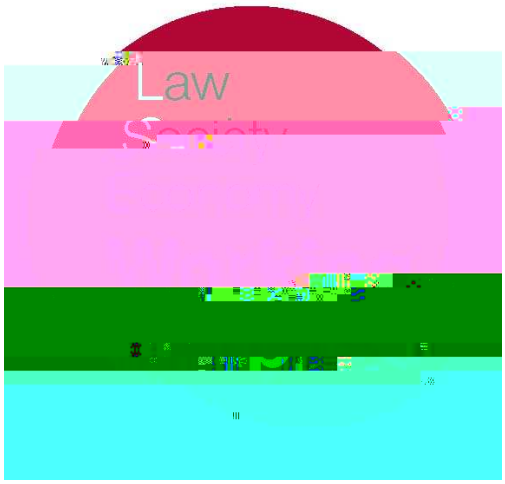

Should States have the Right to Punish Municipal Offences Committed Abroad?

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

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

INTRODUCTION

Under the Sexual Offences Act 2003, the UK claims the right to punish its

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

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

THE PROPOSED EXPLANATION FOR THE RIGHT TO PUNISH

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THE PRINCIPLE OF TERRITORIALITY

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

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

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

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

[10] As I will argue below, by members I refer not to the technical concept of citizens, not even more or less permanent residents; rather, I include in this concept every person who happens to be, for whatever reason 4n

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,

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

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

THE NATIONALITY PRINCIPLE

In this section I examine the moral credentials of the 'nationality principle'. In other words, the issue at stake is whether PS has a normative power to punish O for a crime she committed abroad (in TS), on the grounds that O is a national of PS. Akin to the principle of territoriality, this basis for criminal jurisdiction is also quite uncontroversial under existing international law.[14] In fact, it has been generally recognized that the "original conception of law was personal", and only the appearance of the territorial state gave rise to the right to subject aliens to the lex loci.[15] Recently, this basis of jurisdiction has been a growing significantly in some states, and some lawyers even advocate making it a general basis for criminal jurisdiction in the UK.[16] For example, the UK has recently claimed a right to punish O for certain sexual offences committed against children, regardless of where the act was committed, if O happens to be a national or a resident of the UK.[17] Although m,sW8:D:97q:=5,iW8:D=x7N=x1x,sW88ND:11*9, D9779q=fW8:D19q5:x, Wx)9=NqD

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

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

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

One response to the first of these questions has been: the right of PS to punish, for example, certain sexual offences committed by its members in TS has to do with the possibility of recidivism within PS.[20] A first remark that needs to be made here is that, if anything, this argument provides a justification for punishing PS's residents and not its nationals. In other words, it cannot explain why PS r 7fi

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protection of their interests or, at least, the right to do so.[30]

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THE PROTECTIVE PRINCIPLE

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

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

> The scene was Washington, November and December 1921. The world's naval powers had come to negotiate limits to shipbuilding to prevent a runaway naval race and save money. The point in contention was the ratio of tonnage afloat between the three largest navies, those of Britain, the United States, and Japan. The US proposed a ratio of 10:10:6. … But the Japanese were unhappy and would not budge from their insistence on a 10:10:7

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

It should be noted that this basis for criminal jurisdiction has not been free from criticism. The underlying preoccupation focuses on the rights of those individuals subjected to this type of prosecution. O

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

UNIVERSAL JURISDICTION

Universal jurisdiction entails the right of PS to punish O regardless of where her crime was committed. The nationality of both O and V is immaterial under this basis of criminal jurisdiction. As a matter of law, it is well-established that states do not hold universal criminal jurisdiction to try individuals for domestic offences.[54] Moreover, I know of no serious normative position that would argue differently. But then, why address this broadly uncontroversial issue? The reason is quite simple. So far, this paper has been focussed on asses

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

I find this restatement more plausible but ultimately unconvincing for two reasons. First, although successful in restricting the territorial scope of the right to punish, this move may end up being too restrictive. For instance, if avoiding international friction overrides deterrence in the overall calculus of utility, it follows that the UK would be unjustified in punishing Russian agents for the alleged crime of Litvinenko, which was perpetrated in

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

In the remainder of this section I shall concentrate on two arguments that may provide responses to this problem: von Hirsch and Ashworth's liberal argument for legal punishment and R.A. Duff's influential more communitarian approach.[62] von Hirsch and Ashworth see punishment as mainly explained in terms of censure, though their justification is supplemented by an element of deterrence. On the particular issue at stake here their argument goes as follows: a) offences are moral wrongs; b) by censuring the offender, punishment provides recognition of the conduct's wrongfulness; c) this recognition should be made by a public authority and on behalf of the wider communitydcaleindmj

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

By contrast, I suggest Duff's communitarian theory of punishment does not necessarily collapse into universal jurisdiction. Duff sees punishment as a secular penance whose main purpose is to communicate censure to moral agents. He is therefore very much concerned with being able to reach the offender's moral conscience. I will not examine the soundness of this argument here.[66] My main interest is to appraise Duff' argument in the light of extraterritoriality. For punishment to reach O's moral conscience, two conditions must be met. First, O needs to have committed a wrong; and secondly, PS needs to have the moral standing to censure her for that conduct. It is the second limb of his argument that is relevant to us here. Duff suggests that for PS to have moral standing to punish O, it must fulfil two conditions. First, it must have the appropriate relationship to O, or to her action in question. This implies the existence of a

appropriate standing to bring O into account for her offence.[67] Moreover, he developed this framework having in mind the questions raised by international criminal law. Basically, he argues that the concept of responsibility has a relational dimension. O is responsible for X to Y or, better, O is responsible as W for X to Y.[68] To illustrate: as a university teacher, Duff claims, there are only certain bodies or individuals who can call O into account if, e.g., she delivers an ill prepared lecture. In effect, she will not be accountable to "a passing stranger, or to [her] aunt, … or to the Pope".

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