the service conception, other states should consider that decision as authoritative, that is, they would lack a valid reason to reject it. *A contrario*, this also entails that if a state fails to satisfy these conditions its decision cannot claim authoritative force.

We may be inclined at this point to distinguish between the authoritativeness of convictions and acquittals. Indeed, although a guilty verdict means that D was found guilty beyond reasonable doubt, acquittals do not establish innocence but rather that the guilty threshold was not reached. One could then suggest that acquittals should not

²⁵ *ibid.*, 47-48; Raz, 'The Problem of Authority', 1019.

²⁶ On this see Raz, *Practical Reason and Norms*.

²⁷ As I explained above, the former proposition is one of the conditions that must be satisfied in order to claim that S has legitimate authority to punish D.

²⁸ Prudential reasons might also indicate likewise, as one may hear as a chilling reply: "Some day, and that day may never come, I will call upon you to do a service for me. Until that day accept this justice as a gift on my daughter's wedding day." (Mario Puzo, *The Godfather* (New York: New American Library, 2002), 33).

then carry the same authority as convictions, and therefore that they need not be considered binding, particularly by other states. Accordingly, the fact that D was acquitted in S should not entail that she cannot be tried again (and convicted) in S2. But this, I suggest, conflates two different things. The reason why we might consider S an authority (i.e., that she satisfies the NJT) is not what explains its decision pre-empting other authorities from deciding the case again. As suggested above, the PT is not grounded on S making a more accurate decision than S2, but rather on the need for coordination and cost-reduction. It would be deeply problematic for the purposes of the criminal law system to have conflicting decisions as to whether D is guilty. In particular, the fact that S's courts have acquitted her would render S2's conviction suspicious, at least if it was not grounded on new evidence. This would undermine the whole purpose of punishing D, for it will not convey a clear message that the rule she allegedly violated is in force. I cannot examine here whether states should have the power to try D again on new evidence (for this purposes it is immaterial whether she is tried in a court in the same state or a different one). The majority of states seem to have rules against this kind of proceedings called the safeguard against double jeopardy or *ne bis in idem*.²⁹ To conclude, then, I submit that D's acquittal does carry as much authority as her conviction (in the restricted sense of the PT), even if it arguably has an entirely different meaning.

3. The service conception and the legitimate authority of courts

It is now time to see whether the service conception can convincingly account for the institution at hand, i.e., criminal courts. As argued in Chapter 1, I submit that having a criminal law system in force is a public good we have reasons to secure for ourselves and for others. That is, an interest in this system being in force sufficiently weighty to ground a normative power to punish D. I also suggested that the best way to comply with these background reasons is to empower an authority to investigate and try

²⁹ An exception is the UK, which allows under quite strict conditions a new prosecution (see Criminal Justice Act 2003 ss. 75-81).

criminal offences. This is mainly because of its greater coordination and cost reduction (i.e., its efficiency). This authority would normally be a territorial or extraterritorial one depending on whether the relevant offence is municipal or international.³⁰ The bulk of this chapter is therefore concerned with identifying when such institutions (normally some kind of domestic or international court) satisfy the NJT, that is, when individuals are likely better to conform with reasons which (independently) apply to them by accepting its directives rather than by trying to follow these reasons directly.

Following Ashworth and Redmayne, a plausible answer to this question is that *A* satisfies the NJT when it seeks “accurately to determine whether or not a person has committed a particular criminal offence and does so fairly.”³¹ In other words, the *normal* reason why individuals should recognize the authority of a given Court to decide a particular criminal case has to do with its greater knowledge of the facts of the case and the relevant law, and its careful consideration of the conflicting viewpoints on the matter. This response certainly has much intuitive appeal. However, there are at least three issues that need further elaboration.

First, although the accuracy requirement captures the epistemic advantage that courts normally offer, it raises the question as to why accuracy actually matters. According to the NJT an authority’s epistemic advantage must be connected to the reasons which independently apply to us and which it helps us conform better to. Ashworth and Redmayne’s answer to this question is therefore consistent with the rationale for legal punishment they endorse, to wit, retribution. If *A*’s power to punish is based on the fact that *D* deserves to be punished, it is only natural that the criminal procedure is intended to determine, as accurately as possible, whether this is the case. I have criticized retributivism in previous chapters for being incompatible with the

³⁰ To remind the reader, Chapter 2 argues that individuals in *S* have an interest that warrants conferring upon *S* the normative power to punish offences committed on its territory or against its sovereignty, security or important governmental functions even if committed abroad. Chapters 3 and 4 argue that both the ICC and PS (an extraterritorial state) hold the normative power to punish international offences regardless of where they were perpetrated, and of the nationality of both the offender (O) and the victim.

³¹ Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford; New York: Oxford University Press, 2005), 22.

interest theory of rights, and for leading to unacceptable positions when faced with the issue of extraterritoriality.³² Yet, if I want to endorse accuracy as an element of the NJT, I would need to explain why it would be required also by the justification for legal punishment advocated here.

The basic proposition I have defended throughout this thesis is that *A*'s power to punish *D* is based on the interest of individuals in there being a rule against murder, robbery, systematic torture, etc. in force. For that criminal rule to be in force, those who violate it must be punished; they must be punished by an authority expressly authorized by the relevant legal system; and they must be punished *because they violated this rule*. Only when all these conditions are fulfilled would punishing *D* send the right message to individuals that the rule is in force.³³ Accordingly, we need to make sure as far as possible to convict the right person. Punishing innocent people *qua* innocent will not do for the simple reason that it would ultimately undermine the credibility of the criminal law system and, with it, the sense of dignity and security that it brings to individuals.³⁴ This explains why accuracy is also required by the justification of legal punishment I advocate.

Secondly, we need to clarify what it means to try someone fairly and explain why this would also be required by the NJT. The former question is perhaps simpler to answer than the latter. Fairness in this context is normally connected with respect for certain rights. It is beyond the scope of this thesis to provide a complete account of the rights that a fair criminal process must respect. My argument is about being able to account for the standard cases of fair or unfair trials; it is not meant to discern where exactly to draw the line between them. A good starting point, in any event, is to look at the different incidents that embody the right to a fair trial as provided for in the relevant International Human Rights instruments. Article 14 of the International Covenant on Civil and Political Rights establishes that “everyone shall be entitled to a

³² See Chapters 1 and 2 above, respectively.

³³ See Chapter 1 above.

³⁴ I do admit, however, that a given decision might be authoritative even if in a specific case *D* is wrongly acquitted or wrongly convicted. On this, see section 3.1.4 in Chapter 1 above and below.

fair and public hearing by a competent, independent and impartial tribunal established by law”; “shall have the right to be presumed innocent until proved guilty”; and shall be entitled to several minimum guarantees, such as, “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”; “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”; “to be tried without undue delay”; “to be tried in his presence”, “to have legal assistance assigned to him”; “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf”; “to have the free assistance of an interpreter”; and “not to be compelled to testify against himself or to confess guilt”.³⁵ There are certainly other rights that the criminal process should respect, which are not normally covered by the right to a fair trial as such. Among them, one could mention the right to privacy, to personal liberty, to freedom from torture, etc. In sum, I suggest that fairness in this context has to do with respect for some basic moral rights that individuals have in the context of a criminal process broadly defined.³⁶

Far more difficult is to explain why fairness is required by the NJT, i.e., why accuracy does not suffice. Is not the NJT based on the notion of epistemic advantage and is not the epistemic advantage linked to whether we have sufficient evidence that D is guilty of wrongdoing? Ashworth and Redmayne suggest that accuracy and fairness are twin, concomitant aims. They even resist the idea that individual rights work as mere side-constraints in the pursuit of truth. For them the criminal process “is not just a diagnostic procedure, of which the sole purpose is to establish as accurately as possible ... what happened”; they insist that respect for rights be seen as an objective

³⁵ See roughly similar provisions in article 8 of the American Convention on Human Rights, article 6 of the European Convention on Human Rights. See also complementary rights and provisions in the UN Convention on the Rights of the Child and the Charter of Fundamental Rights approved by the European Union in 2000.

³⁶ Admittedly, some of the particulars of these rights would be jurisdictionally specific (e.g., the right to have legal advice when questioned in a police station). Yet, ultimately my argument rests on a more basic catalogue of rights (e.g., the right to an adequate defence), whose different forms of institutionalization are immaterial for present purposes.

to be attained *while* pursuing that end.³⁷ However, this proposition fails to explain why a violation of the right to fair trial would undermine *A*'s authority to punish *D*, and it seems to take for granted that these two aims will not conflict.

There are two main positions in the literature regarding this specific issue. On the one hand, the separation thesis suggests that "each part of the criminal justice process should be considered independently", that is, that if a wrong was committed during the investigation, the police officers who carried it out should themselves be punished, but this should have no bearing on the situation of *D*.³⁸ And on the other hand, the integrity thesis entails that a breach of, for instance, someone's right not to be tortured during the criminal process would undermine *A*'s authority to punish *D*.³⁹ Ashworth and Redmayne take sides with the integrity thesis and so do I.⁴⁰ However, the difficulty lies in providing a convincing account for this position. A possible reason to endorse the integrity thesis is that fairness is a condition for accuracy. Accordingly, it has been argued that things such as coerced confessions are generally unreliable.⁴¹ Indeed, I suggest that this is the reason why most breaches of the rules of fair process undermine *A*'s authority. However, why should we not admit such a confession when it led to a very specific piece of incriminatory evidence that could not have been made up and which confirms *D*'s culpability? Lack of reliability, thus, cannot take us far enough.

Ashworth and Redmayne advocate a stringent version of the integrity thesis which they call protective or remedial. Ultimately, they argue that the only way to give significant force to a person's right not to be tortured is to exclude the evidence obtained in violation of this right, and that it is much more important to uphold this

³⁷ Ashworth and Redmayne, *The Criminal Process*, 24 and 45 respectively, emphasis added.

³⁸ As described by Duff et al., *The Trial on Trial. Vol. 3*, 226.

³⁹ See, generally, *ibid*, Chapter 8 and A. Ashworth 'Exploring the Integrity Principle in Evidence and Procedure' in Peter Mirfield and Roger Nov Smith, *Essays for Colin Tapper* (London: LexisNexis UK, 2003).

⁴⁰ A note of caution is in order here. This does not mean that under certain circumstances the state officials should not *also* be punished. It only means that their wrong is not entirely unrelated to *S*'s authority to punish *D*.

⁴¹ Interestingly, some 'coerced' interrogation techniques used at Guantánamo Bay were allegedly used by the Chinese during the Korean War to obtain confessions from American prisoners, most of them false. See, S. Shane, 'China Inspired Interrogations at Guantánamo', *New York Times*, July 2 2008.

right than to convict a guilty defendant in the immediate case.⁴² However, their position rests on slippery grounds. First, its premise is far from uncontroversial, since there are other ways of upholding D's right which do not involve excluding illegally obtained but otherwise accurate pieces of evidence. Most notably, and as the separation thesis advocate would argue, S could punish those who violated that right and compensate D for the harm she suffered. Ashworth and Redmayne could still suggest that "the *ideal* remedy for breach of a right is normally (at least) restoration of the victim to the position he would have been in had the right not been violated".⁴³ However, this would still fail to explain the exclusion of evidence when it is the right of a third party that has been violated, or when D's rights were violated by a third party or state.⁴⁴ Secondly, their position would face a significant challenge particularly in cases of trials for international crimes and when excluding this evidence would lead to D's acquittal. Unless one is dealing with extreme situations such as torture it might well not be apparent why symbolically upholding someone's right to a fair trial would be more important than punishing D in instances such as the indictment of key political or military figures responsible for mass atrocities in ongoing conflicts.⁴⁵

By contrast, I want to suggest that the reason why fairness matters is ultimately connected to the NJT in a more fundamental way. The NJT rests on the reasons that objectively apply to us, and those are for our purposes the reasons that justify punishing D. This thesis argues that S's power to punish D is explained by the interest of individuals in S in there being a system of criminal rules in force. For these rules to be in force, D has to be punished by an authority expressly authorized by that legal system, and *because she violated these rules*. That is, if the infliction of punishment is to convey the message that the violated criminal rule is in force, it is vital that individuals

⁴² Ashworth and Redmayne, *The Criminal Process*, 330-331.

⁴³ As put by Duff et al., *The Trial on Trial. Vol. 3*, 230, 235. My emphasis.

⁴⁴ This is why Duff *et al* seek to complement this account, which they call integrity as integration, with the principle of integrity as moral standing. In section 4 below I will discuss in some detail whether the notion of moral standing should play a part in a defensible conception of authority as applied to criminal courts.

⁴⁵ This might well apply also in cases of serial killers such as Harold Shipman, serial rapists, etc. See Adrian A. Zuckerman, 'Illegally-Obtained Evidence - Discretion as a Guardian of Legitimacy', *Current Legal Problems* 40 (1987), 57.

in S see it as credibly meted out for that reason. Yet, if D is punished after her right to a fair trial is violated, this would raise doubts as to whether the reason that she is being punished is that she violated one of these rules. And this would be true, most likely, even if there was strong evidence that indicated that D is guilty. Fairness, I submit, is a necessary condition for credibility.

By credibility I do not mean here simple reliability as to whether D, as a matter of fact, committed the offence. Rather, my submission is that it is crucial that the court is credibly seen as convicting or acquitting D for the right reasons. Put differently, the trial is a means of communication with the public at large (including D and V).⁴⁶ Public confidence in S's courts is therefore a necessary condition for the existence of a system of binding criminal laws. This confidence is not exclusively a product of the factual accuracy or reliability of the verdict.⁴⁷ Trials that are legitimately *perceived* as biased are problematic even if they convict the guilty or acquit the innocent. This explains why publicity and impartiality are widely endorsed conditions for any court's authority even when they are not necessarily instrumental in reaching more accurate decisions. A secret trial is suspicious and therefore its verdict is unacceptable for the public even if it happens to be accurate. Similarly, the House of Lords' decision in *Pinochet I* was quashed not because of it being incorrect, not even because it was biased. As Lord Browne Wilkinson put it, "Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias." This was considered sufficient to undermine the authoritativeness of the decision.

To sum up, I argue that S satisfies the NJT as an authority to punish D if and only if it both seeks to reach an accurate and reliable verdict and it does so fairly. It is

⁴⁶ I.H. Dennis, 'Reconstructing the Law of Criminal Evidence', *Current Legal Problems* 42 (1989), 35.

⁴⁷ Duff et al, *The Trial on Trial. Vol. 3*, 88. The Canadian Constitution provides: "Where ... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that ... the admission of it in the proceedings would bring the administration of justice into disrepute" (cited in Zuckerman, 'Illegally-Obtained Evidence - Discretion as a Guardian of Legitimacy', 60).

therefore not true that according to a generally instrumental conception of the criminal process “the unreliability of the means by which [the decision] was arrived at, or the fortuitousness of its truth, gives us grounds to criticise those who arrived at it, but do not undermine its instrumental value”.⁴⁸ Under the version of the service conception defended here it is also true that the justice of the outcome is not wholly independent of the justice of the procedures.

However, the service conception might be liable to the opposite charge. Namely, it may have to recognize the binding character of a credible wrong conviction or a mistaken acquittal.⁴⁹ The Dependence Thesis does not require that authoritative decisions *correctly* reflect the balance of reasons on which they depend. This proposition is a necessary implication of the conception of authority advocated here, and quite a salient one. Because the justification of legitimate authority relies on its capacity to sort out coordination problems, there is no point in having authorities unless their determinations are binding even if mistaken. This might seem hard to swallow. Yet the difficulty it causes should not be overstated.

First, clear mistakes would disqualify the authoritativeness of S’s decision.⁵⁰ This means that S2 would not be bound by S’s decision to punish D if it has clear and reliable information that D is innocent of the offence. Thus, under these circumstances S2 would be entitled not to extradite her to S. By the same token individuals in S itself and external observers would be able validly to object to that decision, and even, in some circumstances, to refuse to comply with it. Secondly, we can devise rules to help us minimize certain types of mistakes. For instance, states tend (and should) prefer to let a guilty person go free than punish an innocent one, and this explains why they require proof beyond reasonable doubt for conviction, and not merely on the balance of probabilities, given that in principle the latter standard would secure a greater degree of accuracy. Finally, accepting the authoritativeness of a mistaken decision is far less controversial than one would initially think. When a court of law finds D guilty after a

⁴⁸ Duff et al., *The Trial on Trial. Vol. 3*, 88.

⁴⁹ Raz, 'Authority and Justification', 15.

⁵⁰ Raz, *The Morality of Freedom*, 62.

fair process and on the basis of accurate and reliable information, we generally accept its decision as binding. And rightly so; we would rather have this occur than having everyone trying to make up their mind whether to comply with this decision.

It is worth pausing here for a second. There is a particular kind of mistake that is accorded a different treatment. Raz suggests that the only mistakes that make an otherwise authoritative decision void are mistakes over jurisdiction. Yet, he does not give any reason why this should be so.⁵¹ I submit that the fact that mistakes over jurisdiction undermine \mathcal{A} 's authority to punish D has to do neither with it failing to meet the NJT nor the DT. Rather, the problem in such cases would be that \mathcal{A} has no reason to punish D which is sufficiently important to be protected by a right. As I explained in Chapter 3, the reason why a state PS lacks jurisdiction to punish D for a robbery she committed in TS (when it is not an offence against its sovereignty, national security, etc.) is that individuals in PS lack an interest which is important enough to merit the protection of a right. And this is, as explained above, a necessary element of the power to punish D. Accordingly, states which mistakenly assert jurisdiction over offences committed extraterritorially cannot validly effect a change in D's moral rights, let alone do so bindingly.

4. Authority as 'moral standing'

There is a competing view that sees in S's moral standing the main (though perhaps not the only) condition grounding legitimate authority to punish D. This position relies on a conceptual point, i.e., that a "complete account of the legitimacy of any authority must include an explanation of how the authority acquires the moral standing to hold others accountable, as well as an explanation of how it imposes genuine obligations."⁵² Crucially, \mathcal{A} 's moral standing to hold someone (D) accountable for a breach of its rules is explained by the relationship between \mathcal{A} and D. This is a plausible position to hold in several contexts. For instance, the objection goes, moral philosophers are not entitled

⁵¹ *ibid.*

⁵² Scott Hershovitz, 'Accountability and Political Authority', 2008, 5 (manuscript cited with permission from the author).

to discipline any child they happen to see committing a misdeed on the street, regardless of their satisfying the NJT; that power is generally grounded in the parent-child relationship. Competence does not warrant authority.⁵³

In this light, the service conception would be unsatisfactory as an explanation of legitimate authority precisely because it is unable to provide a plausible account of how S acquires the moral standing to hold D accountable. Indeed, Raz argues that “remedies for breaches of the law [such as damages for acts of defamation] ... can be morally justified even if applied to those who are not subject to the authority of the government and its laws.” The “importance of the law in such matters is in creating a centre of power which makes it possible to enforce moral duties.”⁵⁴ Thus, this objection claims, the service conception and the predominantly instrumental justification here advocated only explain why the state is *competent* to hold the tortfeasor to account, but it cannot explain why it has the *standing* to do so.

The damage this criticism does to the service conception is hardly as significant as its proponents suggest. Its initial appeal comes from the fact that it misrepresents the service conception and the normative work that the NJT does within it. The charge is that the NJT cannot explain why we are *bound* to obey a particular authority; in Hershovitz words, “[t]he normal justification thesis appears to tell us whether someone would make a good authority, not whether someone possesses it.”⁵⁵ Hershovitz himself admits that satisfying the NJT is not enough to hold legitimate authority over someone under the service conception. However, he fails to grasp what explains S holding legitimate authority under it. He argues that what accounts for S possessing authority over D is that it has *de facto* authority.⁵⁶ His more plausible charge against the service conception is then that the fact that S has *de facto* authority over D and that it satisfies the NJT does not entail that D is accountable to S. In effect, the fact that D is arrested in Chile and that the courts in Chile satisfy the NJT does not automatically entail that

⁵³ *ibid* 13.

⁵⁴ *ibid*.

⁵⁵ *ibid* 18.

⁵⁶ *ibid* 18-19.

Chile has the normative power to punish her for theft. Chile would not have that power, for example, if D perpetrated this offence in Iran.

But this criticism is wholly misplaced. S satisfying the NJT and having *de facto* authority are simply necessary conditions for S to have authority over D on a given matter; they are not what explains the scope of its justified power. Rather, what explains this is the fact that individuals in S have an interest in a given individual in particular (D) being punished, sufficiently important to warrant the protection of a right. As Raz puts it, a central aspect of the service conception is that it separates between the issues of the authority of the state and the scope of its justified power.⁵⁷ As I have argued in previous chapters, no particular relationship between S and D is needed in order for individuals in S to have an interest in D being punished. The moral standing theorist needs some sort of relationship between S and D because she fails to see that what explains S being justified in punishing D is also a necessary condition for S possessing the authority to do so. Namely, that individuals in S have an interest in D being punished which is sufficiently important to warrant the protection of a right and reasons to empower an authority to do this job.

Antony Duff *et al* take the moral standing line of argument further in a direction relevant for our enquiry. They provide a normative account of the criminal trial that “takes as its starting point the ordinary social practice whereby one person calls another to answer in the light of evidence of serious wrongdoing”.⁵⁸ They illustrate their view by way of the following example:

I think you have been spreading gossip about me at work. I call you to answer. I outline the reasons that I think this, and if they are good reasons, it seems that there is a legitimate demand that you answer. This seems right even if you are in fact innocent of spreading gossip about me.⁵⁹

⁵⁷ Raz, *The Morality of Freedom*, 104.

⁵⁸ Duff et al., *The Trial on Trial. Vol. 3*, 223.

⁵⁹ *ibid*, 209.

In order to call someone to answer and eventually hold her accountable for what she did, they argue, one needs to have the appropriate moral standing, i.e., the right to assess the moral nature of their conduct.⁶⁰ What explains S's moral standing in their view is the notion of citizenship. Citizenship, they suggest, involves a network of responsibilities, obligations and rights that structure relationships between citizens and between citizens and the polity.⁶¹ As a result of these relationships, defendants have the responsibility to answer to the charge based on the fact that they are citizens of S.⁶² The criminal trial should then be "normatively understood as a process in and through which citizens are summoned to answer to their fellow citizens for their alleged public wrongs."⁶³

However, this is too quick. As Mike Redmayne has suggested, their example involves acquaintances, and the moral obligations between citizens may well be different. For instance, if someone on the street falsely accuses me of scratching her car, it is far from clear that as a matter of justice I am under a duty to answer to her, or that she has any right to call me to account.⁶⁴ The crucial point is that no matter whether one takes Duff or Redmayne's side, it certainly does not seem to make any difference whether the person calling me to answer is in fact a co-national, a tourist, or someone calling on the phone from the other side of the globe who has never set a foot on S.

The more interesting proposition is that we must appeal to the fact that D is a citizen of S to explain why it is S and not some other state, which might be similarly well-suited to the task (or even better suited), that has the standing to punish D.⁶⁵ This statement shows precisely where my disagreement with this position lies. Indeed, making S's authority over D dependent on whether she is a citizen of S creates far more

⁶⁰ *ibid.*, 155-156.

⁶¹ *ibid.*, 140.

⁶² *ibid.*

⁶³ *ibid.*, 165. Moreover, this is also consistent with Duff's own justification for legal punishment in that for punishment to reach D's moral conscience it is necessary that A has the appropriate moral standing to censure her for her wrong. On a broader analysis of this theory see Chapters 2 and 3 above.

⁶⁴ *ibid.*

⁶⁵ This claim is also made by Herschovitz, 'Accountability and Political Authority', 21.

problems than it actually solves. First, this position sits very uncomfortably with the core intuition that foreign visitors are bound by S's criminal laws while on its territory. Though Duff *et al* explicitly state that S's right to call into account applies to them, they fail to give any reason as to why this would be the case.⁶⁶ Moreover, and as explained in Chapter 2 above, their position would not be able to explain some standard cases of criminal jurisdiction. For instance, it would fail to explain why Scotland had the power to punish anyone (i.e., anyone who is not a Scottish national) for the Lockerbie incident, or why Uruguay would have the power to punish offences committed by foreigners in France against its sovereignty, security or important governmental functions. After all, there seems to be no significant relationship between D and these states. Finally, by requiring this kind of relationship between S and D, they would have trouble explaining why states have extraterritorial jurisdiction to try international offences committed abroad on grounds of universality unless, of course, the relevant relationship is rendered so thin that it would be hard to see what normative work it is actually doing.⁶⁷

To sum up, then, my claim is not that S should lack a certain moral standing in order legitimately to claim the authority to punish. Rather, my position is that this moral standing does not rely on any special relationship between D and S, and in particular, not on the relationship of citizenship. This completes my general account of authority. In the following sections, I will test it against some common arguments often (though not exclusively) raised against the authority of extraterritorial courts. My task is to show that even when successful, these charges are not directed against the *extraterritoriality* of the court.

5. Show trials, 'Clean Hands', and the problem of Victor's justice

Extraterritorial prosecutions have often been subject, legitimately or not, to the charge of being show trials. This charge was explicitly raised by Hess in the Nuremberg Trial,

⁶⁶ Duff et al., *The Trial on Trial. Vol. 3*, 135-136.

⁶⁷ On this, see my criticism to Duff's position in chapters 2.6 and 4.2.3 above.

by Milosevic before the ICTY, by Saddam Hussein before the Iraqi High Tribunal, and can be inferred in the statements by Justice Rutledge of the US Supreme Court on the trial of General Yamashita, and Justice Pal at Tokyo.⁶⁸ There is certainly no agreement in the literature on what makes any particular criminal proceeding a 'show trial'.⁶⁹ But some instances hardly need elaboration. Meir Cotic recounts that in the Prague proceedings, Regulation of 25 January 1950 stated "The court must inform the Prosecutor in advance of the judgement it is about to hand down and get his opinion whether the judgement is correct... the Prosecutor's opinion is binding on the Court".⁷⁰ "[D]ress rehearsals were conducted prior to these trials and these rehearsals were taped so that if a defendant deviated from the script, the microphone was switched off and the tape would begin playing the defendant's pre-recorded responses".⁷¹ There is little doubt that this type of judicial proceedings is illegitimate and that this undermines S's authority to punish D. The more interesting question is why exactly this is so. This section provides an answer to this question and will show that in order to decide whether it is the case that S's has the authority to punish D it is irrelevant where the offence was committed.

Saddam Hussein faced trial before the Iraqi High Tribunal (IHT) for a number of offences related to killings perpetrated in the town of Dujail in 1982. He was sentenced to death and hanged on December 30, 2006. During the proceedings, he robustly questioned the authority of the IHT: "I do not respond to this so-called court... what is built on illegitimacy is illegitimate"⁷²; and he specifically raised the show trial charge: "this is all theatre by Bush".⁷³ If he was right in that the legitimacy of the Court was tainted, as I think he was, where does the normative force of his claim lie? The central problem with the IHT, and the Dujail Trial in particular, is not necessarily that the verdict was inaccurate, but rather that it failed to provide the defendants with a fair

⁶⁸ Simpson, *Law, War and Crime*, 108.

⁶⁹ For a recent attempt, see Jeremy Peterson, 'Unpacking Show Trials: Situating the Trial of Saddam Hussein', *Harvard International Law Journal* 48, no. 1 (2007).

⁷⁰ Cited in Simpson, *Law, War and Crime*, 130.

⁷¹ *ibid.*

⁷² *ibid.*, 105.

⁷³ S. Tisdall, "A Chance for Justice, but Will It Be Seized?," *The Guardian*, 19 October 2005.

trial. Among its main reported shortcomings are severe political interference, breaches in fair trial standards, and serious evidentiary and analytical gaps.⁷⁴ In effect, it is reported that the Higher National DeBa-athification Commission repeatedly intervened in the Tribunal's appointments and removals and functioned as a "sword over [its] work".⁷⁵ Moreover, the defence counsel had limited access to important evidence and the IHT denied defendants the full opportunity to contest evidence presented against them. There was a failure to gather and disclose exculpatory evidence which, in turn, impaired the opportunity to confront and cross-examine witnesses. Moreover, due to the fact that the trial was held amidst intense conflict, it was impossible for the defence to conduct its own investigations, particularly in al-Dujail village.⁷⁶ This is hardly meant as an exhaustive list, but it certainly suffices to show where lies the normative force of the 'show trial' charge.

A couple of points are therefore in order. First, these examples both show the explanatory power of the service conception of authority, and reinforce my initial claim that the NJT must include fairness in criminal trials. According to the NJT, the IHT's authority must rely on it improving the conformity to reasons which independently apply to the relevant individuals. The reason which justifies the IHT having the power to punish D is that individuals in Iraq (and possibly elsewhere) have an interest in a criminal rule against mass killings being in force. For this type of criminal rule to be in force, I have argued, D must be punished for having violated it. Now, the fact that Saddam was subjected to an unfair trial can hardly ground the perception that he was punished *for violating these rules*. Fairness as I suggested is crucial to credibility. But what is more important, this holds even if most people believed that Saddam was in any event guilty as charged. That is, the lack of fairness harms A's authority to try D in much the same way as lack of reliable evidence.

⁷⁴ Miranda Sissons; and Ari S. Bassin, 'Was the Dujail Trial Fair?' *Journal of International Criminal Justice* 5 (2007).

⁷⁵ *ibid*, 277.

⁷⁶ *ibid*.

One may of course object that show trials are capable of delivering public order. After all, Stalin used them in 1937-8 with considerable success to bring support to his 'kulak operation', which consisted in nothing other than mass killings ("smashing the enemies of the people").⁷⁷ However, this would be completely to misunderstand what is the interest that justifies having the power to punish D, and to turn it into a pure consequentialist argument based on conformity with any kind of rule. To be clear, the Stalinist type of public order is not based on the belief that certain criminal rules are in force and, what is more important, on these rules contributing to the sense of dignity and security of individuals living under them. Rather, this type of public order is generally grounded on a 'Who's next?'-type of concern.⁷⁸ In Findlay's words "exposing the harsher and more arbitrary operations of the criminal sanction to wide public scrutiny may not appear as a re-establishing of justice, but rather as a reactivation of power."⁷⁹

The second thing to note is that the issue of extraterritoriality did not have any significant bearing on the legitimacy of the IHT's authority to punish Saddam. The character of the IHT as territorial, extraterritorial or hybrid institution is a complex philosophical, legal and political issue in its own right. On its Website, one reads that "[t]he IHT is purely a national tribunal and this is beyond discussion." However, its creation was *authorized* by the Coalition Provisional Authority,⁸⁰ its statute was reportedly drafted by the U.S., and its personnel and Judges were selected by the US-appointed Iraqi Governing Council.⁸¹ However, reports from people on the ground

⁷⁷ Michael Ellman, 'The Soviet 1937-1938 Provincial Show Trials Revisited', *Europe-Asia Studies* 55, no. 8 (2003).

⁷⁸ Mark Findlay, 'Show Trials in China: After Tiananmen Square', *Journal of Law and Society* 16, no. 3 (1989), 356.

⁷⁹ *ibid.*, 354. See also, D. Brown and D. Neal, 'Show Trials: The media and the Gang of Twelve', in Mark Findlay and Peter Duff, *The Jury under Attack* (London: Butterworths, 1988).

⁸⁰ Order 48, "Delegation of Authority Regarding an Iraqi Special Tribunal", issued on 10 December 2003.

⁸¹ Moreover, the US contributed some \$128 million to its funding, a sum which dwarfs the Tribunal's own budget, and facilitated extensive security arrangements for the Tribunal and associated personnel. Most IHT functions, such as analytical, logistical and investigative support, relied heavily on the Regime Crimes Liaison Office (RCLO) which is based at the US embassy. Bassin, 'Was the Dujail Trial Fair?'

seem to emphasize how keen the Iraqis were in running the show their way. Charles Garraway recently commented that the defiance of due process standards that characterized the Dujail trial contravened the explicit advice (pressure) of the occupying powers and was probably a symbolic form of claiming sovereignty over the proceedings.⁸² In any event, my contention is precisely that the illegitimacy of Saddam's trial had nothing to do with it being connected with an extraterritorial authority, but rather stemmed directly from the lack of fairness of the procedure and impartiality of the court. It may well be that the only way for a court to satisfy the requirements set out by the service conception of authority was, perhaps, if he was tried extraterritorially by, e.g., Sweden, or the ICC, or a special International Tribunal as some advocated at the time.⁸³

It may be objected that the fact that the new Iraqi government relied so heavily on U.S. military support would have undermined the legitimacy of the trial anyway. But this is not to argue on the basis of the show trials charge. If anything, this claim gets its moral traction from the charge of Victor's justice. This charge is at least as popular as the 'show trials' one. Underlying it, however, is a simple question that proves difficult to answer: how does the fact that *S won* the war disqualify it from punishing *D*? Rather, it seems to be the fact that *S participated* in the conflict that might undermine its authority to punish enemy combatants. The charge of Victor's justice seems only to acknowledge, uninterestingly, that the losing side hardly ever gets to try its enemies.⁸⁴

The only way of making sense of this broader claim is, I think, that *A's* authority would be undermined by the fact that it would be deciding its own case. It might be argued in this type of case that state *S's* courts lack impartiality and, as a result, legitimate authority to try *D*. This, however, would be too stringent a requirement to

See, more generally, Michael P. Scharf, *Saddam on Trial: Understanding and Debating the Iraqi High Tribunal* (Durham, NC: Carolina Academic Press, 2006).

⁸² Kevin Heller and Charles Garraway (Public Lecture, "A Poisoned Chalice: The Substantive and Procedural Defects of the Iraqi High Tribunal", 13 November 2007, LSE).

⁸³ See International Center for Transitional Justice, "Creation and First Trial of the Supreme Iraqi Criminal Tribunal," (October 2005).

⁸⁴ Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes", *British Year Book of International Law* 21 (1944), 68.

sustain. First, it would lead, *a contrario*, to the implausible proposition that the states involved in an armed conflict would also lack authority to try their own combatants for war crimes because of the risk of prosecutions ending up in “partial” acquittals. Moreover, this line of argument would also make very little sense in a domestic setting. This would mean, for instance, that the Spanish courts would lack the authority to try foreigners for the Atocha bombings. This is hardly a limitation most people would accept. Ultimately, I suspect that this charge once again stands on a mistaken analogy between states and individuals. Most rules guarding the impartiality of courts normally make reference to the impartiality of specific judges, or jurors, but not to that of the court or political system itself. Moreover, rules on this issue are normally more stringent than this argument presupposes. It is the fact that judge A is the sister of victim V, not merely a co-national, that would undermine her authority to try D. In short, then, provided that S complies with the conditions of the NJT and the DT set out above, the fact that state S participated in a given conflict is not a clear reason as to why it would lack legitimate authority to try its own soldiers, as well as enemy ones.

This leaves us with the charge of *tu quoque* or, as I prefer to call it, the issue of ‘clean hands’. This kind of argument was raised, for instance, by Jacques Vergès, who is best known perhaps for defending Klaus Barbie in 1988, when addressing the ICJ in the case brought by DRC against France for certain (extraterritorial) criminal proceedings. On this occasion he argued that France had no standing to try the DRC’s Minister of the Interior based on the nature of French colonial rule, the failure of the French authorities to indict President Chirac for alleged corruption, and the racial motivations underlying the French judicial system.⁸⁵

A first version of the ‘clean hands’ objection suggests that, for example, Spain did not have the standing to try Pinochet, because it had been unable or unwilling to prosecute Spaniards for crimes against humanity committed in Spain during the Franco era. This allegedly shows some sort of moral hypocrisy or at least double standards.

⁸⁵ Simpson, *Law, War and Crime*, 106. See also, *Certain Criminal Proceedings in France (Republic of the Congo v France)*.

This charge seems to imply –incorrectly in my view– that trials for crimes against humanity must start at home. Under the service conception of authority there seems to be no significant problem with allowing Spain to try Pinochet, as long as he is tried by competent judges, the investigation was thorough, and his procedural rights were respected. Accordingly, this version of the clean hands objection does not seem to conflict with my argument for authority. In fact, the charge of moral hypocrisy seems wholly misplaced. I have argued that international offences are those criminal rules that cannot contribute in any meaningful way to the sense of dignity and security of individuals in TS unless at least some extraterritorial authority holds the power to punish D for them. This is because, whenever this type of offence is committed on TS it is the case that TS is either responsible for perpetrating, instigating or allowing them, or simply unable to do anything about them.⁸⁶ Accordingly, extraterritorial prosecutions are based precisely on the grounds that TS would *not* normally prosecute D itself. Even in cases of regime change it is unlikely that the new regime will have the political power, or even the will to bring to account those members of the previous one who are allegedly responsible for international offences. Chile and Spain are both standard examples of this.

A second version of the ‘clean hands’ challenge would go: What if the actual regime is *itself* responsible for some international offence? Would this not undermine its authority to try D? Surely a criminal state cannot legitimately claim this kind of authority. Had the Nazis won the war, is the argument advocated here committed to recognizing them as a legitimate authority to try the Allies for war crimes? One may say, of course, that it is unlikely that such a regime would satisfy the NJT. Iraqi law under Saddam, for instance, allowed for “the admissibility of coerced confessions, the exclusion of Defence Counsel during some investigations, and some proceedings to be closed to the general public.”⁸⁷ In other cases blatant interference from the executive branch, or admissibility of evidence obtained through torture, would disqualify S’s

⁸⁶ See Chapter 3 above.

⁸⁷ Jose E. Alvarez, ‘Trying Hussein: Between Hubris and Hegemony’, *Journal of International Criminal Justice* 2 (2004), 324.

claim for authority. Yet, I suggest that even if S wanted to try these offenders fairly, it would still lack the legitimate authority to do so. This is not because the court itself failed to comply with the NJT, or the DT. Rather, the reason is that S punishing D would not bring about the benefits of having a system of criminal laws in force. Individuals living under such regime would not consider their rights protected by such laws; they would not consider S bound by these laws.

The last and perhaps most difficult case is that of a state S which, though perhaps being relatively decent, has entered the war unjustly or failed to fight it in accordance with the laws of war.⁸⁸ This was arguably the position of the US and the UK after WWII where their authority to carry out war crimes trials was challenged on the grounds of their own behaviour in the Dresden and Hiroshima bombings. This charge points to the uneasy relationship between the categories of *jus ad bellum*, *jus in bello* and *jus post bellum*. Whether they are logically and normatively interconnected is in itself a highly complex and controversial question that cannot be addressed here. I suggest, though, that the conception of authority advocated here can still provide a convincing answer in this type of case.

According to the service conception, in so far as the court satisfies the NJT and the DT and is justified in punishing D, there is no good reason to disqualify its authority to try D. Few would argue that the U.S. lacks the authority to try offenders domestically because of what it might have done in Abu Graib, Guantanamo Bay and elsewhere. Whether it holds the authority to punish a murderer in Minnesota ultimately depends on whether the competent court fulfils the requirements set out by the service conception.⁸⁹ Yet, there might be no inconsistency in claiming that, for example, Israel has the moral standing to punish D domestically but lacks the standing to punish a member of Hezbollah. And the reason for this would be that although Israel has

⁸⁸ For the standard notion of decency in this respect see Rawls, *The Law of Peoples*.

⁸⁹ Duff et al touch upon a related issue when they discuss whether S can claim authority to try D under unjust socio-economic conditions. Ultimately, they suggest that the criminal trial is not the appropriate forum for this kind of claims, but rather that they should be discussed in a political forum (Duff et al., *The Trial on Trial. Vol. 3*, 156). In other words, they rightly suggest that we can never expect perfect legitimacy.

committed no crimes against its own people, it allegedly has perpetrated some against the Lebanese.

However, this case is harder to make than one would initially think. The first thing that should be noted is that the charge of ‘clean hands’ consists in the claim that Israel lacks the authority to punish Hezbollah fighter D, not because of any crime against *her*, but rather for crimes it perpetrated in Lebanon and against some of her fellow nationals. Accordingly, we need to explain what are the precise grounds of this charge. Indeed, this objection cannot be simply grounded on *nationality* considerations. The fact that some people who might have been unlawfully killed by S military personnel were of S2 nationality would probably not disqualify S from trying a group of S2 terrorists for hijacking a vessel flying S’s flag on the Mediterranean. Similarly, this objection does not seem to rely on *territorial* considerations either, that is, on the fact that Israel might have committed its crimes on Lebanese soil. If that were the case it would follow from this that Israel would lack the authority to prosecute and punish a Turkish national who is counterfeiting Israeli currency and Passports in Beirut.

Rather, I submit that the only situation in which S would lack the authority to try D is when, because of its criminal wrongs, it will not be deemed to convict D *for having committed a crime* by the relevant stakeholders. In such situation, the interest that justifies S punishing D, that is, the interest in a criminal rule against some wrongdoing being in force would not be served. An example might clarify this point. It might be the case that the U.S. lacks the authority to try Iraqi insurgents for war crimes committed against the Iraqi established authorities even if these acts constituted crimes under international law. This is because, the U.S. would arguably be seen neither by the Iraqi people nor it seems by anyone with a concrete interest in this type of acts being punished as enforcing the relevant rule of international criminal law. Yet, we must be careful not to overstate the scope of this argument. It entails neither that the U.S. would lack the authority to try an Iraqi counterfeiting U.S. currency in Morocco, nor that they would lack the authority to try war crimes committed by its own soldiers or against them in Iraq.

To sum up, then, my position is that the fact that S's military forces have committed war crimes in a conflict against S2, does not *per se* undermine S's authority to try and punish S2 war criminals. This, in so far as S is a minimally decent state and it is seen by the relevant stakeholders as punishing D for the right reasons. Admittedly, it would not be easy to set out a list of criteria for when a state stops being minimally decent and becomes criminal in the sense that the Nazi state was arguably criminal. Similarly, it would be hard to establish a clear test that would tell us when a particular state would not be deemed to convict D for the right reasons. However, as already stated, the aim of the theory here defended is not to decide where to draw the line, but rather to account for standard cases and provide a clear and consistent explanation for them.

6. Trials *in absentia* and of Defendants Abducted Abroad

This last section deals with two further issues that can arise in the context of extraterritorial prosecutions: trials *in absentia* and trials of defendants who were abducted or illegally transferred to the forum state. These issues do not pertain exclusively to the domain of extraterritorial prosecutions. Yet they constitute a sensitive issue that no theory of extraterritorial punishment can ignore. I shall examine whether S can claim legitimate authority to punish D in these cases. Ultimately, I will argue that while trials *in absentia* undermine S's authority, the fact that D is present before a court as a result of having been abducted or illegally transferred does not.

Let us concentrate first on the issue of trials *in absentia*. I am concerned here with the question of whether S can try (and sentence) D if she was not present at her trial. I will not examine borderline situations, such as when she flees or absconds during trial, or just before sentencing or if someone is summonsed in an airport in S while in transit to S2. My interest is in the core issue of principle, namely, with whether, for example, France had the authority to try and convict Alfredo Astiz *in absentia*, that is, someone who was never appropriately summonsed by the French authorities, nor present during

his trial (and, for that matter, if Argentina had the right to refuse to extradite him on these grounds).⁹⁰

Although article 14(3)(d) of the International Covenant on Civil and Political Rights explicitly establishes that all defendants have the right “to be tried in [their] presence”, the general understanding is that there is no clear prohibition of trials *in absentia* under current international law.⁹¹ In effect, even the Human Rights Committee, which is in charge of ensuring the ICCPR’s implementation, noted that this provision “cannot be construed as invariably rendering proceedings *in absentia* inadmissible irrespective of the reasons for the accused person’s absence.”⁹² Trials *in absentia* are not uncommon in many civil law countries.⁹³ Although common law countries have tended to be more reluctant, the US, for instance, has increasingly admitted this practice domestically.⁹⁴ Indeed, according to a recent survey, of 139 national constitutions examined, only 25 prohibited trials *in absentia*, and most of them provided for certain exceptions to that general prohibition.⁹⁵ These exceptions include, standardly, unequivocal waiver on the part of the defendant, her causing disruption during trial, and her absconding once the hearings have started. Under these lines, there would seem to be hardly any point in examining this charge.

However, the status of trials *in absentia* is far from being as straightforward as these facts seem to indicate. There are at least three elements in the law that undermine S’s

⁹⁰ See, the “Universal Jurisdiction in Europe” the Redress Trust, at <http://www.redress.org/documents/inpract.html> (last accessed July 8 2008).

⁹¹ This right is also recognized, albeit implicitly, in article 6(1) of the European Convention of Human Rights, and it is implied by the confrontation clause contained the sixth amendment to the US Constitution. On the compatibility of trials *in absentia* with international law see, e.g., Stefan Trechsel and Sarah J. Summers, *Human Rights in Criminal Proceedings* (Oxford ; New York: Oxford University Press, 2005), 254; Cassese, *International Criminal Law*, 402, Mark Thieroff and Edward A. Amley Jr., 'Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61', *Yale Journal of International Law* 23, no. 231-274 (1998), 261; and Paola Gaeta, 'To Be (Present) or Not to Be (Present). Trials in Absentia before the Special Tribunal for Lebanon', *Journal of International Criminal Justice* 5 (2007), 1174.

⁹² *Daniel Monguya Mbenge v Zaire*, para. 76.

⁹³ See, e.g., the French Criminal Procedure Code, art. 639.

⁹⁴ James G. Starkey, 'Trials in Absentia', *St. John's Law Review* 53 (1979).

⁹⁵ M. Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', *Duke Journal of Comparative & International Law* 3 (1993), 279-280.

jurisdiction *in absentia*. First, under the framework of the European Convention on Human Rights, trials *in absentia* are acceptable only in so far as the person convicted can obtain a retrial simply by asking for it.⁹⁶ In addition to this, trials *in absentia* are far less popular in cases of extraterritorial criminal jurisdiction. The ICC, ICTY and ICTR bar trials *in absentia* almost absolutely. That is, defendants cannot be tried *in absentia* even if they fled or absconded themselves after the beginning of the trial, and even if they have unequivocally waived their right to be present.⁹⁷ Although some hybrid tribunals have admitted trials *in absentia*, they too provide for the possibility of retrial when the decision is challenged by the defendant.⁹⁸ Finally, the established law on extradition shows that while many states are comfortable enforcing their own convictions *in absentia*, they are far less happy extraditing offenders who have been convicted *in absentia* abroad. Some jurisdictions require that the requesting state provides evidence sufficient to support at least an indictment, but many may require a retrial altogether or reserve the right to refuse to extradite her.⁹⁹ Even France which, itself, is hardly against trials *in absentia* has followed this trend.¹⁰⁰

I suggest that the theoretical framework advocated in this thesis can help make sense of these different claims. There is little dispute that D has a right to be “tried in his presence”, using the language of article 14 of the ICCPR. A lot hinges, however, upon the actual structure of this right. Arguably, one way of construing this right is in terms of a claim-right.¹⁰¹ In that sense, the fact that D has a claim-right to be tried in

⁹⁶ See, e.g., *B v France* and *Colozza v Italy*.

⁹⁷ See ICC Statute Art. 63; ICTY Statute art. 21(4)(d) and ICTR Statute art. 20(4)(d).

⁹⁸ See Article 22(1) of the Special Tribunal for Lebanon Statute, rule 60 of Special Court for Sierra Leone, and article 114 of the SOC Law (Kram on Criminal procedure (8/Feb/1993), applicable to the Extraordinary Chambers in the Courts of Cambodia).

⁹⁹ Commentary, 'Foreign Trials in Absentia: Due Process Objections to Unconditional Extradition', *Stanford Law Review* 13 (1961), 377. The same rule applies in the UK, see Ivor Stanbrook and Clive Stanbrook, *Extradition : Law and Practice* (Oxford: Oxford University Press, 2000), 150-152. See also Extradition Act 1989, s 6(2).

¹⁰⁰ Stanbrook and Stanbrook, *Extradition : Law and Practice*, 150. Interestingly, in the *Bozano* case France was ultimately condemned by the ECHR for deporting the defendant to Switzerland, where he was to be extradited to Italy, after France refused to extradite him itself on the grounds that he had been convicted *in absentia*.

¹⁰¹ There is hardly any question that this right entails a liberty. In usual circumstances, it would make little sense to say that D is under a duty *not* to be present at her trial.

his presence only means that S is under a duty not to exclude D from the proceedings by, for instance, denying her physical access to the courtroom. This possibly also entails a duty to notify D about the hearings, etc. There is, of course, little doubt that this right amounts at least to this. But this is not what the charge of trials *in absentia* is usually about.¹⁰²

A more ambitious way of describing this right is as containing also an immunity. This immunity would entail that S simply lacks the power to punish D *in absentia*. However, I suspect that this interpretation of the right to be tried in one's presence has little promise because one would have to demonstrate that the interest of D in being present in court is sufficiently important to put S under a disability to try her. In other words, this interest would have to outweigh the collective interest that individuals in S have in S's system of criminal rules being in force. In the light of both the modest contribution that these rules being in force arguably make to these individuals' sense of dignity and security, and the serious consequences that follow from a criminal conviction, one may be tempted to conclude that this individual interest does suffice to confer upon D such an immunity. However, that would be too quick. First, we must note that the charge is simply that D is absent, not that the court is biased or convicting her on what is clearly insufficient evidence. Moreover, we must take into consideration the real implications of D's absence. Most courts carrying out trials *in absentia* will provide D with appropriate defence counsel *ex officio*. What is more, in most criminal proceedings it is the fact that her counsel is present, not the fact that D is, that serves D's interest the most.¹⁰³ Provided this is the case, then, it seems that D's interest in not being tried *in absentia* is hardly as weighty as we might have initially thought and that,

¹⁰² See criticisms by the Inter-American Commission in its *Report on the Situation of Human Rights in Panama* on this particular basis (OEA/Ser.L/C/11.44, doc 38, rev 1, 1978, accessible at <<http://www.cidh.org/countryrep/Panama78eng/chap.4.htm>>, last accessed July 1st, 2008).

¹⁰³ Legal counsel is generally more effective in presenting evidence and scrutinising the case of the prosecution, will not be perceived as trying to subvert the process in her favour, and will be less emotionally engaged. Duff et al., *The Trial on Trial. Vol. 3*, 212.

ultimately, there are other ways of protecting that interest which do not amount to conferring upon D this immunity.¹⁰⁴

In any event, the fact that the right to be tried in one's presence cannot be conceptualized as an immunity does not exhaust the challenge that trials *in absentia* represent for the authority of a criminal court. In effect, this charge may still undermine the specific considerations on which S's *authority* is based. The fact that under several legal systems trials *in absentia* warrant a right to request a retrial seems to confirm that they are seen as affecting specifically the *bindingness* of S's decision rather than its content.¹⁰⁵ Indeed, trials *in absentia* would affect S's complying with the NJT because they may undermine the accuracy of the verdict.¹⁰⁶ This would be the case, for instance, when D is innocent or there was some mitigating circumstance, as she would know best how to defend the case. Yet, this argument does not take us far enough. In other cases the inculpatory evidence may be so overwhelming that D's presence would not make much difference in terms of the accuracy of the outcome. Moreover, the instances of trials *in absentia* that are the subject matter of my present analysis are such that D, probably knowing about the existence of the proceedings, has deliberately decided to stay at large (usually abroad). Accordingly, she cannot complain about the inaccuracy of the result much in the same way as if she decided not to give testimony or point to crucial exculpatory evidence at trial.

I submit that, ultimately, trials *in absentia* undermine S's authority because they taint the credibility of the Court, rather than the accuracy of its verdict. I argued above that S's authority rests not only on the NJT (and the DT for that matter), but also on the reasons that justify S's meting out legal punishment upon D, namely, that it contributes to the system of criminal rules being in force. For this to obtain, D has to be punished *because she violated these rules*. Yet when the credibility of the proceedings is compromised,

¹⁰⁴ Interestingly, this right was clearly understood as an immunity ("it deprived the court of jurisdiction") in the time when defendants were required to defend themselves without the assistance of counsel. Starkey, 'Trials in Absentia', 723.

¹⁰⁵ See, e.g., the decision by the ECtHR in *Colozza v Italy*, *Gallina v Fraser* in the US, art. 639 of France Code of Criminal Procedure, and article 22(3) of the Statute of the Special Tribunal for Lebanon.

¹⁰⁶ See Cassese, *International Criminal Law*, 403.

as is arguably the case when D is convicted *in absentia*, the fact that D is sentenced and eventually punished does not convey to individuals in S the message that the reason she is being punished is that she violated a criminal rule. This holds, I suggested, even if they have good reason to believe she was guilty anyway. Put differently, the sense of spuriousness that trials *in absentia* bring about stems from the fact that it is ultimately crucial that D has herself or through counsel of her own choosing the opportunity to challenge the accusation if the trial is to be perceived as fair. This is illustrated by the fact that states themselves normally take great pains to ensure that defendants are present throughout the trial even against their will, going as far as keeping defendants in detention or making them liable to arrest in order to be brought to trial if necessary.¹⁰⁷ *Ex officio* defence counsel cannot ultimately convey to individuals in S (and elsewhere) the belief that D's interests are being appropriately protected. Moreover, this sense of spuriousness is enhanced by the fact that *a priori* it is not even likely that S will be able to enforce that conviction. It is therefore only natural that states are very reluctant to extradite offenders convicted *in absentia*.¹⁰⁸ Giving D the possibility of a retrial seems the right solution. Yet, this simply means rejecting the bindingness (authority) of S's original decision.

Some may object that, all in all, given the policy goals advanced by extraterritorial prosecutions (particularly those carried out for international crimes) and the difficulties they normally will have to confront, trials *in absentia* are preferable to impunity.¹⁰⁹ This objection, however, misses the particular claim on which my argument against them

¹⁰⁷ This account is also compatible with the fact that in less serious cases, some jurisdictions do not require the presence of the defendant (see, e.g., Magistrates' Courts Act 1980, ss.11-12). Indeed, when the consequences of the trial are potentially minor, as in a fine for a traffic violation, the sense of spuriousness dissipates.

¹⁰⁸ Commentary, 'Foreign Trials in Absentia: Due Process Objections to Unconditional Extradition', 377. The author exemplifies this by quoting that "[i]n two [out of] seven reported cases concerning extradition of persons convicted *in absentia* the American courts have discharged the prisoner on the ground that the evidence was insufficient to support even an indictment" (note 31). Similarly, Lord Widgery CJ, in *Re Salvatore di Monaco*, argued that sentences in contumacy "were of such unsafe duration and security that they were not thought suitable to support extradition" (in *ibid*).

¹⁰⁹ Stefania Negri in Michael Bohlander, *International Criminal Justice : A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2007), 29; Daniel J. Brown, 'The International Criminal Court and Trial in Absentia', *Brooklyn Journal of International Law* 24 (1998-9), 782.

stands. Admittedly, it is important that perpetrators of serious crimes, including but not limited to international offences, are punished. It is also the case that extraterritorial prosecutions will normally face great obstacles, of which the fact that the defendant will normally be at large abroad is but one. Nevertheless, my argument is that in so far as trials *in absentia* undermine the credibility of the court, they do not serve the interest that justifies punishing offenders in the first place. That is, either because D remains at large or because the reason why she is being punished is perceived as spurious, they would not contribute to our sense that the criminal rule that has been violated is in force, and that we have certain rights which the state endorses and protects.

Let us finally examine the cases in which D was abducted from the territory of S and transferred to the abducting state's (AS) territory to face trial. I will look in particular at the case of abductions because it is arguably the most extreme case of illegal transfer, but the argument I provide should also work for defendants who have been transferred to the AS by stealth, fraud or other illegal means. This is a matter of concern in international prosecutions. The trials of Eichmann, Barbie, Milosevic and Nikolic were all preceded by abductions or transfers of questionable legality.¹¹⁰ Moreover, this issue affects extraterritorial prosecutions for domestic offences with almost the same intensity, as the significant array of cases I refer to below illustrates. Again, although this charge is perhaps more common in cases of extraterritorial jurisdiction, it can similarly affect AS's jurisdiction to try D for embezzlement committed on its own territory, provided she is captured and transferred while living or travelling abroad. Before I examine this issue a final caveat is in order. The purpose of this section is to examine whether AS has jurisdiction to try D, not whether jurisdiction should be exercised.¹¹¹ In other words, it might be that there are all sorts of prudential reasons why states should refrain from trying defendants who have been abducted

¹¹⁰ Simpson, *Law, War and Crime*, 116.

¹¹¹ F.A. Mann, 'Reflections on the Prosecution of Persons Abducted in Breach of International Law' in Yoram Dinstein, Mala Tabory, and Shabtai Rosenne, *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht: Nijhoff, 1989), 414.

abroad.¹¹² Yet, the question here is only whether a decision reached in these cases can claim to be authoritative, or the punishment inflicted justified. To claim that AS has the right to punish D in these situations implies, in any event, that it would be up to AS, and only up to AS, to weigh the countervailing prudential reasons.

It goes without saying that a state which authorizes or conducts the abduction of a person from the territory of another state is responsible for a violation of public international law.¹¹³ However, it does not automatically follow from this that it lacks jurisdiction to try D as a result of that violation. A further argument is needed for this. The traditional view is that an abducting state violates the victim state's claim-right to territorial integrity.¹¹⁴ This violation purportedly entails AS being barred from trying her. Under this view, D would be entitled to bring this up in court herself, but she would only have a 'derivative' standing to raise this violation as a bar to the exercise of jurisdiction.¹¹⁵ This is because she suffered no greater deprivation than that which she would have endured through lawful extradition.¹¹⁶

This view, however, rests on slippery grounds. It entails that the victim state's (VS) consent, even if given *ex post*, would make D's abduction morally unproblematic.¹¹⁷ This is unconvincing. The fact that VS's authorities may have consented to the abduction of D by AS's officials does nothing to ease our central intuition that some moral wrong has been committed. Instead of exonerating AS, we tend to see VS as an

¹¹² Among the often cited ones are the risk of international friction and the fact that states may sacrifice the recovery of many more criminals through regular means in order to obtain a few drug runners or terrorists, etc. See Mann, 'Reflections on the Prosecution of Persons Abducted in Breach of International Law', 420; Geoff Gilbert, *Aspects of Extradition Law* (Dordrecht, Netherlands: M. Nijhoff, 1991), 185 and Richard Downing, 'The Domestic and International Legal Implications of the Abduction of Criminals from Foreign Soil', *Stanford Journal of International Law* 26 (1990), 592.

¹¹³ See Mann, 'Reflections on the Prosecution of Persons Abducted in Breach of International Law', 405, and the references in fn 1.

¹¹⁴ AS may also be said to violate its treaty obligations vis-à-vis VS when there is an extradition treaty in force between them.

¹¹⁵ Rosemary Rayfuse, 'International Abduction and the United States Supreme Court: The Law of the Jungle Reigns', *International and Comparative Law Quarterly* 42 (1993), 886 citing *Verdugo*.

¹¹⁶ *Davis v Mueller*, cited in Mann, 'Reflections on the Prosecution of Persons Abducted in Breach of International Law', 418.

¹¹⁷ See article 16 of the Harvard Draft Convention on Extradition, which states that "no state shall prosecute or punish [a defendant]... without first obtaining the consent of the state or states whose rights have been violated" at 'Harvard Draft Convention on Extradition', *American Journal of International Law* 29, no. Supp. (1935), 623.

accomplice to that wrong. Thus, the wrong to VS simply does not exhaust whatever it is that we find morally objectionable about extraterritorial abductions.

Furthermore, I submit that the traditional view fails even in its own terms. It is far from clear that even in cases where VS does *not* consent to the abduction, the necessary implication of the wrong is a bar to AS's power to try her. When abducting D, AS violated VS's claim-right to its territorial integrity. This claim-right, I have argued, is explained by the interest of individuals in VS in foreign officials not going around physically enforcing their own laws on VS's territory. It is unclear that this particular interest extends to AS lacking the normative *power* to punish D. VS's claim-right and AS's *power* belong to different levels.¹¹⁸ Thus, there seems to be no clear reason why compensation should be ruled out as an appropriate remedy for the breach of this claim-right. Or, put differently, there seems to be no reason why the only acceptable remedy for this breach would be the restitution of D to the territory of VS before she is tried. Ultimately, as Rayfuse suggests "a claim by an offended State for a violation of its rights ... is a separate and distinct matter from the issue of whether an individual might be entitled to rely on that violation as a bar to the exercise of a domestic court's jurisdiction."¹¹⁹ To infer this bar from the former violation is to reason on the basis of a *non sequitur*.

A more promising line of argument for AS's lack of authority to try D is to see D's abduction as an infringement of some of her individual rights. Arguably, these abductions violate D's rights to personal liberty and freedom from arbitrary arrest and detention.¹²⁰ The crucial question is, once more, whether these violations warrant conferring upon AS a *disability* to try and eventually punish D. This implication is far from straightforward. In the eloquent words of F.A. Mann, "[w]ith rare unanimity and undeniable justification the courts of the world have held that the manner in which an accused has been brought before the court does not and, indeed, cannot deprive it of

¹¹⁸ See the section 3 of the general Introduction to this thesis.

¹¹⁹ Rayfuse, 'International Abduction and the United States Supreme Court: The Law of the Jungle Reigns', 890.

¹²⁰ See, e.g., Article 9 of the ICCPR, article 5 of the ECHR and article 7 of the American Convention of Human Rights.

its jurisdiction, of its right to hear the case against the person standing before it.”¹²¹ This is the central tenet of the famous U.S. Supreme Court’s *Ker-Frisbie* doctrine and is illustrated by the old adage *mala captus bene detentus*.¹²² Admittedly, the UK and New Zealand have stayed criminal proceedings on the grounds that the defendants had been illegally abducted abroad.¹²³ However, these decisions were not based on the proposition that they lacked the power to try them. Rather, they were framed on them having discretion (the power) not to hear the case.¹²⁴

I want to argue that the fact that D was abducted from VS does not, *per se*, undermine AS’s authority to try her. This may seem deeply counterintuitive.¹²⁵ But I think this intuition is simply misplaced. Arguably, AS’s behaviour constitutes a violation of the *substantive* rule against abducting individuals. However, this does not necessarily affect any of the considerations on which AS’s authority to punish her stands. The fact that D was abducted abroad affects neither the NJT nor the DT. She can clearly be convicted (or acquitted) on the basis of accurate and reliable evidence, her procedural rights during the investigation and trial upheld, and the Tribunal may ultimately decide on the basis of reasons which independently apply to individuals in AS (whether D was innocent or guilty).¹²⁶ In that spirit, the U.S. Supreme Court in *Alvarez-Machain* argued that the constitutional procedural safeguards of a fair trial were sufficient to satisfy the

¹²¹ Mann, ‘Reflections on the Prosecution of Persons Abducted in Breach of International Law’, 414. For a list of papers both supportive and critical of this position see Jacques Semmelman, ‘Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The Ker-Frisbie Doctrine Reexamined’, *Columbia Journal of Transnational Law* 30 (1992), fn 20 and 21 respectively.

¹²² Named after the series of cases by which it was established: see *Ker v Illinois*, *Frisbie v Collins*. For a more recent application of this doctrine see *United States v Alvarez Machain*.

¹²³ *Connelly v DPP* and *R v Hartley*, respectively.

¹²⁴ In *R v Horseferry Road Magistrates Court*, ex parte *Bennett*, the House of Lords held that the judiciary had the power to “oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law” (Per Lord Griffiths, 150). Yet, as it has been correctly argued, this already assumes that UK courts have the power to hear the case (Rayfuse, ‘International Abduction and the United States Supreme Court: The Law of the Jungle Reigns’, 893-894).

¹²⁵ Indeed, many authors disagree with this claim. See, Duff, *Answering for Crime*, 182 and references in fn 131.

¹²⁶ This distinction seems to be incorporated in the law of some countries. Interestingly, an individual who is abducted, or even illegally arrested, may be able to suppress statements or evidence provided during his illegal custody (see Robert M. Pitler, ‘“The Fruit of the Poisonous Tree” Revisited and Sheparized’, *California Law Review* 56 (1968), 601 and ff.). The reason for this, I would suggest, has nothing to do with the fact that she was abducted *per se*, but with their lack of reliability.

requirements of due process of law.¹²⁷ Moreover, I do not think that the credibility of AS's courts in terms of the fact that D is being punished *because she committed an offence* is necessarily undermined by her abduction. No one seems to criticize the trial of abducted defendants on this ground. Accordingly, I submit that the adequate response to the violation of the substantive rule prohibiting kidnapping is to punish its perpetrators. If the state of Virtuosia were to prosecute and punish also its own state officials who ordered and carried out the unlawful abduction (regardless of their position in government) or allow their extradition to VS few people would still find it problematic that it claims the normative power to punish D.

To support my case further, let me explain why the three standard arguments on which AS's *disability* is based fail. First, the question has been sometimes framed as a matter of extending the exclusionary rule beyond the suppression of evidence which has been illegally obtained to the suppression of defendants who have themselves been illegally seized and brought before the court.¹²⁸ The first thing to note is that the feasibility of this extension depends on the rationale underlying the rule. This extension is normally based on the proposition that we exclude evidence obtained illegally to deter officials' misconduct during an investigation.¹²⁹ Accordingly, this rationale implies that we should also suppress D's presence to deter abductions. I am not, as is perhaps clear by now, a big supporter of deterrence generally. Above I argued for an alternative approach to explain the exclusion of certain pieces of evidence in trial. I submit that this rationale fails also to explain this purported implication in its own terms. Prosecuting and punishing AS's officials themselves would have a much greater

¹²⁷ On trial, the charges against Alvarez-Machain were dismissed on the basis of insufficient evidence. (see Rayfuse, 'International Abduction and the United States Supreme Court: The Law of the Jungle Reigns', 886-887).

¹²⁸ Note, 'The Greening of a Poisonous Tree: The Exclusionary Rule and Federal Jurisdiction over Foreign Suspects Abducted by Government Agents', *NYU Law Review* 50 (1975), 682. See also Duff, *Answering for Crime*, 185-186.

¹²⁹ Deterrence seems to be particularly popular with some American writers: see Pitler, "'The Fruit of the Poisonous Tree' Revisited and Shepardized", 580; Julie Philippe and Laurent Tristan, 'International Law, Extraterritorial Abductions and the Exercise of Criminal Jurisdiction in the United States', *Willamette Journal of International Law and Dispute Resolution* 11 (2004), 75. See also Judge Mansfield writing for the majority in *Toscanino*. The U.S. Supreme Court, however, has explicitly rejected this rationale with respect to the suppression of a defendant in *United States v Crews*.

deterrent effect on abductions than simply returning D to VS. Moreover, maximization of *the law's* deterrent effect would indicate that AS should *also* seek to punish D, instead of sending her back. Of course someone will object that, as a matter of fact, the deterrent effect of AS prosecuting its own officials would be very weak because AS will normally be very reluctant to do so (let alone extradite them to VS). However, this is hardly a reason to advocate suppressing D over my preferred course of action. As most of the cases in this area show, states are as reluctant to suppress abducted offenders as they are to prosecute their own officials.

A further reason on which AS's lack of jurisdiction is often based suggests that its government should not be allowed to 'benefit' from infringing the defendant's rights. As the maxim says, *ex injuria jus not oritur*, i.e., AS should be barred from realizing the fruit of its unlawful act by bringing the accused to trial.¹³⁰ This argument seems to be based again on a misuse of the domestic analogy. It implies that it is the government or the state of AS itself who benefit from D being punished. This might be so in certain instances, but it is certainly not the reason why that state *itself* holds the power to punish D. This power should be explained by the fact that it benefits the *individuals* who happen to live or be in AS. Accordingly, in so far as it relies on the claim that it is AS or its government who benefits from punishing D, this argument is simply flawed. By contrast, if we take into consideration the interest of individuals in AS in its system of criminal laws being in force, this interest would lead, as I have argued, to AS holding the normative power to punish both D *and* the officials who ordered and executed her abduction.

Finally, some argue that by trying D AS's courts become accomplices in the government's criminal activities.¹³¹ This seems to be a form of the 'clean hands' argument I have addressed in the previous section. I argued there that states cannot be treated as individuals in the sense that because some of its agents are responsible for

¹³⁰ Mann, 'Reflections on the Prosecution of Persons Abducted in Breach of International Law', 415. See, also, Pitler, "'The Fruit of the Poisonous Tree' Revisited and Shepardized', 600.

¹³¹ Note, 'The Greening of a Poisonous Tree: The Exclusionary Rule and Federal Jurisdiction over Foreign Suspects Abducted by Government Agents', 694. Also Philippe and Tristan, 'International Law, Extraterritorial Abductions and the Exercise of Criminal Jurisdiction in the United States', 79.

some given wrong, the whole state should be barred from punishing those who violate its criminal laws. Moreover, the fact that AS also prosecutes and punishes those responsible for the abduction entails morally distancing itself from the wrongdoing. Accordingly, one would hardly argue that it remains an accomplice of that wrong.

To conclude, I have argued that as a matter of principle it would be mistaken to derive from D's abduction a bar to AS's power to try D. Rather, the appropriate normative implication of this wrong is that AS should also prosecute and punish those responsible for it. By doing this, AS both enforces the belief in the rule against abductions being in force, and morally distances itself from the wrong suffered by D. The appropriate remedy for the violation of D's claim-rights is therefore a civil suit for damages, not her return to VS. This is also consistent with the claim that, as argued above, VS's consent to D's abduction or its collusion with AS's authorities should have no bearing on AS's power or lack of it. That many would still feel uneasy with my proposed solution has to do with the fact that few states would normally behave like *Virtuosia*.¹³² Yet we should not misconstrue the theoretical implication of this fact. It might well be that the best way of *institutionalizing* the bundle of moral claim-rights, powers, and liabilities examined here is to bar AS from punishing D in this type of cases. However, my point is that that this solution would be based on expediency, not moral principle or conceptual rigour.

6. Conclusion

This chapter closes my general theory of extraterritorial punishment. I have defended three main propositions. First, I argued that the question regarding the conditions that any body should meet in order to hold, itself, the power to punish D is ultimately a question regarding whether it has the *authority* to punish D. Secondly, I have argued that Raz's version of the service conception of authority provides us with an insightful and convincing account of why (and when) we should recognize a given body having the

¹³² The US, e.g., explicitly authorized the FBI to abduct foreign nationals subject to outstanding U.S. arrest warrants currently residing abroad, and to bring them back for trial. See Downing, 'The Domestic and International Legal Implications of the Abduction of Criminals from Foreign Soil'.

authority to punish D, and what it means to consider its decisions authoritative. I have argued that for X to have the authority to punish D it must carry out a thorough investigation of the facts and the relevant law (it must be able to claim an epistemic advantage), it must try D fairly, it must have some *de facto* authority, and it must serve the particular interest that justifies it holding this power. Finally, I have examined several charges usually raised against extraterritorial prosecutions such as the issues of show trials, 'clean hands', victor's justice, trials *in absentia* and trials of individuals abducted or illegally transferred from abroad. I have assessed how convincing each of them is as an objection against X having the power to punish D, and reached different conclusions in each case. In doing so, I have argued both that, analytically, they are all arguments against X having the *authority* to punish D, not against it being justified in doing so; and that in every case whether X has the authority to punish D is unrelated to the issue of extraterritoriality. This confirms the view suggested throughout the thesis, and advocated in this chapter, that although a complete explanation of the power to punish D needs to account for X having authority, the *extraterritorial scope* of this power rests on the particular interest that explains conferring this power on X, and on who the holder of this interest is.

A final remark is in order here. The reader might find the conditions set out in this chapter quite demanding. Yet we should not underestimate the importance of this aspect of the account of authority for the overall argument I have developed. In Chapter 1 I argued that under the justification for legal punishment defended there, states hold the power to punish an innocent individual (by mistake). Even if it would be wrong, the exercise of this power would effect a normative change in IN's moral boundaries. I have similarly argued in this chapter that X's decision would be binding upon third parties even if mistaken (unless the mistake is a clear one). As a result of this, I suggest that the fact that the conditions X must satisfy are quite stringent is crucial if my account is to be able to tame the unsettling effect that these claims may bring about.

Conclusion

1. The argument

This thesis presents a philosophical account of the morality of extraterritorial punishment. I have provided a justification for certain specific instances of extraterritorial jurisdiction held both by individual states and by the International Criminal Court and challenged the moral defensibility of other well-established rules. Yet this thesis is not meant only as a narrow exploration of the rules that should govern the distribution and scope of criminal jurisdiction under international law. I submit that the issue of extraterritoriality also forces us to revise our understanding of the reasons we have for punishing offenders, and stirs the debate on the justification for legal punishment in a new and pressing direction. Overall, I submit that the theory of extraterritoriality advocated here is better equipped than the leading accounts of punishment available in the literature to make sense of our core intuitions and practices regarding the extraterritorial scope of the right to punish.

By way of concluding remarks, I will provide a summary of how the argument I have developed throughout this thesis fits together. I have endorsed here a rights-based approach. The question I address is therefore under what conditions would a given body B hold the *moral right* to punish O extraterritorially. Following Hohfeld, I distinguished four different types of rights, namely, liberties, claims, powers and immunities. I suggested that the right to punish is essentially a normative power. It is the capacity to modify the first and second order incidents held by a particular individual O. This power is normally coupled with a liberty, and a claim-right against others interfering, etc., though these other incidents do not play a significant role in my overall argument. Furthermore, I have argued that rights are best explained as interests of a particularly important kind. In order to assign B the power to punish O we must identify a specific interest that is sufficiently important to warrant putting O under a

liability to being punished.¹ But this is not the end of it. We need also to account for the specific body (B) having the *authority* to exercise that normative power.² Distinguishing these two separate arguments is crucial for the purposes of providing an analytically sound account of extraterritorial punishment. Throughout this thesis I have argued that the *extraterritorial scope* of B's power to punish O rests exclusively on the particular interest that explains B holding this power and, crucially, on whose interest it is. By contrast, I have argued that despite being a necessary condition for B to hold this particular power, the considerations on which B's *authority* stands are conceptually and normatively separate from the scope of its power.

Indeed, in Chapter 5 I have applied one of the leading philosophical accounts of authority to explain, in particular, why and when we ought morally to recognize the authority of a given court. I have argued, perhaps uncontroversially, that in order for B to have the authority to punish O, it must carry out a thorough investigation of the facts and the relevant law (it must be able to claim an epistemic advantage), it must try O fairly, it must have some *de facto* authority, and it must decide based on the reasons that justify it holding this power. I also suggested, perhaps more controversially, that in order for B to have the moral standing (authority) to try O, there need not be any particular relationship between them, such as citizenship or nationality. Finally, I have argued that some of the most common charges usually raised against *extraterritorial* authorities punishing O, such as victor's justice, *tu quoque*, show trials, or trials *in absentia* or against defendants abducted abroad, are unrelated to the *extraterritoriality* of B's power.

By contrast, I have explained the power to punish O by reference to the collective interest of individuals in there being a system of rules prohibiting criminal wrongdoing in force. I argued that having such a system of criminal rules in force contributes to their sense of dignity and security. That is, it reinforces their view of them being rights-

¹ I have also endorsed a broad cosmopolitan position, i.e., that in order to examine this particular question we must ultimately consider the interests of individuals, we must look at the interests of all the relevant individuals concerned, and their interest should matter equally regardless of their nationality, religion, etc.

² See section 3.3. in the General Introduction to this thesis.

holders, and of their rights being protected by a system of legal rules. The fact that these rules are in force is not a mere psychological fact. For a legal system to be in force, this psychological fact needs to rest on certain specific considerations. In short, those who violate them (or those who we have sufficient reasons to believe they have violated them) should be punished, they should be punished by an authority expressly authorized by that legal system, and they should be punished for having violated these rules.

Moreover, I argued that S is at liberty to exercise this normative power against an offender O. This is because when she commits a crime, O forfeited her claim-right against being punished. The forfeiture mechanism has been explained by reference to the fact that the claim-right against being punished, like almost every other moral right, is conditional upon the conduct of its holder. In particular, I argued that the claim-right against being censured in the way punishment requires is conditional upon O not committing a moral wrong.

This explanation for the right to punish O has some important advantages over other competing accounts in its own terms. First, it accounts for the fact that the right to punish O is a normative power, and not simply a liberty to inflict suffering upon O. Moreover, it can accommodate the fact that every single state (and every single international, or hybrid criminal tribunal) claims the power to punish an innocent individual (although, not *qua innocent*), while at the same time retain the core intuition that it would be *wrong* (i.e., that it would not be at liberty) to do so.

Most significantly, perhaps, I have argued that this argument is overall the best suited to account for our core intuitions regarding both the territorial and extraterritorial scope of this normative power. I have argued that individuals in state B share an interest in these rules being in force *on the territory of B* that is sufficiently important to confer upon B the power to punish every violation of a criminal rule perpetrated on its territory. A murder in France undermines the sense of bindingness of the prohibition of murder *in France* irrespective of the nationality of both the offender and the victim. By contrast, I have argued that individuals in France lack an interest in

the French criminal rules being in force in, for example, Canada that is sufficiently important to be protected by a right. Nor do individuals in Canada have an interest in the French criminal laws being in force in Canada that would warrant conferring on France the power to punish O.³ Ultimately this is because the French criminal laws cannot provide individuals in Canada with the sense of dignity and security they can provide individuals at home. Rather, individuals in Canada have an interest in *Canada's* criminal rules being in force there. It is this fact that would contribute to their sense of dignity and security. For these purposes I have suggested it is immaterial whether either or both the offender (O) or the victim (V) happen to be French nationals.

This implies a somewhat frontal attack on two reasonably well established rules on extraterritorial jurisdiction provided for under international law: the nationality and passive personality principles. In order to make my stance more plausible I have argued that most of the arguments on which these principles are based either beg the fundamental question they are meant to answer, or end up advocating much broader rules of extraterritorial jurisdiction than they admit to.

I have argued, by contrast, that states hold a power to punish offences committed extraterritorially when they affect their sovereignty, security or important governmental functions. Unlike with the nationality or passive personality principles, in this case it is the interest of individuals *in PS* in its prohibition against, for instance, counterfeiting of currency being in force extraterritorially that explains this extraterritorial scope. This, however, does not fully account for allocating this power to PS. In order to confer upon PS the power to punish O extraterritorially, PS not only needs to justify holding this power to O, but also to individuals in TS. In other words, I have argued that the principle of sovereignty normatively entails that individuals in TS have a collective interest in TS being a self-governed entity that is sufficiently important to warrant conferring upon TS a *prima facie* immunity against extraterritorial bodies dictating criminal rules binding on its territory. Yet I also recognized that this immunity is not

³ In fact, I have argued that the opposite is true. They have an interest in France's criminal law *not* being in force in Canada that is sufficiently important to warrant conferring upon individuals in Canada a *prima facie* immunity.

absolute. It is limited, *inter alia*, by the interests of individuals abroad. Moreover, the interest of individuals in TS in an extraterritorial authority (PS) not dictating criminal rules prohibiting certain acts against its own (PS's) sovereignty, security or important governmental functions committed in TS does not outweigh, in particular, the collective interest of individuals in PS in such a rule being in force extraterritorially. This means that even if TS generally holds an immunity against extraterritorial bodies prosecuting offences committed on its territory, this immunity would not normally preclude an extraterritorial state acting on the basis of the principle of protection.

A further crucial distinction is in order. I have argued that this restrictive framework of extraterritorial jurisdiction applies only to domestic crimes such as murder, rape, robbery, fraud, etc. I have argued, by contrast, that some crimes, namely international ones, should be subject to broader jurisdictional rules. This is because when an international crime such as war crimes, crimes against humanity, genocide, etc. is perpetrated on TS, it must necessarily be the case that TS is either responsible for it, is encouraging or supporting the perpetrators, or can simply do nothing about it. As a result of this, the relevant international criminal law cannot really be in force in the territory of TS unless at least some extraterritorial authority holds a concurrent power to punish O. Assuming that individuals in TS have a fundamental interest in these prohibitions being in force, it is *their* interest that warrants conferring upon PS the power to punish O.

I have also argued that TS's *prima facie* immunity against PS punishing O extraterritorially must be addressed by the explanation of the jurisdictional rules applicable to international crimes. This allows me to introduce an important distinction. It is not my claim that the commission of *any* kind of offence on a widespread or systematic basis warrants conferring upon PS the power to punish O for a crime on TS; only the commission of particularly heinous or serious type of crime would. It therefore follows that the interest of individuals in TS in the rule against widespread bicycle theft being in force on TS might not suffice to override TS's immunity, but their interest in the rule against widespread torture would. This is an important qualification because it

accounts for one of the most extended normative features usually associated with international crimes (their moral heinousness), and it allows the framework I advocate to specify exactly what normative work it does.

Admittedly, this is not yet an argument for universal jurisdiction; at least, not explicitly. Thus, in Chapter 4 I submitted that the interest of individuals in TS by itself, could suffice to warrant conferring upon every state the power to punish international crimes committed on its territory. There is no conceptual problem with conferring upon A a right on the basis of an interest exclusively held by B. Yet I argued that universal jurisdiction is also advocated on the basis of the interests of individuals in TS2, TS3, etc., namely, other states where these crimes are being perpetrated, or have been perpetrated recently; and I have argued that certain individuals in other states (PS, PS1, etc.), like refugees or members of relevant minorities in a country like Switzerland, might also have an interest in these rules being in force, as they would also contribute to *their* sense of dignity and security. The collective interest of all these individuals in the rules against widespread or systematic torture, war crimes, genocide, etc. being in force explains, or so I have suggested, the fact that *every* state holds the power to punish O for an international crime irrespective of where the crime was committed, or the nationality of both offenders and victims.

I have also argued that this joint interest would warrant conferring upon the International Criminal Court the same broad jurisdictional competence. The ICC is a treaty-body created by a number of states; it is not a global criminal court. Accordingly, the scope of its jurisdiction is usually explained by recourse to the powers that its state parties have delegated upon it. I have argued that as a matter of normative argument this delegation framework does no justificatory work whatsoever. The scope of the ICC's power to punish O rests directly on the interest of the relevant individuals. And just as these individuals (those in TS, TS2, TS3, PS, PS2, etc.) have a joint interest in these rules being in force that is sufficiently important to confer upon every state the power to punish O, this interest also warrants conferring upon the ICC a power to punish O that is universal in scope. Thus, I have argued that the jurisdictional regime

currently enjoyed by the ICC, which confers upon it universal jurisdiction only if the case is referred to the Prosecutor by the U.N. Security Council is unduly restricted from a normative point of view.

Finally, this framework provides for a third type of criminal provision with different and case-specific jurisdictional rules. These are internationalized or trans-national criminal laws. I have argued that states can authorize extraterritorial bodies to punish O for an offence she committed on their territory. In other words, the interest that justifies TS holding the power to punish O also warrants conferring upon TS the power to reach an agreement with PS so that PS can enforce a particular criminal provision in force in TS. This, again, is explained by referenced to the interests of individuals in TS, and it still means that PS lacks, *itself*, the power to punish O. I have recognized that it would be particularly sensible to reach this kind of agreement in matters such as organized crime, certain environmental crimes, etc. But we need to be careful in the kind of inferences we draw from this proposition. This means, that states can ‘regionalize’ certain criminal provisions, and allow each other to exercise jurisdiction for crimes committed on their respective territories or against their respective security, sovereignty or important governmental functions. However, this only means that states have a *prudential* reason to authorize extraterritorial bodies to punish O for this type of crime; but this is not the same as saying that these extraterritorial bodies (e.g., PS) themselves have the power to punish O. This claim both makes my overall position more flexible and largely accounts for internationalized or trans-national approaches to the criminal law in certain areas.

With this I close this summarized exposition of the general account of extraterritorial punishment advocated in this thesis. I submit that this account has some important advantages over other competing arguments, and it is worth highlighting a few salient ones. First, it can convincingly explain why states hold the power to punish every single offence committed on their territory irrespective of the nationality of O and V. I have argued that accounts such as Duff’s influential communitarian theory of punishment faces significant difficulties on this account. Secondly, it can readily

distinguish domestic from international crimes, at least with respect to the jurisdictional rules that apply to each of them. This constitutes an important advantage over other retributivist, consequentialist or mixed theories available in the literature. These, I have argued, mostly collapse this distinction and advocate states holding universal jurisdiction for both of them. Finally, this account of the morality of extraterritorial punishment provides a systematic normative argument that makes sense of all the relevant instances of extraterritorial jurisdiction. With this lies an important advantage over most philosophical or normative work done in this area of international law, which standardly rests on *ad hoc* arguments not easily transferable to other instances of extraterritoriality. I submit that the analytical framework I have put forward brings a significant amount of clarity, insight and conceptual rigour to an often messy and largely under-theorized debate.

2. Avenues for future research

In this thesis I have addressed the core principles of international law that purportedly regulate the scope of states' and other tribunals' jurisdiction, namely, the principles of territoriality, nationality, passive personality, protection and universality. I have also explained how different principles apply to the cases of domestic and international crimes. However, I have only been able to address what I have described as "standard cases". I have neither really tackled the issue of when a particular crime can be said to be perpetrated on the territory of TS nor examined other less central, though by no means less philosophically challenging instances of extraterritoriality. This, I suggest, is not really a weakness of this project, but rather points to some interesting paths for future research.

In the context of the rules of international law governing the distribution of criminal jurisdiction for domestic offences, for instance, it is worth trying to provide a more detailed examination of the contours of the principle of territoriality. In particular, I suggest it is worth examining the moral credentials of the controversial 'effects doctrine' by which a state can exercise jurisdiction over O "for conduct outside

its borders that has consequences within its borders which the states reprehends".⁴ Similarly, I suggest it is worth looking at the rationale behind states' jurisdiction on vessels and aircrafts flying their flag and within their embassies abroad.⁵ These are highly symbolic instances of extraterritoriality which further illustrate how entrenched this feature is in domestic criminal law systems and how problematic it is for any account of the philosophical foundations of the criminal law.

With regards to extraterritoriality in the context of international criminal law, there are two essential developments which might be of interest. First, I suggest it is worth expanding the theoretical understanding of international crimes and compare the analysis I provided of terrorism with piracy or aggression. Secondly, I suspect it would be of interest to explore in some detail the relationship between the justification I am advocating for the power to punish and other values, such as peace and reconciliation, but also economic and social development. For that purpose, I believe greater interaction with the paradigm of restorative justice, the practice of truth and reconciliation commissions and the normative constraints of transitional justice theory are warranted.

Finally, and from a different standpoint, there are other instances of 'quasi' territoriality that it would be worth examining in some detail. Mainly, I am referring here to the case of occupying forces and transitional administration regimes and their holding the power to punish O both for domestic and international crimes. To what extent, if at all, these foreign, albeit territorial institutions should hold the power to punish O for an offence committed on the occupied or administered territory is a question of momentous significance in situations such as post-war Iraq. To conclude, this thesis provides a fully developed philosophical argument for extraterritorial punishment, a contribution much needed in this area of the law; however, it cannot and

⁴ *US v Aluminium Corp of America*, at 443. See also Vaughan Lowe, *Extraterritorial Jurisdiction : An Annotated Collection of Legal Materials* (Cambridge: Grotius Publications, 1983) and Hirst, *Jurisdiction and the Ambit of the Criminal Law*, 47-48.

⁵ Hirst, *Jurisdiction and the Ambit of the Criminal Law*.

does not claim to exhaust the normative problems raised by this increasingly important aspect of the criminal law.

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