Extraterritorial criminal jurisdiction: do states have the right to punish offences committed abroad?

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

1. Introduction

Under the Sexual Offences Act 2003, the UK claims the right to punish its nationals or residents who commit certain types of sexual crimes, e.g., on a holiday trip to South-East Asia. Similarly, under article 113-7 of its Penal Code, France claims jurisdiction over any felony committed outside its territory where the victim is a French national at the time the offence took place. Although the criminal law is usually regarded as mainly territorial in its application, this type of provisions are somewhat standard in the vast majority of states. This extraterritorial application of criminal laws by individual states is not even something particularly new. For some reason, however, it has not received enough attention from scholars working on the justification of legal punishment from a philosophical perspective. This presents us with an interesting, albeit unusual scenario. On the one hand, the legal principles that govern this area of the law have rarely been examined at the bar of justice. This has led to a quite sophisticated body of law devised mostly on grounds of expediency or inherited practice, and whose moral defensibility has often been taken for granted. On the other hand, the issue of extraterritoriality sheds a new light on the discussions regarding the justification of punishment per se by, I shall argue, pressing deterrence and retribution on a significant difficulty that has remained largely unnoticed.

Let me briefly introduce the three main theses I shall defend in this paper. First, I shall contend that the collective interest that explains a state’s right to punish offenders is incompatible with the nationality and the passive personality principles, i.e., their

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exercising extraterritorial criminal jurisdiction on grounds of the nationality of the offender or that of the victim respectively. I shall argue that the majority of the arguments on which both these principles are advocated either beg the fundamental question they are meant to answer or collapse into a less appealing form of universal jurisdiction. By contrast, I suggest that the territoriality and the protective principles are fully consistent with the explanation for the right to punish I put forward. Secondly, I shall argue that the two most popular justifications for legal punishment, i.e. deterrence and retribution, when pressed against the issue of extraterritoriality, are committed to granting PS a power to punish O that is universal in scope. This, of course, does not prove them wrong but, I suspect, it is an implication that few of their defenders would be happy to endorse. Finally, I argue that the justification for legal punishment sketched in this paper is able to accommodate more plausibly the difficulties stemming from the issue of extraterritoriality. As a result, it holds a significant comparative advantage over other, well-established arguments available in the literature.

Before going any further, I need to clarify precisely what is the question at stake here. For this purpose, four points of disambiguation are in order. First, I suggest that the right to punish O can be best portrayed as a normative power to alter certain O’s moral boundaries, usually by inflicting harm on her, coupled with a liberty to do so and a claim-right not to be interfered with. In this paper, we shall be concerned only with the power to punish offences committed extraterritorially. So defined, the right to punish does not include a right to use physical force against O irrespectively of where she is. Thus, it 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. These incidents, S’s power and its liberty/claim, should not be conflated. In short, this paper deals only with the question of whether Israel had the power to try Eichmann, not with whether it was at liberty to ‘arrest’ him in Argentina and held a claim-right against Argentina interfering with that arrest. To avoid any possible equivocation between these incidents I will assume, throughout this paper, that 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.

Secondly, this paper examines the grounds on which S’s courts can claim criminal jurisdiction to punish an offender (O). It deals with the question of whether a particular state can claim to have itself, 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

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5 I shall use the standard Hohfeldian terms to refer to different incidents of a right, namely, liberties, claim-rights, powers and immunities. These incidents correlate, respectively, with a no-right, a duty, a liability and a disability. On this, see the seminal work by

6 On the absolute independence between this power and this claim-right under public international law see, generally,
right to punish O. Let me illustrate this distinction. A court of a prosecuting state (PS) may serve an interest of the population of the state in whose territory an offence was committed (TS) in trying O for an act of murder she committed there. This particular court, however, may at the same time fail to meet the conditions that justify it, in particular, holding such power. This may be because, e.g., it would normally decide on O’s culpability on grounds of confessions extracted by torture. Thus, it is only the former question that will be tackled here.

Third, the purpose of this enquiry is not to clarify which principles are currently in force as a matter of international or domestic criminal law. Rather, it purports to discern which of these principles ought to be in force at the bar of justice.

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

Conceptually, it is possible to distinguish five different bases for S’s criminal jurisdiction: territoriality, nationality, passive personality, protection and universality. I shall examine these principles in said order. I shall first provide a justification for the principle of territorial criminal jurisdiction. By this I mean when state S claims jurisdiction over crimes committed on its own territory. In the remainder of this paper I shall examine possible grounds of PS’s right to punish to offences committed outside its territory. I shall evaluate, secondly, the moral credentials of the nationality principle, i.e. when PS claims jurisdiction over O for a crime committed abroad, on the basis that O is a national of PS. Thirdly, I shall consider the passive personality principle; according to this principle, PS has jurisdiction over O for a crime committed abroad, on the basis that V is a national of PS. Fourth, I shall consider the protective principle. This principle gives PS jurisdiction over O for a crime she committed abroad when O’s crime affected the security of PS. Finally, I shall examine the principle of universal jurisdiction for domestic crimes.

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

8 Sometimes a sixth basis of jurisdiction is articulated: the floating territorial principle. Examining these particular cases, as well as the grounds of jurisdiction on embassies abroad is beyond the scope of this paper. For simplicity, I will assimilate these cases to the territory of a state (T).
i.e., whether a state can punish violations of its criminal laws committed abroad, irrespectively of the nationality of either O or V.

2. A brief explanation for S’s power to punish O
Before I can tackle the issue at hand, I shall succinctly present the justification for legal punishment I shall advocate in this paper. I will not argue for it here, but rather assume it is convincing enough to merit consideration. In fact, my contention is that this argument is better suited to face the specific challenges that stem from the issue of extraterritoriality than the two most broadly held justifications available in the literature, i.e., deterrence and retribution.

As stated above, I suggest that the right to punish ought to be understood mainly as the power to alter certain moral boundaries of an offender (O). In short, the justification for this normative power I propose is based on the assumption that having a system of criminal law in force constitutes a public good that benefits the individuals that live under it in a certain way. Let me explain. I suggest 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. This is, admittedly, an empirical claim whose plausibility will have to be taken at face value here. I assume that the collective interest individuals have in this system being in force, i.e., binding on them, is sufficiently important to grant S a right to punish those who violate these rules.⁹

Now, a further argument is clearly warranted. 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.¹⁰ For this to obtain, two conditions must be met: i) those who violate these criminal rules should be punished; and ii) this punishment ought to be meted out by a body expressly authorized by that legal system. These conditions explain, I suggest, why this collective interest entails both a power to punish offenders and why this power should be held by a given court authorized by a particular legal system (in short, that which claims to be binding). I shall introduce one qualification to this argument. This collective interest grants states only a prima facie a right to punish O. In other words, this interest would not prevail over other interests of individuals under such a system. Thus, I will assume that for S to hold an actual right to punish O, O must have forfeited her immunity and her claim-right against being punished. O can be said to characteristically do so when she attempts to violate someone else’s rights.

Let me pause for a second here: this argument does not entail that the right to punish is grounded on an increase in the dignity and security of individuals in a particular society. That would lead to a purely consequentialist argument, which is quite different from what I advocate. Rather, the relationship of implication works in the opposite

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⁹ I also assume that rights are better explained as interests of particular normative weight. For the interest-based theory of rights see M. Kramers’ contribution in
¹⁰ On this, see
direction, i.e., it is because having certain criminal rules in force contributes to our sense of dignity and security that a state (S) holds the right to punish an offender (O). Thus, this argument relies on the interest individuals hold in having these laws in force rather than on the interest they have in their physical security.

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

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

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11 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
12 See, for example,
13 As I will argue below, by members I refer not to the technical concept of citizens, not even more or less permanent residents; rather, I include in this concept every person who happens to be, for whatever reason, on the territory of a particular state.
14 For present purposes I will treat nationals and permanent residents alike.
S. For example, when a bomb is detonated in a bus full of foreign tourists with the purpose of killing aliens, this certainly affects the belief of the people in S that the rule against murder is in force. This explains why states, which are often portrayed as self-interested machines, characteristically prohibit the murder of any person on their territory, and not only the murder of their nationals/residents. Indeed, we should not conflate the belief that a rule is in force with the somewhat different one that I, *in particular*, am less vulnerable to being a victim of a criminal offence. Criminal laws, I suggest, can ground the former belief, but not the latter.

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

These considerations, then, fully explain the territoriality principle to the extent that it involves S holding a normative power to punish anyone who violates its criminal law within its borders. Let us now examine whether S can claim an exclusive right to do so, or whether other states (PS2, PS3, etc.) could claim the power to exercise their criminal jurisdictions concurrently. In effect, the collective right to self-government each society holds does not merely include the power to criminalize certain behaviours. It also entails an immunity against foreign states dictating and enforcing its criminal rules on the territory of S. This immunity explains why Sri Lanka is *prima facie* disabled from dictating criminal rules that apply in the UK. This immunity must also be explained on grounds of the interests of the people in S. I shall assume here that individuals in S have a collective interest in deciding how to regulate the behaviour of individuals on their own territory that is sufficiently important to ground a disability on other states to do so. Now, this immunity can be neither absolute nor unconditional. Following Raz and Margalit I suggest this immunity holds only insofar it contributes to the well-being of the members
of S.\textsuperscript{15} As a result, and for our purposes here, it is limited by the interests of non-members. Accordingly, the interest that explains S’s immunity does not necessarily preclude S holding a power to punish O for crimes committed in S. Where individuals in S have an interest in their criminal laws being in force on S, S would not be entitled to complain if S were to punish O for an offence she committed in S.

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

4. Nationality principle

In this section I will examine the moral credentials of the ‘nationality principle’. In other words, the issue at stake is whether PS has a normative power to punish O for a crime she committed abroad (in TS), on the grounds that O is a national of PS.\textsuperscript{16} Akin to the principle of territoriality, this basis for criminal jurisdiction is also quite uncontroversial under existing international law.\textsuperscript{17} In fact, it has been generally recognized that the “original conception of law was personal”, and only the appearance of the territorial state gave rise to the right to subject aliens to the \textit{lex loci}.\textsuperscript{18} Recently, this basis of jurisdiction has been a growing significantly in some states, and some lawyers even advocate making it a general basis for criminal jurisdiction in the UK.\textsuperscript{19} For example, the UK has recently claimed a right to punish O for certain sexual offences committed against children, regardless of where he has committed the act, if O happens to be a national or a resident of the UK.\textsuperscript{20} Although many countries have self-imposed restrictions to 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.\textsuperscript{21}

I have assumed that PS’s normative power to punish O is explained by the collective interest of the members of PS in having a system of criminal laws in force. I now contend that this justification cannot accommodate the nationality principle. In short, there seems to be no way in which PS’s criminal rules being \textit{in force} require punishing O

\textsuperscript{15} Let me recall that I use PS for the prosecuting state and TS for the state in whose territory the offence was committed.

\textsuperscript{16} See, Vaughan Lowe in \textit{op cit}. For more cautious stances, albeit considering uncontroversial, see and See also article 12 b) of the ICC Statute, where this basis of jurisdiction stands side by side with the territoriality principle.

\textsuperscript{17} See the Sex Offenders Act 1997, Landmines Act 1998 and the Nuclear Explosions (Prohibition and Inspections) Act 1998. Also, See sections 5-15 and 72, and Schedule 2 of the Sexual Offences Act 2003 (note 2 \textit{op cit}).

\textsuperscript{18} Regarding self-imposed restrictions, in some countries the law requires that the offence be a crime under the law of the state in whose territory it was committed (e.g. Egypt, see ). In others, it is only provided for certain particularly serious offences (e.g. France).
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 warranted 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, or sympathetic to the victims of a given crime occurred abroad, but the system of criminal rules under which they live is not put into question by these offences. This conclusion is at odds with current international law as well as, to some extent, with common sense morality. In the remainder of this section I will examine the arguments put forward to justify this basis for extraterritorial criminal jurisdiction. Most of them are scattered in the treatment that lawyers give to this issue. I will close the section considering a more elaborate, although ultimately unsuccessful argument extrapolated from international political theory.

Nationality-based criminal jurisdiction has been defended, e.g., 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 her human rights). In Vaughan Lowe’s words, “[i]f a State were to legislate for persons who were indisputably its nationals, who could complain?”22 This argument, however, begs the relevant question, i.e., it assumes rather than explains what particular interest of PS (or, more precisely, of the members of PS) is sufficiently important to ground O’s liability to have punishment inflicted upon her. Likewise, it fails to take seriously TS’s immunity against having criminal laws being prescribed on its territory by foreign authorities. These two are precisely the issues we need to explain if we are to claim that PS holds this right.

One response to the first of these questions has been: the right of PS to punish, for example, certain sexual offences committed by its members in TS has to do with the possibility of recidivism within PS.23 A first remark that needs to be made here is that, if anything, this argument provides a justification for punishing PS’s residents and not its nationals. In other words, it cannot explain why PS would hold a power to punish its nationals residing permanently abroad. This argument would therefore change the scope of this basis of jurisdiction in a way that, to some extent, would be inconsistent with current international law. But leaving this aside, the problem with this argument is that it has to justify the right to punish on the basis of incapacitation or, to a lesser extent, the moral reform of the offender. Now, most legal and political philosophers reject these arguments as a plausible justification for legal punishment simpliciter. It seems to me that nothing in the extraterritorial application of criminal laws would override these clear, well-established considerations.

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22 V. Lowe in See also
23 Similarly, Vaughan Lowe in
In a different vein, it has been claimed that passive personality constitutes an ‘evolution’ from the ‘narrow’, ‘self-interested’ territorial purposes of the state.\textsuperscript{24} In other words, the criminal laws of the UK now ‘protect’ children abroad against, e.g., certain sexual offences committed by citizens or residents of the UK.\textsuperscript{25} However, if the extraterritorial exercise of criminal jurisdiction by PS is justified on the extra protection awarded to these children, I do not see on what possible grounds this right could be limited to PS’s own nationals. In other words, if what makes the justificatory work is the extra ‘protection’ awarded, e.g., to children abroad, a strict application of this argument would lead to the principle of passive personality, or eventually to universal jurisdiction, but not to the nationality principle. To that extent, this argument can be readily rejected as a basis for the nationality principle.

Some further arguments try to ground this particular right in an interest other than the interests of the members of PS. For example, this power to punish has been based on the interest of O in having a fair trial, or not facing capital punishment.\textsuperscript{26} Now, this argument might only show, if anything at all, that certain states, namely those which cannot guarantee a fair trial or which provide for capital punishment, would lack the power to punish O.\textsuperscript{27} But it simply does not follow from this that the state of which O is a national holds the right to punish her. Somewhat differently, the right of PS has been based on an interest of the members of TS. The argument goes: TS might have an interest in not being forced to face the option of either punishing O (and face diplomatic pressure and bad international press) or simply release her.\textsuperscript{28} I take it that this argument derives its pull from endorsing a Realpolitik perspective. But it is based on a non sequitur. TS may have an interest in avoiding such a nasty scenario; this would probably depend on the identity of PS and TS, as well as plausibly of V and O. But even if we accept that this is necessarily the case for the sake of argument, this claim does not warrant the stated conclusion. Rather, TS’s interests seem to grant it a power to decide whether to: a) exercise its right to punish O itself (despite diplomatic pressure); b) simply release her; or c) have PS punish O. This interest entails that it is up to TS, and only up to TS, to decide. Thus, this argument cannot justify PS’s right to punish O. All it can prove is that TS holds a normative power to authorize other states, such as PS, to punish O. But this is not the same as claiming that PS holds itself a right to do so. Granting PS a right for the sake of TS, moreover, seems to me a very unappealing form of judicial imperialism.

Some scholars are concerned with what they call jurisdictional gaps and the need to fight ‘impunity’. Two different scenarios are often mentioned. First, this problem

\textsuperscript{24} Section 7(2) of the Sex Offenders Act 1997.

\textsuperscript{25} Indeed, I will argue that states which cannot guarantee a fair trial lack the power to punish O, regardless of what the basis of its jurisdiction is. The question of capital punishment is a more difficult one that, unfortunately, is certainly beyond the scope of this paper.

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would obtain when O returns to her country (PS) after committing an offence in TS. For the extradition laws in many states claim at least a right not to extradite their nationals. Now, from a moral point of view this is of little relevance. Someone advocating this view would need to provide an argument to show that states hold a right not to extradite their nationals, something which I honestly doubt. Absent this argument, the answer seems to be: ‘just amend these laws’. But even if we grant for the sake of argument that states do hold that right, it once again does not follow that PS would, as a result, have the right to punish O. In other words, the fact that the members of PS have an interest in not extraditing O that is sufficiently important to grant PS a liberty not to do so, is simply unrelated to the question of whether they have an interest in themselves punishing her or not. I have argued that under these circumstances they lack an interest that can grant PS a right to punish O. If impunity is so important to the members of PS, then it should simply refrain from withholding 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. Admittedly, if I stick to my justification for the right to punish, PS would lack the right to punish O in this case. But even if we recognize PS the right to punish O in this case on the grounds that we want to avoid impunity, it does not follow that only the state of which O is a member has a right to do so. Rather, the logical implication of objecting my solution on these grounds is that any state would have a right to exercise criminal jurisdiction over O under these circumstances, not just the state to which the offender belongs. Thus, the aim of avoiding impunity cannot in any event explain the nationality principle.

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. This argument depends of what exactly this relationship amounts to. A first consideration that needs to be made here is that none of the well-known arguments defending the intrinsic ‘ethical significance’ of nationality seem to entail the application of PS’s criminal laws to its nationals abroad. Basically, 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.

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29 Some states, such as most European countries, go further and claim to be under a duty not to do so. Cf. Jones v. United States (1890), 137 U.S.202L.
30 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 The Netherlands applied a similar provision in art.5 (2) of its Penal Code (1881). See also the Calvin’s Case [1608] 4 Co. Rep. 1 (1793).
31 I borrow the expression from On this, see
Therefore, they do not directly support the principle of nationality. If anything, they may provide an argument for the principle of passive personality, i.e., the right of PS to protect V (wherever she is) by punishing those who violate her rights. Hence, they will be examined below.

Alternatively, we may build this allegiance relationship under the terms of a ‘mutual exchange of benefits’ scheme.\textsuperscript{34} Defenders of this argument would suggest that because O receives protection and other benefits from PS, she also has to bear the burdens of her membership to P. A first objection against this argument is that it does not seem to apply to every state. Indeed, not every state seems to confer enough benefits upon their members so as to claim from them a duty to bare their burdens while abroad.\textsuperscript{35} 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 granted that O is under certain obligations towards PS, this approach still begs the crucial question, namely, what is the interest of the people in PS that justifies O being under a duty to comply with PS’s criminal rules abroad. Consider the following case: Oscar travels to TS and robs a bank. When he is back in PS, he is prosecuted under PS’s criminal law and punished. Now, it is unclear to me what is PS’s interest in O respecting PS’s laws abroad. Certainly, the right to punish O is not based on PS’s members in enjoying the sense of dignity and security that their system of criminal laws provides them. I fail to see in what meaningful sense O’s act undermined PS’s criminal rules or the sense of dignity and security of the people in PS. Other interests that PS may put forward would collapse into unappealing justifications for the right to punish (incapacitation or moral reform), or into some form of universal jurisdiction (deterrence or retribution). In other words, I contend that unless there is a specific element in the offence itself (e.g., its effects or purpose) that affect the public good that individuals in PS themselves enjoy, PS would lack the power to enforce its criminal rules against O.

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

\textsuperscript{34} Interestingly, until well in the 20\textsuperscript{th} Century many European powers had ‘national courts’ in the territories of other states (e.g., Persia, China, the Ottoman Empire, etc.) to try their citizens for crimes committed abroad. This jurisdiction, however, was based on capitulation treaties and not on a right held by the European powers themselves. See
of 16. In TS, however, the age for which sexual intercourse is permitted is 10.\textsuperscript{36} Now, suppose that O, a resident of PS, goes to TS and has sexual intercourse with a 10-year-old girl. I do not see in what sense his act would affect the criminal laws of PS being in force. These rules, I contend, provide a public good to the people living there and have not been violated. From the point of view of both individuals in PS and external observers it would be hard to argue that her offence did in fact undermine the confidence in that the criminal rules of PS are in force. Individuals in PS may of course have an interest in O being punished but, unlike the interest of those in TS, their interest would be based on incapacitation or deterrence. The problem, however, is that incapacitation is often considered morally indefensible and that deterrence, as I have argued, would lead us to universal jurisdiction, not to jurisdiction based on the nationality of the offender.

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

5. Passive personality
This section addresses the question of whether state PS has the moral right to punish O for a crime she committed abroad, on the grounds that V is a member of PS. This basis of criminal jurisdiction is among the most contested ones in contemporary International Law.\textsuperscript{37} It is the only regular basis of criminal jurisdiction that was not included in the 1935 Harvard Draft Convention on Jurisdiction with Respect to Crime.\textsuperscript{38} However, it has been increasingly adopted by states.\textsuperscript{39} Although there currently seems to be a trend to widely endorse it, this trend relates to what I have conceptualized as crimes under

\textsuperscript{36} Such a low age limit seems highly problematic for other reasons. In short, I suggest that such a threshold would be incompatible with the rights of children in TS. However, I have devised this example to confront my argument with a real difficulty.

\textsuperscript{37} Oppenheim says its inconsistent. It was heavily criticized by Judge Moore in the Lotus case (PCIJ, Ser. A, no.10). And even there the majority, which accepted that Turkey had the right to punish M. Demons on the grounds of territoriality, did not fully endorse the principle of passive personality.

\textsuperscript{38} The Harvard Research project (1935) contains a list of 28 states that have adopted this principle; many of them still endorse it (see ). France, for example, objected vociferously against the application of this principle by Turkey in the Lotus case (note 37, above). Indeed, before 1975, it recognized jurisdiction on this basis but it was rarely applied. To do so it required a decision of the Ministère Public that it was in the public interest to do so. This occurred when the offence had some territorial effects or endangered the security of the state. To that extent, it is hard to say that jurisdiction was based on passive personality. France’s Criminal Procedure Law provides for its criminal jurisdiction for crimes (as opposed to délits) committed extraterritorially against its nationals (art. 689 of its Code the Procedure Pénal referring to art. 113-7 of its Code Pénal).
international law, such as genocide. It does not have to do with the extraterritorial application of a state’s municipal criminal law.\footnote{Vaughan Lowe in See in particular, the Joint Separate Opinion of Judges Higgins, Hooijmans, and Buergenthal in the Arrest Warrant case (ICJ Reports, 2002, p.3, at p. 11).}

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

Moreover, I suspect that it is not even accurate that the German citizens abroad have a collective interest in the German criminal law being in force extraterritorially that would be sufficiently important to grant Germany a power to punish O in this type of cases. The reason for this is, in short, that the German criminal law cannot provide abroad the benefits that justify Germany’s right to exercise criminal jurisdiction at home. An example will clarify my point. It seems to me that 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. In other words, I have explained the power to punish by reference to a public good. This public good benefits the individuals on a particular territory. Because of the features of this public good, it cannot be enjoyed by the members of PS extraterritorially. In fact, this is the case with most public goods offered by PS, such as public health or transport. While V is abroad, the only system of criminal law that can contribute to her (relative) sense of dignity and security is the criminal law of the territorial state. This is so, I suggest, at least when we refer to municipal offences. It follows, thus, that PS would lack a right to punish O extraterritorially on the grounds that one of the victims of her offence is a member of PS.

It is time to tackle the arguments proposed by those who defend the ethical significance of nationality. Regardless, of the particular reasoning on which each of these is based, the proposition they commonly endorse is that individuals have certain special
obligations towards their co-nationals. These arguments vary with regard to the duties each one gives rise to, and some of them recognize that the content of these obligations is, in fact, indeterminate. However, it seems safe to assume that all of them entail that PS has a special obligation to protect the interests of its nationals. This special obligation implies that they also have a right to do so. Now, if the nationality bond intrinsically requires PS to fulfil these special duties, it seems that the proponents of special obligations to co-nationals are committed to extending this protection abroad. So far, so good. However, to assert a right to punish on the basis of this proposition is a non sequitur. As I have explained elsewhere, the right to protect V does not per se entail the power to punish O. In short, we are usually ready to recognise S’s the power to punish O for a homicide even if V’s rights cannot be protected anymore. Therefore, a further argument is needed. It seems to me that the only way in which we could meaningfully say that this right to protect entails a right to punish is by claiming that legal punishment is justified by its deterrent effects.

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

To conclude, I suggest there is no argument that can explain the right of PS to punish O on the grounds that V is a national of PS. In the previous section I also rejected the proposition that PS has the right to exercise criminal jurisdiction on the grounds that O is a member of that state. Let me briefly examine now whether PS might have a right to punish O if both these conditions obtain. A case with this configuration occurred recently in Ferrugem, a holiday village in Brazil. A group of Argentinean youngsters (O1, O2 and O3) killed another Argentinean national in a fight (V). Would Argentina have a right to punish O1, O2 and O3? I have assumed that Argentina’s power to punish O can only be justified by reference to the stabilization of its own criminal rules. Now, it seems clear to

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41 The standard arguments are made by
42 This argument is also used by ICL scholars. See
43 See, the Malvino case. On this, see http://www.clarin.com/diario/2006/12/21/sociedad/s-05202.htm.
me that no criminal law of Argentina has been violated in this case. The nationality of both the offenders and the victim cannot alter that plain fact.

6. 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. 44 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 jurisdiction these grounds. I shall concentrate for present purposes on certain offences for which the principle is standardly invoked, such as those committed against PS’s governmental authorities, its military forces, counterfeiting of currency or public documents issued by the state. It may well be that the protective principle antedates the contemporary state and the modern principle of territoriality. In any case, it has developed as a practice under international law only in the 19th Century. 45 It seems safe to argue that currently this basis for criminal jurisdiction is reasonably well established under international law. 46 It should be noted, however, that states have had diverging attitudes towards this principle. While Continental Europe and Latin America have often advocated this basis of jurisdiction, the Anglo-American world has traditionally opposed it. 47 However, more and more the US and the UK have tended to come to terms with it and use it for their purposes. The only remaining distinction seems to be that while some states claim a right to prosecute only their nationals on these grounds, others claim a right to prosecute also aliens. 48

There have been four standard arguments that purportedly justify PS’s criminal jurisdiction on grounds of ‘protection’. They can be identified as the sovereignty, self-defence, deterrence, and protection stricto sensu arguments. 49 Let me deal briefly with the first three of them, which I contend are unconvincing for reasons already stated here. The sovereignty argument basically relies on the proposition that each state should be completely free to determine the scope of its criminal laws. 50 As I have already argued, this proposition is clearly untenable for several reasons. First, because PS’s criminal

44 See 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
45 , citing statues of Italian cities in the 15th and 16th Centuries. See also
46 Art. 8 of the 1883 the Institute of International Law adopted a resolution which contained the following principle (in ). See also the the list of 43 states that provided for it either in their legislation in force or in their projected criminal codes (at 543 and 551). 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
47 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.
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49 For deterrence as a justification see For a careful treatment of the other three see
jurisdiction would be incompatible with the sovereignty of TS; in short, it would conflict with TS’s immunity against having criminal laws prescribed on its territory by an extraterritorial authority (PS). If both rights are absolute, it does not follow that PS’s power overrides TS’s immunity. Secondly, and more importantly, the problem with this argument is that it begs the relevant question, i.e., it assumes rather than explains what/whose interest justifies PS’s power to prescribe and enforce criminal rules extraterritorially. On a different vein, it should be noted that this argument does not provide a justification for the protective principle *per se*, but rather it provides a justification for any kind of extraterritorial jurisdiction. In other words, it cannot explain what is special about these offences that would justify PS holding the power to punish O extraterritorially.\(^5^1\)

The argument based on self-defence is, for its part, as unsound as the sovereignty argument, even if it has been far more popular and enduring.\(^5^2\) A standard version of it would runs on the following lines: “in the absence of a centralized authority capable of protecting its security, the [s]tate has the competence to punish those who from foreign territory frustrate the possibility of internal peace.”\(^5^3\) Now, elsewhere I have argued extensively against the proposition that self-defence can ground the power to punish O, period.\(^5^4\) In short, I claimed that this argument cannot explain the power to punish O once the offence has been committed, i.e., once PS’s Congressman has already been killed. Unless, of course, this self-defence argument collapses into some form of incapacitation or deterrence. I have already discarded incapacitation as a plausible explanation for the right to punish elsewhere. Suffice to mention here, by way of example, the treatment accorded by the US to Al Qaida combatants detained in Afghanistan and kept, mostly without a criminal trial or access to a court, detained for a period of time that one may fear would be unlimited. Thus, I will now turn to deterrence.

The deterrence argument fails to meet a critical evaluation for different reasons, reasons that I cannot address here. For present purposes, the big difficulty is its ‘inflationary’ character. In other words, if what makes the justificatory work here is the deterrent effect that punishing O might bring about, it would make sense then to make this effect as large as possible. Thus, if PS’s power to punish O for counterfeiting its currency abroad is grounded on the fact that it would deter O2, O3, etc. from doing so, it follows that PS would be justified in holding the power to punish O alongside TS. This, quite plausibly, will increase the deterrent effect on potential offenders. But on the same basis

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\(^{5^1}\) This argument is not a serious contender today. In fact it was even rejected in 1935 by the group of experts in the Draft Convention on Jurisdiction with Respect to Crime, 555.

\(^{5^2}\) It was, until quite recently, very popular in Continental Europe and Latin America. See the *Bayot* case by the French Court of Cassation (22 February 1923) and its decision in the *Fornage* case (84 J. du Palais 229 -1873).

\(^{5^3}\) with reference to Des Vabres, *Les Principes Modernes Du Droit Pénal International*, 87, and the argument that this basis of jurisdiction is grounded on self-defence in Continental Europe.

\(^{5^4}\) See my “A rights-based theory of punished”, paper presented at the Brave New World Conference 2006, University of Manchester, unpublished.
PS2, PS3, PS4, etc. would be able to claim such a power to punish O. Once again, deterrence cannot serve its stated purpose and inevitably collapses into universal jurisdiction.

Let me now turn to the fourth argument provided in the literature, which I have termed, for lack of a better name, ‘protection *stricto sensu*’. This argument suggests that PS’s right to punish extraterritorially those offences that affect the security of the state is derived from PS’s right to its free enjoyment of its political institutions. As a corollary, the argument goes, PS holds a right to be secured against those who from foreign territory affect the possibility of internal peace and security. This right entails a correlative duty for TS to prosecute and punish crimes committed against PS enjoying these goods. Now, because TS will often fail to do so, it is necessary to ‘fill in the gap’ and provide PS with the power to do so itself. From an analytical point of view, this argument is a bit messy. A first shortcoming is that it seems to make PS’s power to punish O dependent on the fact that TS would normally fail to punish O, when in fact this does not follow from the premises. Let me explain. Provided PS holds a right to enjoy peace and security against aliens abroad and its power to punish those aliens would allow it to secure these rights, it must follow that PS would hold the power to punish O irrespectively of whether TS would be willing/able to do so or not. Accordingly, PS’s right does not arise as a way to ‘fill in the gap’, or more relevantly, is not subsidiary to TS failing to punish O. In any event, the main difficulty with this argument once again has to do with a problematic understanding of the relationship between punishing O and securing someone else’s rights (PS’s in this case). Namely, this argument explicitly relies on the proposition that punishing O for an act she committed abroad would secure PS’s rights to peace and security. But if one follows this argument closely it does not lead to its ambitioned goal. If PS’s power to punish O extraterritorially is based on PS securing its right, e.g., not to have its currency counterfeited, it would follow that PS would also have a power to punish O in order to secure the right of any individual (V) against being murdered abroad. V’s interest in her life is at least as important as PS’s interest in not having its currency counterfeited. In other words, once we grant that by punishing O, PS can really secure anybody’s rights, we are committed to grant PS a right to secure anybody’s rights. This, then, implies PS holding a power to punish O on universality grounds and not one limited to its own protection.

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55 This argument has been carefully presented by Manuel García Mora although he considers it ultimately unsuccessful (see I follow his description.

56 As a matter of fact it seems true that few countries seem to have the appropriate legislation to do so.

57 I will not address the issue of whether TS is under a duty to do so. For present purposes it is rather immaterial whether that is the case.

58 In effect, this type of offences almost never require that the act is also an offence under the territorial laws (
Although ultimately unsuccessful, this argument points in the right direction. In other words, it is concerned with whether the members of PS have an interest that is sufficiently important to grant PS a power to punish O.\footnote{This was recognized both by, although neither of them explains what this interest is.} It just gets wrong the particular interest that justifies PS’s power to punish O \textit{simpliciter}. I have argued that the only interest that provides a non-contingent justification for this power is the collective interest in having a system of criminal laws \textit{in force}. This is because, or so I claim, this system is a public good that provides the inhabitants of PS with a relative sense of dignity and security that contributes to their well-being. Let me recall that this is not to say that this sense of dignity and security is what justifies punishing O. The logical implication works in the opposite direction, i.e., because having certain criminal rules in force contributes to our sense of dignity and security PS has the right to punish those who violate these laws. Thus, the relevant question is whether the members of PS have a collective interest in their criminal laws being in force extraterritorially vis-à-vis certain offences against, e.g., the security and political independence of the state. I contend they do. Let me illustrate this point by way of an example:

“The scene was Washington, November and December 1921. The world's naval powers had come to negotiate limits to shipbuilding to prevent a runaway naval race and save money. The point in contention was the ratio of tonnage afloat between the three largest navies, those of Britain, the United States, and Japan. The US proposed a ratio of 10:10:6. ... But the Japanese were unhappy and would not budge from their insistence on a 10:10:7 ratio, which would give them 350,000 tons. ... 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.”\footnote{Taken from Thomas Powers review entitled “Black Arts”, \textit{NYRB}, Volume 52, number 8, May 12, 2005.}
Japanese) as acts of espionage against Japan on its own territory. In other words, it makes little difference where the codes were broken or the secret message intercepted. But then, if the Japanese have the power to punish those who carry out acts of espionage against Japan on its territory, it must follow that Japan would have to hold this power extraterritorially. In other words, unlike cases of theft or murder against V, espionage against PS, even if carried out on TS, will affect the interests of the members of PS. For them to be able to enjoy the thin protection that this rule being in force provides, the rule has to be binding on O irrespective of where she commits the act of espionage. Moreover, the members of PS would have an interest in PS prosecuting and punishing espionage against PS, but not against PS2. Indeed, this entails, in our example, that China would be disabled to prosecute Mr. Yardley for his deed. Finally, PS would hold this power regardless of whether TS decides to prosecute O itself or not. In short, the justification for legal punishment defended in this paper is able to explain PS’s power to punish O on grounds of protection.

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

On the other hand, it has been argued that this type of jurisdiction lends itself to inadmissible extensions. This is historically true. Famously, Professor Jessup cites a case in which, during the Nazi period, a German court approved the prosecution in Germany of a Jewish alien who had extramarital intercourse with a German girl in Czechoslovakia on the basis of the “purity of the German blood.” Salman Rushdie’s death fatwah seems another powerful illustration of this danger. Without going as far as that, many provisions that invoke the protective principle are unacceptably vague. For example, the Hungarian Penal Code at some point provided for jurisdiction for any act against ‘a fundamental interest relating to the democratic, political and economic order of

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the Hungarian People’s Republic. As it is often said, the fact that PS can abuse a right it has is hardly a conclusive argument against PS holding that right in the first place. In other words, these examples show cases of blatant abuse of this doctrine, but they say very little about its application to offences that do in fact affect the security or political independence of PS.

Finally, one should ask whether PS’s laws being in force abroad can provide the members of PS with any sense of dignity and security in this type of cases. In particular, since I have previously argued that this public good benefits the individuals on the territory of the state where they are. For instance, I argued that a German citizen, while abroad, cannot enjoy the sense of dignity and security provided by the German criminal laws, but rather, it is the criminal laws of the country where she is (T) being in force that can contribute to her sense of dignity and security. Would that not undermine the argument I make in this section? I suggest it would not. I stand for what I said in the case of the German tourist in Buenos Aires. But, by contrast, in this case we are not considering the sense of dignity and security that the German criminal laws provides to, e.g., Germany’s Chancellor abroad. In effect, frau Merkel herself, on a visit to Patagonia, would have an interest in Argentina’s criminal laws being in force. The issue at stake here then is not her sense of dignity and security. Rather, the protective principle is explained by the sense of dignity and security it provides to the German people in Germany regarding their Chancellor, while she is abroad. And this, I contend, German criminal law is perfectly able to contribute to.

7. Universal jurisdiction

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

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66 See the section on passive personality above.
deterrence, if applied consistently, would necessarily advocate PS holding a power to punish O on universality grounds. In other words, this section is directed against some well-established beliefs held by many philosophers of punishment.

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

Let us see how deterrence would do in this context. Standardly, the central tenet on which this argument is grounded is that punishment is justified as a means of protecting individual’s rights and other valuable public goods by deterring potential offenders. The protection granted justifies the suffering inflicted upon O. Deterrence seems inevitably attached to the following reasoning: the ‘more’ punishment it 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 standardly said to depend on the certainty, severity and celerity of the punishment. Now, it surely seems that allowing states to exercise its criminal jurisdiction on grounds of universality will contribute to the certainty of the punishment. More importantly, perhaps, this would contribute to the perceived certainty of the punishment. It is obviously beyond the scope of this enquiry to even begin to consider how strong this extra deterrent effect would be. That, I suspect, will greatly depend on the type of crimes and the type of offenders. Shoplifting and money-laundering may well be differently affected. In any case, if we accept that there will be some extra deterrence, it follows that this justification is stuck with advocating universal jurisdiction. This, surely, does not prove this justification

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68 I leave aside, for present purposes, the issue of how this would affect acts that are considered offences in S but not in S2, a standard example being that of abortion. I suspect that advocates of deterrence would have to argue in favour of S having universal jurisdiction for this type of acts as well. In any case these cases seem to represent a small minority of the totality of offences and, therefore, I need not rely on them to make my point against both deterrence theory and retributivism.
wrong. But it shows that it will be up to those who defend it to explain either why it is not true that deterrence is committed to such a view, or that such a view is, as a matter of fact, morally appealing.

Interestingly enough, retributive justifications for legal punishment seem to lead to the same normative consequence. Even under risk of oversimplification, it seems safe to say that the central tenet of retributive justifications for legal punishment is that ‘O deserves to be punished’. Now, a distinction is warranted here. Some retributivists argue that this proposition only explains why it is permissible to punish O.\textsuperscript{70} In the language of rights I have been using so far, this argument explains why O lacks a claim-right not to be punished. It does not explain why PS has the power to do so. This version of retributivism is not committed to universal jurisdiction but it does not, either, provide a complete justification for the institution of legal punishment. To that extent, it has little to say about the central issue at hand. A second type of retributivist suggests that desert is also a sufficient condition to grant PS the power to punish O. I take issue with this kind. Regardless of what is the precise explanation of the proposition ‘S has the right to punish O because O deserves to be punished’, it seems to warrant the conclusion that PS should have the right to punish O irrespectively of where the offence was committed. This, 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 do that. Take for example Ted Honderich’s argument that the truth in retributivism is that punishment is justified by grievance-satisfaction.\textsuperscript{71} It seems to me that to the victim, and all those who sympathise with him, it would make little difference in terms of the grievance satisfaction they would get, which state does in fact punish O, as long as O is effectively punished. In short, then, it seems that most retributivists will also be committed to defending PS holding criminal jurisdiction on universality grounds.\textsuperscript{72}

Admittedly, a few of the leading scholars in the field have recently tackled this issue, albeit not in relation to extraterritoriality. Accordingly, they may argue that their justifications do not share this unfortunate consequence. I shall concentrate here on two arguments in particular. I shall first examine R.A. Duff’s influential communicative theory of punishment and, subsequently, I shall close this section by addressing the argument put forward by A. Von Hirsch and A. Ashworth.\textsuperscript{73}

Duff’s communitarian theory of punishment does not seem to 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. Now, I will not examine the soundness of

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\textsuperscript{72} In effect, I suspect that Nozick’s influential argument that punishment connects the offender with “correct values”. See his

\textsuperscript{73} See, respectively,
this argument here.\textsuperscript{74} Rather, my main interest is to appraise his argument under the light of extraterritoriality. In order for punishment to reach O’s moral conscience, he contends that two conditions must be met. First, O needs to have committed a wrong; and secondly, PS needs to have the moral standing to censure her for that conduct. It is the second limb of his argument that is relevant to us here. Duff suggests that in order for PS to have moral standing to punish O, it should fulfil two conditions. First, it must have the appropriate relationship to O, or to her action in question. This implies the existence of a political community on behalf of which punishment is imposed, i.e., a linguistic community that shares a normative language and a set of substantive values, to the extent so as to render mutually intelligible the normative demands that the law makes on its citizens. Secondly, PS must not have lost that standing as a result of some (wrongful) previous dealing with O. In short, I suggest that Duff’s argument is capable of doing much better than most of its rivals in this context. This, I believe, is because Duff is aware that the question of the justification for punishment is not just that about whether it is permissible to punish O, but rather, and crucially, about whether some particular body (S) has the right to do so. 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., 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. But I rather think that is not what he has in mind. Duff seems to be talking of a thicker notion of political community. Accordingly, his argument is safe from collapsing into universal jurisdiction.

However, its problems seem to be the opposite ones. It is worth pausing for a second to consider this under the broader light of this whole paper. First, I believe Duff would have trouble in explaining S’s power to punish O for a crime she committed on its territory, when O is not a member of S or does not share many of its values. This seems quite unappealing; imagine claiming that foreigners are not subject to local criminal laws. On the same grounds, although this justification would have no problem in explaining the why states have the right to punish their nationals abroad, it would have to stick to it even if it entails PS holding a power to punish O for an abortion she carried out on the territory of TS, where abortion is lawful. Third, this justification would seem unable to accommodate both the passive personality and protective principle. Again, the problem is that because his argument is offender-centred, PS would lack moral standing to censure foreigners counterfeiting PS’s currency or murdering PS’s nationals. On these grounds alone, I suspect that this argument leads to less appealing consequences than the argument proposed here.

Let us now turn to Von Hirsch and Ashworth’s argument. Famously, they also see punishment as mainly explained in terms of censure, though their justification is

\textsuperscript{74} On this see the interesting exchange between Duff and Andrew von Hirsch in
supplemented by an element of deterrence. On the particular issue at stake here their argument goes as follows: a) offences are moral wrongs; b) by censuring the offender, punishment provides recognition of the conduct’s wrongfulness; c) this recognition should be made by a public authority and on behalf of the wider community, because it relates to basic norms of decent interaction among individuals; d) the state is, so the argument goes, the only body capable of providing such public valuation of O’s conduct. Regardless of the merits of this argument itself, I suggest that the main difficulty it presents is that, unlike Duff’s, it does not identify the wider community on whose behalf censure should be conveyed. This may be because their main underlying concern is to establish that legal punishment is the business of the state rather than of private individuals. Whatever the reason for this, their answer does not seem to explain the business of which state this is. Von Hirsch and Ashworth consider themselves conventional liberals. Thus, the community they seem to have in mind is a group of individuals that share some basic norms of decent interaction. But then, this community would have to include every individual. After all, most moral wrongs do not depend upon territorial boundaries or political allegiances. Now, on these grounds, it would be up to them to explain why PS would not be in a position to provide a public valuation of O’s offence perpetrated in TS. For it seems to me that both their decisions 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 which the offence was perpetrated. Thus, it can be concluded that their argument does, again, warrants PS a power to punish O that is universal in scope.

8. Conclusion

The findings of this paper are quite straightforward. I have argued that the non-contingent justification for legal punishment I advocate grants states the power to punish only offences committed on their territory or against their security and political independence. However, this argument rejects the proposition that states hold the power to punish O on grounds of the nationality of the offender or that of the victim. Moreover, I have argued that the standard arguments in favour of these bases of criminal jurisdiction either beg the question they are meant to answer or collapse into justifying a power to punish of universal scope. This is not a proposition of what the law is on this matter. My contention is that states should refrain from ascertaining criminal jurisdiction on these two grounds and modify their domestic criminal law accordingly. Otherwise they would act ultra vires.

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

76 , 29-31. Italics added.

77 Ibid., 30.
By contrast, the last section of this paper is intended for philosophers of punishment. In short, I contend that the two most influential justifications for legal punishment, i.e. deterrence and retribution, when examined under the light of extraterritoriality, are committed to granting PS a power to punish O of universal scope. This, I suggest, does not prove them wrong, but it certainly is a necessary implication that few of their defenders would be happy to endorse. Having clarified the central tenets of this paper, I want to briefly examine two quite separate issues, namely, whether the notion of a nexus often invoked in the literature by international lawyers is conceptually sound, and the general objection to this paper that the approach defended here is simply too restrictive.

Let me briefly refer to the doctrine of necessary nexus. In short, this doctrine argues that whenever there is a sufficient nexus between PS and either O or the offence itself, PS has jurisdiction to try O. Indeed, all the bases of jurisdictions above constitute, according to this doctrine, nexi in the relevant sense. However, I contend that this cluster concept obscures rather than clarifies anything we might want to say in favour or against PS holding a power to punish O. There is no single element common to all bases of jurisdiction that can be said to warrant a reference to this seemingly univocal term. Each basis stands on very different grounds. Thus, this nexus concept has to be completely hollow and lacks any conceptual rigour. For that reason, it must simply be discarded.

We hereby reach the final point I want to make in this paper. Admittedly, many people would find the theory of criminal jurisdiction advocated here simply too restrictive. They may protest, for instance, that by preventing states from exercising their criminal jurisdiction extraterritorially on grounds other than protection, this approach would preclude joint efforts by states to fight certain forms of criminality. This is not what this argument entails. True, it warrants that PS is disabled to punish O for an offence she committed outside its territory unless it threatens its security or political independence. The reason for this is, basically, that individuals in PS lack an interest in PS’s criminal laws being in force abroad that would trump the interest of individuals in TS in not having a foreign authority dictating criminal laws on its territory. However, I have also suggested that it might be the case that the members of TS have an interest in PS being able to enforce TS’s criminal laws. In short, I now contend that this interest is sufficiently important to warrant TS a normative power to authorize PS to punish offences committed on the territory of TS. In other words, the interest of individuals in TS not only warrants TS a power to punish O for an offence she committed on its territory, but it also explains

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78 Sometimes called ‘direct and substantial connection’ (, ‘clear connecting factor’ (V. Lowe in ), “or sufficient nexus test” (), or nexus (). For a strong defence of this notion, see
79 V. Lowe in
80 The most extreme application of this concept has been, to my knowledge, the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the famous Arrest Warrant case, where they admit as a link the fact that the individual happens to be present in the territory of the prosecuting state (P). (Democratic Republic of the Congo v Belgium, ICJ Rep. 2002, p.3, paragraph 31 of their Separate Opinion). They are not alone in this consideration.
81 See the section on the nationality principle above.
TS’s power to authorize a foreign authority to do so, and thereby waive its immunity against having criminal rules enforced on its territory. But this is simply not the same as arguing that PS, *itself*, has the power to punish O. My argument entails only this latter proposition.

Let me put it in clearer terms. My argument allows for states to hold a normative power to make treaties granting each other extraterritorial criminal jurisdiction for acts committed on their respective territories. The Conventions of the Council of Europe on Cybercrime (2001) and on Action against Trafficking in Human Beings (2005), and the 2003 UN Convention against Corruption are but a few examples of this.\(^2\) 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. Finally, states have a power to grant jurisdiction to foreign states for all sorts of domestic crimes, from shoplifting to money-laundering, albeit they will not necessarily have the same incentives.

To conclude, I willingly admit that, in Chief Justice Taft words, some offences “are such that to limit their scope to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute…”\(^3\) However, this does not warrant PS extraterritorial criminal jurisdiction. My contention is that it is up to TS, and only up to TS, to decide on whether PS will hold the power to punish O for an offence she committed on the territory of TS. This explanation holds only vis-à-vis what we may call internationalized criminal law, i.e., domestic criminal laws that are enforceable extraterritorially by domestic courts.\(^4\)


\(^3\) 260 U.S. 94, 98, referred to in 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.

\(^4\) This proposition, however, does not cover ‘purely’ international crimes such as genocide, war crimes or crimes against humanity. On this see,