Introduction

1. The Morality of Extraterritorial Punishment

Why should a Spanish court take jurisdiction over an American lawyer accused of facilitating torture in Guantanamo Bay? What empowers a London magistrate to sign an arrest warrant for a former Chilean dictator? Can it be legitimate or morally defensible for an Israeli court to try a former Nazi whose crimes occurred outside Israel and indeed prior to the establishment of Israel? This book provides a philosophical assessment of the underlying normative and conceptual issues that concern extraterritorial punishment as regulated under international law.

Extraterritoriality is deeply entrenched in the modern practice of legal punishment. States often claim the right to punish certain offences provided for under their own domestic laws even when they are committed outside their territorial boundaries. Many of them, for instance, claim the right to punish certain offences committed abroad by or against their own nationals, or certain crimes such as the counterfeiting of their currency, espionage, or treason. Furthermore, since the end of the Second World War, but especially since the end of the Cold War there have been important developments in the practice of extraterritorial punishment for crimes provided under international law. Many individuals have been prosecuted in different parts of the world for crimes against humanity, war crimes, genocide, and so on before domestic, international, or 'hybrid' tribunals which were often located outside the territorial boundaries or institutional structure of the state in which the offences had been perpetrated. Paradigmatic examples of this trend, and of the palpable difficulties it creates, are the current proceedings against Omar Al-Bashir, standing President of Sudan, before the International Criminal Court in The Hague, and the extradition proceedings against former Chilean dictator Augusto Pinochet in the UK. Finally, the issue of extraterritorial punishment is also relevant in the light of the emergence of new forms of globalized crime. The US currently holds several hundred people detained in Guantanamo and other foreign prisons. A crucial underlying claim in this situation is that the US has the right to punish these individuals even if the overwhelming majority of the acts for which they would be prosecuted have been committed outside US territory. Several of the normative claims made in this context have been applied, *mutatis mutandis*, to other phenomena such as transnational organized crime, including drug-trafficking, cybercrime, trafficking in human beings, and so on.

The legal regime governing this practice is covered in every textbook on Public International Law.[1] This book provides a different type of enquiry on the rules

[1] See eg Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008), Part VI. There are also other texts examining the issue of extraterritorial criminal jurisdiction from both an international and a domestic law perspective, such as Michael Hirst, *Jurisdiction*

governing extraterritorial criminal jurisdiction. It builds a philosophical argument that enables us critically to assess this legal framework, and identify which of its basic tenets can be consistently defended at the bar of justice. It is therefore neither a black-letter law analysis of the principles that are currently in force as a matter of law, nor an abstract normative account which purports to come up with an entirely innovative set of principles that should regulate the practice of extraterritorial punishment. This work is therefore inscribed in contemporary debates regarding the philosophy of international law, the justification for legal punishment, and the requirements and limits of global justice.

The topic of extraterritorial punishment certainly has a salient moral dimension. Extraterritorial prosecutions for war crimes are often accompanied by a great deal of moral enthusiasm. Many have cheered the detention of Augusto Pinochet in London, the prosecution of Charles Taylor by the Special Court of Sierra Leone, or the establishment of an International Criminal Court as a triumph of justice. Advocates of these developments are strongly committed to enlarging the reach of this 'accountability project'. Yet, this process has also been the object of controversy. Besides the fear of abusive prosecutions and unfair trials, there are other more fundamental objections. It is argued that such trials are a form of victors' justice, of moral or cultural imperialism, and of 'show trials'. Interestingly, much of what is at issue in these controversies concerns the legitimacy of extraterritorial prosecutions as a matter of right, not merely as a matter of international or even domestic law.

The search for the philosophical foundations of a particular institution can sometimes be subject to conflation or misinterpretation. The purpose of this book is not to present a set of views which claim validity across all time and space; rather, it is to provide a specific argument aimed at tackling certain issues arising from contemporary circumstances. Nor does this book present an account of what counts as a moral foundation; such an enquiry is obviously beyond the scope of the possibilities here. In David Rodin's words, its purpose is mainly to 'transform our pre-reflective moral responses into a [more] systematic whole'.[2] That is, its aim is to subject our technical understandings and moral intuitions of the practice of extraterritorial punishment to careful critical scrutiny under the light of more basic or fundamental normative considerations, so as to develop a more consistent and coherent whole. The building blocks of such examination will be moral considerations, philosophical analysis, and principles of international and criminal law as they currently stand. This book, thereby, draws heavily both on thought experiments and actual cases to illustrate or test its conceptual or normative claims.

Despite its eminently theoretical focus, this account builds on existing factual circumstances and widely endorsed legal rules and practices. That is, it takes as a given that the world is divided into territorially defined states with their own political organization and a more or less permanent population. It also acknowledges

and the Ambit of the Criminal Law (Oxford: Oxford University Press, 2003) and Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008).

[2] David Rodin, *War & Self-Defense* (Oxford: Oxford University Press, 2003), 8.

the existence of international criminal tribunals and other forms of supranational arrangements, and seeks to examine their actual legal framework. There are good reasons to address the empirical context in which a normative or philosophical argument is made. Even though normative claims and factual conditions belong to different levels of discourse, they are not entirely unrelated. Factual conditions usually constitute an exogenous limitation that links any normative argument to a certain state of affairs. More importantly, perhaps, they also raise normative questions. The question of extraterritorial punishment would have little relevance under other types of institutional arrangements, such as a world state, or ancient modes of political organization.[3] At the same time, however, this approach needs to stand apart from these factual conditions by looking at the normative principles on the basis of which they can be justified.

Accordingly, to conduct this enquiry we shall proceed by the method of 'reflective equilibrium' or 'coherence model' between fundamental moral considerations and the relevant legal framework.[4] That is, we will start with a set of moral principles that may be considered reliable. These are neither simple moral intuitions, nor mere personal preferences. They are normative claims which will be argued in some detail. On the basis of these principles, we shall assess the basic rules governing extraterritorial punishment under international and domestic criminal law. It is likely that some principles have such normative force that they will force us to revise certain standard legal practices; but it is also likely that some established legal rules are seen as so fundamental as to count against certain of these principles. The coherence method entails going back and forth between the basic principles and the established set of rules and practices until we reach a perfect fit between basic reliable principles and morally justified legal rules, namely, a point of 'reflective equilibrium'. This method presupposes that readers will

> be willing to modify or relinquish some of their beliefs if they could be shown that by so doing, they would strengthen the support for others that are more fundamental, and increase internal coherence generally.[5]

This book argues that a philosophical account of extraterritorial punishment both sheds new light on, and challenges, some widely held positions regarding the way in which the scope of the right to punish is currently regulated as a matter of international law. Connecting the existing legal framework regulating extraterritoriality to the normative justification for legal punishment forces us to question our 'received' knowledge regarding the appropriate regulation of this important right held by states. The proposed account also confronts the current leading philosophical justifications for legal punishment with extraterritoriality,

[3] See, eg, Shalom Kassan, 'Extraterritorial Jurisdiction in the Ancient World', AJIL 29/2 (1935), 237–47.

[4] See John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1999) and Norman Daniels, 'Wide Reflective Equilibrium and Theory Acceptance in Ethics', *J of Philosophy* 75/5 (1979). For applications of this method in criminal law theory see Joel Feinberg, *The Moral Limits of the Criminal Law*, vol 1, *Harm to Others* (Oxford: Oxford University Press, 1984); this is also similar to the methodology in Antony Duff et al, *The Trial on Trial*, vol 3, *Towards a Normative Theory of the Criminal Trial* (Oxford: Hart, 2007).

[5] Feinberg, *Harm to Others*, 18.

an important problem that has remained largely underexplored. It will be argued, for instance, that both standard retributive and deterrence-based accounts have serious difficulties in tackling the issue of extraterritoriality, by obscuring rather than illuminating the rationality of the rules that regulate this area as a matter of law. These issues are of growing importance in the context of globalization, and the initial consolidation of a system of international criminal law.

This book will defend five interrelated propositions.

1. For a given body A to have the right to punish a certain individual (O) someone's interest must be sufficiently important to warrant conferring upon A (in particular) that right, *and* A must be able to claim the authority to do so.
2. In order to explain the *extraterritorial* scope of this right we need to look at the interest that explains conferring upon that given body the right to mete out legal punishment to O.
3. A state's right to punish is justified mainly by reference to the collective interest that individuals in that state have in there being a system of criminal rules prohibiting murder, rape, theft, etc in force.
4. The scope of states' right to punish is primarily territorial, but it can be legitimately exercised extraterritorially over domestic offences perpetrated against sovereignty, security, or important governmental functions of the state.
5. There are certain offences, namely international crimes, which warrant conferring upon individual states generally the right to punish O irrespective of where the alleged crime was committed, or the nationality of either the offender or the victim.

These propositions are largely consistent with the existing framework regulating extraterritoriality under international law. They provide a rationale for distinguishing domestic from international crimes, and account for the distinct rules or principles regarding the extraterritorial scope of the right of individual states and other international bodies to punish their perpetrators. To that extent, the normative account advocated in the book can claim a significant explanatory force as to the moral defensibility of this institutional arrangement.

At the same time, however, this book also challenges some of the widely held conceptions and rules regarding the scope of the right to punish both as a matter of law and as a matter of normative argument. In this respect, it puts forward four rather controversial propositions. First, it claims that the leading normative justifications for legal punishment are generally ill-suited to deal with the issue of extraterritoriality. This is because either they lead to problematic restrictions to the territorial application of a state's domestic criminal laws (such as the inability of a state to punish offences committed on its territory by foreigners); or they collapse the distinction between domestic and international crimes by advocating broad principles of extraterritorial jurisdiction for both. Secondly, this book submits that

some of the legal rules or principles currently in force governing the extraterritorial application of states' domestic criminal laws are ultimately illegitimate at the bar of justice. In particular, it argues against the right that states have to punish an offender based on the fact that either she or the victim is a national of that state. Thirdly, it argues that as a matter of normative argument, the International Criminal Court should have a broader jurisdictional scope than is currently provided under article 12 of the Rome Statute. And finally, this book suggests that although a convincing account of authority is necessary to provide a complete justification for the right to punish, the extraterritorial scope of this right is unrelated to the considerations on which this authority is explained. The authority of any given court, it will be argued, depends ultimately on the defendant receiving a fair trial and the verdict being credibly based on reliable evidence.

Before presenting the structure of the book, the specific normative question at the centre of this enquiry should be isolated further from other, closely related issues. Ultimately, any justification for legal punishment needs to make an argument of the following sort: 'A is morally justified in punishing an offender (O) on the grounds of C, D, etc' where A is a certain individual or body that metes out punishment to O, and C, D, etc are the reasons that justify inflicting this punishment. Jeffrie Murphy has suggested that providing a full account of that claim involves answering at least five interrelated, albeit distinct questions.[6] First, one needs to provide an adequate theory of criminalization, that is, of the sort of behaviours that can be the object of criminal sanctions, and distinguish criminal punishment from, for instance, torts or liability for damages. Secondly, one needs to explain the moral justification for legal punishment, namely, 'how a certain conduct which is clearly morally wrong when considered in isolation ... can be morally justified all things considered'.[7] Thirdly, one needs to explain why a particular body (eg, the state) would be legitimately entitled to perform this task. Fourthly, one would need to provide an adequate theory of criminal liability, that is, a set of rules governing, inter alia, justifications, excuses, and other defences. And finally, one would need an account of the appropriate punishments.

Arguably, not every one of these questions is relevant to the case for extraterritoriality. This does not mean that they are entirely unrelated but rather that a plausible argument on the specific issue of extraterritoriality need not sort out all of them in full. For example, examining the rules that should govern individual criminal liability in the international sphere is certainly beyond the scope of this work. On similar grounds, this book will not provide either an account of what makes certain conduct criminal or the appropriate punishments that should be available (ie, sentencing rules). In sum, it will concentrate only on the specific considerations on which *the extraterritorial scope* of the right to punish rests which, it will be argued, concern the justification for a particular body A holding the right to mete out legal punishment to a particular offender.

[6] Jeffrie Murphy, 'Does Kant Have a Theory of Punishment?', *Columbia L Rev* 87 (1987), 509–32.

[7] Ibid, 510.

2. A Brief Overview

Let me now briefly summarize the structure of this book. Chapter 1 clarifies the moral methodology and advocates using a rights-based approach to address the topic at hand. That is, it assumes that the issue of extraterritorial criminal jurisdiction can be adequately explored by considering whether and under what conditions we will confer upon a particular body (or bodies) the right to punish a particular offender. This approach has two direct sources. On the one hand, it builds upon Wesley Hohfeld's classic distinction between different types of rights, and suggests that the right to punish is essentially a normative power. On the other hand, it draws heavily on a plausible version of the interest theory of rights. This rights-based approach concedes, however, that in order to confer upon a particular state or tribunal the right to punish an offender, it does not suffice to identify a particular interest as sufficiently important to be protected by a right; we must also account for that specific body having the authority to exercise that right. Distinguishing these two arguments is crucial for the purposes of providing an analytically sound account of extraterritorial punishment, as will be argued throughout the book. Chapter 1 is also concerned with explaining the specific moral challenge presented by extraterritoriality. This normative challenge is closely associated with the principle of state sovereignty, and with the normative argument on which it rests. The book endorses a broad cosmopolitan position and advances an account of state sovereignty based on the interest of individuals living or belonging to a particular state. Under this particular framework, the main normative challenge is the fact that states enjoy a right to self-government which entails a prima facie (ie, defeasible) immunity against extraterritorial bodies enforcing criminal prohibitions on its territory.

Chapter 2 presents a justification for the power to punish based on the interest of individuals in a given state having in force a system of rules prohibiting murder, rape, and so on. This argument rests on a jurisprudential point about the existence of a legal system, and on a normative point about the way in which criminal law systems can contribute to the well-being of individuals living under them. Moreover, this justification arguably has two important advantages over most of its prominent rivals available in the literature. First, it allows us to account for the fact that the right to punish is a Hohfeldian power, and not simply a liberty to inflict suffering upon the offender. Secondly, it can accommodate the fact that both states and international criminal tribunals claim the power to punish an innocent individual (by mistake), while at the same time retaining the core intuition that it would be wrong (ie, impermissible) for them to do so.

Chapter 3 critically examines the principles that ground extraterritorial criminal jurisdiction over domestic offences under international law. It argues that the reasons that account for a state holding the power to punish advocated in Chapter 2 explain it having jurisdiction over any offence committed on its territory and over offences committed abroad against its sovereignty, security, or important governmental functions (principle of protection). It suggests, however, that these

reasons are incompatible with the widely held principles according to which states claim extraterritorial jurisdiction over an offence on the basis of the nationality of either the offender (nationality principle) or the victim (principle of passive personality). Finally, this chapter argues that overall this general framework is more convincing that one that would result from some of the most influential justifications for legal punishment available in the literature.

The next part of the book is concerned with international criminal law. Chapter 4 presents a jurisdictional theory of international crimes. It argues that the defining feature of the concept of an international crime is that it warrants conferring upon at least some extraterritorial authority the power to punish perpetrators. It critically examines the leading arguments available in the literature and submits that they ultimately fail to account for the specific jurisdictional regime of international crimes mainly because they are entirely unrelated to the reasons that initially justify meting out legal punishment to offenders. By contrast, the argument provided in Chapter 2 allows us to explain precisely this normative implication for standard cases of international crimes. Chapter 4 also examines certain cases of war crimes to assess the explanatory potential of the view here endorsed.

Chapter 5 provides a fresh look at the issues of international and universal jurisdiction, that is, at the theoretical explanation for the scope of the jurisdiction of the International Criminal Court and the proposition that *every* state should have the right to punish an offender for an international crime. It challenges the standard position that seeks to explain the territorial scope of the Court's jurisdiction by reference to state consent or delegation of powers and rejects arguments for universal jurisdiction based, for example, on the pursuit of peace, and the interests of humanity as such. By contrast, it offers an alternative account based on the interests of individuals worldwide in the legal prohibitions of war crimes, crimes against humanity, etc being in force. It also examines and rejects some of the pressing charges against universal jurisdiction, such as that it criminalizes political decision-making, that it would be liable to political hijacking, or that it is ultimately an expensive taste for western elites.

The final chapter provides a theory of legitimate authority to try offenders. It applies Joseph Raz's service conception of authority to the question of what conditions a given body should meet in order to claim, itself, the power to punish an offender. This approach will enable us to conduct a philosophical examination of certain charges often raised against extraterritorial prosecutions, such as 'show trials', victor's justice, 'clean hands', *tu quoque*, and trials *in absentia* or against defendants who have been abducted abroad. It ultimately argues that although some of these considerations might undermine a particular state holding the authority to punish a given offender, they are all unrelated to the fact that it purports to punish an offender extraterritorially. In other words, although the argument for a given body's authority is necessary in order to provide a complete justification for that body holding the power to punish an offender, it is conceptually and normatively mistaken to consider these obstacles as objections to extraterritoriality.