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# Liability to International Prosecution: The Nature of Universal Jurisdiction

Anthony R. Reeves\*

## Abstract

*This article considers the proper method for theorizing about criminal jurisdiction. It challenges a received understanding of how to substantiate the right to punish and articulates an alternative account of how that theoretical task is properly conducted. The received view says that a special relationship is the ground of a tribunal's authority to prosecute and, hence, that a normative theory of that authority is faced with identifying a distinctive relation. The alternative account locates prosecutorial standing on an institution's capacity to address the basic reasons generating criminal liability. This reframes the normative issues at stake and has the result that various, perhaps quite heterogeneous, considerations can substantiate penal authority. It also eliminates the existence of a special relation as a necessary condition for legitimate criminal accountability. The argument proceeds by offering an analysis and account of universal jurisdiction. Not only does the alternative elegantly perform where the received view struggles, it can accommodate much of what motivates the pursuit of relational ties in existing efforts to vindicate jurisdictional conclusions.*

## 1 Introduction

Normative theorizing about international criminal jurisdiction is caught in a certain picture of authority. This picture has framed how the problematic of the 'right to punish' is understood and, consequently, set the terms for the method of justifying an international tribunal's moral standing to hold an offender criminally accountable.

\* Associate Professor of Philosophy, Binghamton University, State University of New York, Binghamton, USA. Email: [areeves@binghamton.edu](mailto:areeves@binghamton.edu). I am grateful for the particularly extensive and useful comments provided by Ryan Liss and for the generous commentary by Christopher Essert, Mattias Iser, Maxim Pensky, Benjamin Yost and an anonymous reviewer for this journal.

Put otherwise, it has marked the success conditions for an account of supra-national criminal jurisdiction and indicated certain kinds of questions as essential to proper inquiry into the matter. The picture says that standing to conduct a criminal prosecution depends fundamentally on some special relation between a defendant or a defendant's conduct and the prosecuting authority: the relation is the ground of a tribunal's right to punish a properly established offender. This (broadly speaking) Kantian view of authority then erects the justificatory hurdle of identifying some special interest, shared civic bond or other relational tie that could enable an international tribunal to legitimately prosecute international crimes. There is an alternative picture, though, which is roughly Razian in character. On this view, put initially, authority to punish is fundamentally conferred by a capacity to respond to the reasons at issue in punishment. The basis of a tribunal's standing, so to speak, is an institutional capacity to properly see to criminal liability. I will elaborate as I proceed, but the shift in perspective transforms the problematic of the right to punish, and the method pertinent to morally substantiating jurisdictional claims. Moreover, the alternative vision has significant analytical power, can capture much of what drives the allure of the standard model and can accommodate what the standard model cannot but should. Hence, if we are to continue on as before, we are owed more of an answer as to why international criminal law theory ought to proceed as it (largely) has.

I will pursue these points by offering an account of universal jurisdiction, frequently understood as an especially difficult to found jurisdictional claim. By examining the challenges thought to beset universal jurisdiction, we can bring into relief the background assumptions constituting the standard model of penal authority and motivate the alternative picture. The resulting analysis of universal jurisdiction, moreover, may be valuable in its own right, insofar as it clarifies the justificatory task initiated by a claim to universal jurisdiction.

## 2 Justifying Universal Jurisdiction

What is the nature of a claim to universal criminal jurisdiction? How can that claim be vindicated? A Frenchman commits a murder on French soil against a French citizen and, despite any heinousness of the crime, we tend to think that it is a matter exclusively for French courts. Meanwhile, an act of piracy involving modest coercion and no harm aside from loss of property falls, according to international law, squarely within the jurisdiction of all competent judicial authorities. Despite, then, the fact that many of the crimes that international lawyers are eager to include under the umbrella of universal jurisdiction are heinous, 'heinousness' appears both insufficient and unnecessary for establishing that a crime is candidate for universal jurisdiction.<sup>1</sup> Yet, surely a large part of what drives the concern to classify (for instance) a state official's violent and systematic attack on the populace as a universally

<sup>1</sup> Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', 45 *Harvard International Law Journal* (2004) 183.

justiciable crime against humanity is a recognition that the act is a grave atrocity.<sup>2</sup> What is going on here?

I argue that part of why the ‘grounds’ of universal jurisdiction have remained elusive is that we have not been adequately attentive to why and how certain kinds of considerations are pertinent. There are two oft-occurring mistakes in the international criminal law theory relating to jurisdiction. First, the prerogative of certain states to conduct a prosecution is not fully distinguished from the criminal liability of a defendant to a particular penal institution. Second, it is assumed that a general requirement of a tribunal’s legitimacy is that it establish special standing in relation to either the defendant or the defendant’s conduct. This standing might, for instance, be a feature of an interest a tribunal has in the conduct (for example, an interest in discouraging atrocities from crossing borders)<sup>3</sup> or be conferred by shared political community. In any case, the assumption that special standing or ground is a hurdle for prosecutorial legitimacy is frequently maintained independent of any discussion of the underlying normative rationales for punishment (for example, deterrence, retribution, censure, and so on). I argue that this is a mistake and that it occludes potential routes to substantiating universal jurisdiction.

If the analysis is successful, it demonstrates that properly establishing universal jurisdiction is, in important respects, easier than some have thought. It is an error, for instance, to think that such jurisdiction needs to have a single, special ground, like ‘heinousness’ or international harm.<sup>4</sup> The standing of a tribunal to prosecute an offender depends on its ability to respond to whatever reasons generate criminal liability on the part of the offender in the first place. These reasons may be multiple and heterogeneous in character and need not always pertain to the interests or relationships of those conducting the tribunal. Moreover, although a state may have a special prerogative to address the criminal liability of an offender, this is a separate matter from the issue of standing. A state prerogative to prosecute is a bar to universal jurisdiction, but it is a claim held by the state, not the offender. If a tribunal convicts an offender with proper process and in accordance with those aspects of an offender’s criminal liability that it is positioned to address, but in contravention of a state prerogative, only the state has been wronged. The convicted party has no complaint. If there is no state prerogative, or it has been waived, or if there is no relevant state to assert a claim, there is no one with a principled basis for rejecting a fully competent tribunal’s claim of jurisdiction.

My overall aim is to consider what the claim to universal jurisdiction is comprised of and, hence, what an adequate justification of the claim involves. I proceed in two

<sup>2</sup> *The Princeton Principles on Universal Jurisdiction* begin: ‘During the last century millions of human beings perished as a result of genocide, crimes against humanity, war crimes, and other serious crimes under international law. Perpetrators deserving of prosecution have only rarely been held accountable. To stop this cycle of violence and to promote justice, impunity for the commission of serious crimes must yield to accountability.’ S. Macedo (ed.), *The Princeton Principles on Universal Jurisdiction (Princeton Principles)* (2001), at 23.

<sup>3</sup> L. May, *Crimes against Humanity: A Normative Account* (2005), at 63–95.

<sup>4</sup> *Ibid.*

stages. In the third section, I illustrate two purported hurdles to universal jurisdiction suggested by recent reflection on the topic. First, I exhibit the widely held assumption that a special ground is needed to generate legitimate juridical interest in a criminal offender, relying on prominent normative theories of international criminal law (ICL). Second, I explicate R.A. Duff's articulation of the challenge of relational standing for international tribunals.<sup>5</sup> To establish the legitimacy of a tribunal (his thought goes), it is insufficient to show that it offers a high quality process and is prosecuting a crime under existing law. Rather, one must also demonstrate that the court has relational standing to prosecute the offence. As Duff puts it, '[a] defendant's challenge "By what right do you try me?" must be answered if the trial is to be legitimate; the answer "our procedures respect the demands of natural justice" is not an answer to that challenge'.<sup>6</sup> A defendant's criminal liability partly depends on whether the adjudicating court has the relevant moral relationship to hold the defendant accountable for the crimes in question. On this view, the relational standing of domestic courts is normally grounded in a shared political community. The lack of an international political community, then, threatens international tribunals with a special defect of legitimacy. (Hereafter, when I speak of 'special standing', I refer to both of the above thoughts, the underlying idea being that even a competent tribunal must have some specific tie to a person to legitimately adjudicate a criminal offence.)

In the fourth section, I consider what criminal liability generally consists in, how it relates to the standing of any tribunal to prosecute a criminal offence, and what this says about the nature of universal jurisdiction. I argue here that the legitimacy of international courts is not burdened with a general justificatory hurdle of showing special standing to prosecute, so long as they respect any prerogative on the part of other courts. As mentioned above, I contend that liability to a penal procedure is a feature of its capacity to respond to whatever reasons ground criminal liability in the first place. To answer 'by what right do you try me?', a court can properly answer in terms of any reasons within its capacity, and, thus, it is only on a controversial understanding of what reasons can ground criminal liability that the obstacle of special standing arises. More generally, the approach I develop here articulates a way of conceiving penal authority that challenges a common way of understanding the justificatory task posed by a jurisdictional claim. I do not seek to abandon what drives the standard picture outright but, rather, accommodate much of its motivation and show that it supposes a narrower understanding of the normative aims of punishment than has been shown to be warranted. The account of criminal jurisdiction I offer is capable of handling the variety of aims of the criminal law.

In the end, my aim is not so much to make the job of ICL easier. Rather, I think the crucial hurdles to its rightful conduct are legitimate state interests and that we ought to be devoting our theoretical attention to these issues (rather than a misguided quest

<sup>5</sup> For purposes of this article, 'international courts' includes national courts trying international crimes on claim of universal jurisdiction.

<sup>6</sup> Duff, 'Authority and Responsibility in International Criminal Law', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 589, at 591.

for the foundation of universal jurisdiction). I contend that the complaints of those convicted by proper criminal process of proper international crimes, whether humble pirates or infamous warlords, have unhelpfully distracted international criminal law theory.

### 3 Two Assumptions Concerning the Task of Justifying Universal Jurisdiction

#### *A Assumption 1: Universal Jurisdiction Requires a Special Ground*

The *Princeton Principles on Universal Jurisdiction* is not quite a theoretical document aiming to conclusively address fundamental problems facing universal jurisdiction. It states, rather, a kind of consensus among a select group of jurists and scholars about the appropriate aims, methods and limits of the practice. It is all the more useful, though, as an embodiment of agreement of highly regarded thinkers. It defines the scope of universal jurisdiction as follows:

When [standard grounds of jurisdiction] and other connections are absent, national courts may nevertheless exercise jurisdiction under international law over crimes of such exceptional gravity that they affect the fundamental interests of the community as a whole. This is universal jurisdiction: it is jurisdiction based solely on the nature of the crime. National courts can exercise universal jurisdiction to prosecute and punish, and thereby deter, heinous acts recognized as serious crimes under international law.<sup>7</sup>

Although the meaning of ‘jurisdiction based solely on the nature of the crime’ might otherwise be uncertain, the context appears to indicate the following thought: an international crime’s possession of the property of heinousness (or unusual and threatening gravity) warrants an otherwise unjustified jurisdictional claim. Throughout the document, crimes viewed as candidate for universal jurisdiction are described as serious, of a heinous nature, harmful to international interests and involving gross violations of human rights. Also, when the specific crimes (including piracy) are enumerated, they are listed under the rubric ‘*Serious Crimes under International Law*’.<sup>8</sup> This further suggests that the authors understand universal jurisdiction as requiring a special ground, some distinctive consideration or considerations the absence of which would render a claim of universal jurisdiction illegitimate. Such jurisdiction would not obtain, for instance, in the case of ordinary domestic crimes, they not being serious or heinous enough in character to vindicate the relevant juridical interest.

In response to this sort of thought, Eugene Kontorovich challenges what he calls the piracy analogy: the idea that we can expand universal jurisdiction beyond the traditional confines of piracy on the grounds that other international crimes share with piracy the property of heinousness. This analogy ought to be rejected, Kontorovich

<sup>7</sup> *Princeton Principles*, *supra* note 2, at 23.

<sup>8</sup> *Ibid.*, at 29 (emphasis added).

contents, because piracy was not understood by international law as essentially heinous in character:

[T]he rationale for piracy's unique jurisdictional status had nothing to do with the heinousness or severity of the offense. Indeed, piracy was not regarded in earlier centuries as being an egregiously heinous crime, at least not in the way that most human rights offenses are heinous. Thus piracy could not have become universally cognizable as a result of its perceived heinousness.<sup>9</sup>

The conclusion that Kontorovich draws from the failure of the piracy analogy is that, as it stands, universal jurisdiction for human rights abuses and other heinous crimes rests on a hollow foundation. If universal jurisdiction for piracy is not grounded on heinousness, piracy no longer serves as a precedent for expanding such jurisdiction to encompass heinous crimes. Consequently, those seeking to effect such an expansion need a new legal principle to render it legitimate, especially given that such a broad foundation could plausibly engender international conflict.<sup>10</sup> Kontorovich's argument appears to be primarily legal in character, as he acknowledges that there might be other moral warrants for universal jurisdiction: 'Some form of universal jurisdiction may in theory be justifiable in a number of different ways', but his concern is with 'today's universal jurisdiction'.<sup>11</sup> What is striking, for our purposes, is simply the assumption that some special justification would be required to distinguish crimes cognizable by universal jurisdiction from ordinary crimes that are not.<sup>12</sup>

Larry May's much discussed approach to ICL also supposes that international tribunals need a special jurisdictional ground. May has it that a state's normal sovereign presumption against interference is undermined when the state inadequately protects subjects from threats to their basic security. Nonetheless, he asserts, even if a state lacks immunity from interference, we have not yet legitimated international prosecution:

When the security of a person has been jeopardized ... then it is permissible for sovereignty to be abridged so as to render the individual secure. But when we ask about international tribunals that hold some individuals criminally liable for the violations of the security of other persons, more needs to be shown than just that a person's security has been breached. There must be some compelling reason why the international community is warranted in prosecuting individuals as opposed to States.<sup>13</sup>

May proceeds to defend the 'international harm principle' as the additional compelling reason, arguing that crimes against humanity (given their group-based character) are not merely local harms but also endanger humanity broadly. Hence, humanity has

<sup>9</sup> Kontorovich, *supra* note 1, at 186.

<sup>10</sup> *Ibid.*, at 186–210.

<sup>11</sup> *Ibid.*, at 236.

<sup>12</sup> Kontorovich's driving concern seems to be that overbroad universal jurisdiction threatens international order by impinging upon state sovereignty. This type of concern is, I think, of the right sort in thinking about the proper scope of universal jurisdiction. Yet, despite my agreement on this point, I argue that ordinary reasons of criminal liability may sometimes generate sufficient warrant.

<sup>13</sup> May, *supra* note 3, at 81.

a legitimate interest in prosecuting offenders who are liable in view of this general threat.<sup>14</sup>

Jovana Davidovic pursues a formally similar approach that also appears to presume a need for a special jurisdictional ground: 'I conclude that universal jurisdiction can be justified as a right of the international community as a whole, explained by the fact that the type of a wrong that arises from the international community failing to prosecute a *jus cogens* crime is different from the wrong of failing to prosecute such violation by some state or another (that has jurisdictional relationship to that crime).'<sup>15</sup> Davidovic contends that the common recognition of *jus cogens* norms partly constitute an international community that realizes the rule of law. Failure to prosecute violations of these norms, then, undermines the international rule of law, and this threat generates special standing for the international prosecution of *jus cogens* crimes.<sup>16</sup>

I will provide one additional example.<sup>17</sup> Jiewuh Song argues that what unites universal jurisdiction over piracy and those atrocities recognized in international law is that such jurisdiction serves to mitigate enforcement gaps. Piracy is not an atrocity, but universal jurisdiction is appropriate since traditional jurisdictional grounds leave the international legal prohibition on piracy inadequately enforced. Universal jurisdiction increases the chances of capturing pirates, which then increases compliance with the law. Similarly, legally recognized atrocities are inadequately addressed by standard jurisdictional principles, especially since they are frequently conducted by the state, and, thus, universal jurisdiction is justified with respect to these crimes as a method of filling an enforcement gap.<sup>18</sup> Song continues:

Why, then, is universal jurisdiction permitted over some but not other norms? The natural answer on the enforcement gap-filling account is that universal jurisdiction norms are (i) norms of international law (ii) that are prone to enforcement gaps on the typical delegated system of enforcement, (iii) which are appropriately filled through judicial mechanisms imposing individual legal liability. The first two components explain why torture, genocide, crimes against humanity, war crimes, and piracy become matters of legal concern for foreign states with no territorial or geographic ties.<sup>19</sup>

Slightly differently, an essential part of the reason why legal institutions unrelated to offenders can prosecute them is because the offenders violate recognized norms of international law. Absent this, the assertion is, we would leave something unexplained about the justification of universal jurisdiction – that is, shared positive law is

<sup>14</sup> *Ibid.*, at 63–95.

<sup>15</sup> Davidovic, 'Universal Jurisdiction and International Criminal Law', in C. Flanders and Z. Hoskins (eds), *The New Philosophy of Criminal Law* (2016) 113, at 124.

<sup>16</sup> *Ibid.*, at 123–127.

<sup>17</sup> Though more could be enumerated. See, e.g., David Luban's approach to crimes against humanity. Luban, 'A Theory of Crimes against Humanity', 29 *Yale Journal of International Law* (2004) 85. See also Lee, 'International Crimes and Universal Jurisdiction', in L. May and Z. Hoskins (eds), *International Criminal Law and Philosophy* (2010) 15.

<sup>18</sup> Song, 'Pirates and Torturers: Universal Jurisdiction as Enforcement Gap-Filling', 23 *Journal of Political Philosophy* (2015) 471, at 481–484.

<sup>19</sup> *Ibid.*, at 485.

a crucial ground for universal jurisdiction.<sup>20</sup> Common to all these approaches, then, is the idea that a special ground concerning the nature of the crime, the crime's effect on international interests, or the crime's common recognition, is necessary both to demonstrate a legitimate juridical concern as a matter of universal jurisdiction and to determine the proper scope of that concern.

### **B Assumption 2: Relational Standing a General Prerequisite of Criminal Liability**

On Duff's view, criminal liability requires not merely failing with respect to a standard or reasons (that is, not doing what one is responsible for doing) but failing where one is responsible to somebody for meeting the standard or responding to the reasons. Liability to penal sanction is conditional upon both a criminal wrong and the existence of a party to which an agent is responsible for avoiding the wrong so that this party, consequently, has standing to hold the agent to account. The dependence of answerability on relational standing is, Duff argues, a familiar feature of our moral lives. If I am unkind to my aunt, she or my family can rightly hold me to account, but not a stranger on the bus. I am not responsible to the stranger, and, to her criticism of my insensitivity, I can reply that it is none of her business. Likewise, infidelity on the part of a committed partner does not confer a right on an uninvolved neighbour to hold the partner to account, and a teacher's neglect of his pedagogy invites accountability from students and colleagues but not from his aunt. These cases illustrate, Duff contends, that one's answerability for wrongdoing depends on one's relationship to the person or body doing the accounting. For crimes, the relevant relationship is one of common citizenship – the political community has standing to hold citizens accountable for wrongs that are the public's concern: '[W]e are criminally responsible *as* citizens, under laws that are our laws; which implies that we are criminally responsible *to* our fellow citizens collectively.'<sup>21</sup>

Why not think that criminal responsibility for moral wrongs attaches to us simply as moral agents? First, it would render all types of moral wrongdoing candidate for criminalization. Cruelly ending a sexual relationship may be morally wrong, but it is not an activity of proper concern to the criminal law. Our ability to talk of criminal law's 'proper concern', for Duff, is a feature of criminal liability's relational character. I am responsible *for* some things *to* my political community as a citizen, and it is only for these things that I can be criminally responsible. For other activities of no legitimate public concern, however wrongful, I cannot acquire criminal liability.<sup>22</sup>

Duff's second objection is that treating wrongdoing by moral agents, as such, as a sufficient ground of criminal liability over-includes who can criminalize:

<sup>20</sup> A point she emphasizes. See *ibid.*, at 487.

<sup>21</sup> Duff, 'Answering for Crime', 106 *Proceedings of the Aristotelian Society* (2005) 87, at 94 (emphasis in original).

<sup>22</sup> *Ibid.*, at 88–101. Here Duff requires, as he acknowledges, a substantive account of what makes for public wrongs, but the claim of interest to us here is simply that there are such wrongs.



[I]t implies that there is reason to make it a crime under English law for a German to steal from a fellow German in Germany: a sensible division of labour might favour a system of national courts operating with more limited jurisdictions, but if the aim is that wrongdoers be punished as they deserve, this seems to give any legislature reason to criminalise any kind of wrongdoing anywhere in the world. Surely, however, the German thief could rightly claim that his admittedly wrongful theft is simply not the business of the English legal system.<sup>23</sup>

Duff emphasizes the point in rejecting David Luban's contention that international tribunals acquire their legitimacy through the quality of justice they deliver. On Luban's account, what is crucial to the legitimacy of international courts policing the activities of sovereign states is not any prior authorization (treaty or otherwise) but, rather, 'the manifested fairness of their procedures and punishments'.<sup>24</sup> Fairness, Luban argues, provides a non-arbitrary basis for a tribunal's jurisdiction over international crimes. The reason we rightly prefer an international tribunal, compared to (for instance) the World Chess Federation or the Kansas City dogcatcher, to carry out the prosecution of international crimes is the fact (where it obtains) of a tribunal's provision of adequate process and fair treatment. As Luban puts it, a tribunal can 'bootstrap' itself into legitimacy by delivering what natural justice requires.<sup>25</sup> In response, Duff notes that a Polish thief's theft against a Polish citizen on Polish territory is, in principle, not an English crime or justiciable in an English court and is so irrespective of the quality of English proceedings: 'A court's procedures might be impeccable; the defendant might be guilty of wrongdoing that merits condemnation and punishment: but unless this court can claim jurisdiction over him, it cannot legitimately try him.'<sup>26</sup> Slightly differently, a defendant can resist criminal liability by challenging a court's relational standing, and pointing to fairness is not the right kind of answer to a defendant's challenge. Rather, we must answer in terms of a relevant relationship. Domestically, we can address the challenge in terms of shared political community. Internationally, we might point to delegated jurisdiction consequent of, say, a treaty (we can try you because your political community authorized us). For claims of universal jurisdiction, however, we need an account of a relationship that could ground standing to prosecute. Absent a relationship grounding standing, an international tribunal is illegitimate.<sup>27</sup>

<sup>23</sup> *Ibid.*, at 93.

<sup>24</sup> Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in Besson and Tasioulas, *supra* note 6, 569, at 579.

<sup>25</sup> *Ibid.*, at 569–588.

<sup>26</sup> Duff, 'Authority and Responsibility in International Criminal Law', in Besson and Tasioulas, *supra* note 6, 589, at 591.

<sup>27</sup> *Ibid.*, at 589–604. Duff gestures at the notion of humanity as a moral community as one potential solution to the problem of standing for universal jurisdiction, noting that community is frequently more aspiration than achieved social fact. I discuss this below. Other thinkers who accept Duff's hurdle to universal jurisdiction include Renzo, 'Crimes against Humanity and the Limits of International Criminal Law', 31 *Law and Philosophy* (2012) 443; Wallerstein, 'Delegation of Powers and Authority in International Criminal Law', 9 *Criminal Law and Philosophy* (2015) 123; Davidovic, *supra* note 15.

## 4 Criminal Jurisdiction: Liability and State Prerogative

I will begin by critically examining Duff's understanding of the preconditions of a right to punish and then connect the resulting analysis of universal jurisdiction to the assumption that such jurisdiction requires a special ground. Duff employs powerful intuitions to support a sophisticated and interesting view, but they do not establish the general dependence of criminal liability on relational standing. I will state the point roughly first and then more rigorously. It strikes me as odd that someone correctly convicted of a proper crime (that is, a crime that is legally established and ought to be legally established – for instance, murder) is wronged when he is penalized proportionate to his offence by capable and fair institutions, by virtue of the fact that the institutions bear no special relationship to him. Or, at least, that he is wronged to the degree of someone who is convicted and punished by unfair and incompetent procedures. But, this is what Duff's position implies. In treating both criminal wrongdoing (suitably established) and answerability to as threshold conditions of criminal liability, the complaint against punishment of the murderer convicted in the wrong jurisdiction is on par with that of someone wrongly convicted by inadequate process. The complaints would appeal to different conditions, but both would establish (if Duff is correct) an identical lack of criminal liability. This strikes me as absurd, but it may not as forcefully for everyone, so let us think through the point.

At minimum, to suffer criminal liability is to have a moral status, such that one is eligible for penal treatment, treatment that would otherwise be wrongful. Punishing someone for a crime she clearly did not commit (seriously) wrongs her since our normal moral status as persons bars punishment. Criminal liability, then, is acquired as a departure from a moral *status quo* forbidding punishment, and it attaches to a person, differentiating her from others who retain moral immunity to penal treatment. Others retaining the initial moral status have standing to complain of a wrong when subjected to punishment, whereas the criminally liable does not so long as punishment does not exceed the extent of the liability. Criminal liabilities could be relational, where the departure from the moral *status quo* is only in reference to certain bodies or persons. To know, we have to ask what criminal liability is a function of – in virtue of what is a person rendered liable to penal treatment? To answer this question is to enter familiar debates about the justification of punishment: retribution, deterrence, expression, rehabilitation, censure, some combination of these and so on. The account of justified punishment will identify some features of a situation or person or choice or act whose moral salience generates a change in the moral status of a person to one of criminal liability.<sup>28</sup> These features are reasons for criminal liability – they are reasons for disabling the otherwise able complaint against penal treatment. A successful theory of punishment will identify these reasons and show them to be sufficient to establish criminal liability.

<sup>28</sup> At least, an account of punishment will be interested in doing this so far as it is concerned to legitimate the punishment of the guilty, specifically.

Now consider Duff's substantive theory of punishment and its bearing on his generic claims about criminal accountability. Duff's substantive theory has it that state punishment is justified as a communicative disavowal of an offender's neglect of reasons she is responsible for (that is, her crime) by those to whom the agent is responsible (that is, fellow citizens) in order to bring about a restoration of the normative relationship between the offender and his fellow citizens ruptured by the criminal act:<sup>29</sup> '[O]ffenders should suffer retribution, punishment, for their crimes: but the essential purpose of such punishment should be to achieve restoration.'<sup>30</sup> Relational standing is critical, on this view, because of the special reasons that are thought to ground criminal liability: they are reasons to restore a relationship, and, as such, only parties to the relationship can appropriately respond to them, in much the same way that a friend alone could accept a relationship-restoring apology for a misdeed that damaged a friendship. On this theory, the crime initiates criminal liability (the offender deserves punishment because of the wrong), but, again, this is because the function of punishment is to restore a relationship the crime breaches. Punishment is thereby the province of a political community. Without a relevant community, punishment has no legitimate purpose (we have no reasons for criminal liability), and, hence, there can be no criminal liability. We have just stated a version of the idea that special relational standing is a condition of criminal liability.

The central point is that relational standing is not a general problematic for criminal liability but only a hurdle for a view that treats the basic reasons for criminal liability as primarily or exclusively relationship dependent.<sup>31</sup> Consider this by contrasting Duff's theory with those that justify punishment in terms of, for instance, classical retributivism, deterrence or norm expression. On these sorts of accounts, the reasons for criminal liability are relationship independent, and, hence, special, relational standing cannot appear as a lacuna arising between criminal wrong and criminal liability. For instance, if deterrence sometimes justifies criminal liability, then what is required from the view of such liability is the capacity to introduce the relevant incentives. Or, if norm-expression sometimes justifies criminal liability, then (roughly) what is required from the view of such liability is the capacity to properly articulate the message to those who should hear it. Relational standing, then, only performs as a theoretical hurdle on a sectarian view of the moral reasons for criminal liability. In fact, insofar as it is intuitively clear that procedurally sound international courts can sometimes try defendants for crimes (in absence of ties of community) without thereby wronging them, we have some evidence that a relational theory of punishment like Duff's is not the whole story of criminal liability. (I enumerate some

<sup>29</sup> R. Duff, *Punishment, Communication, and Community* (2000).

<sup>30</sup> Duff, 'Restorative Punishment and Punitive Restoration', in Lode Walgrave (ed.), *Restorative Justice and the Law* (2002) 82.

<sup>31</sup> Call reasons for criminal liability 'relationship dependent' when they are reasons for accomplishing a change in a relationship; normally, the relationship modification can only be brought about by parties to the relationship.

problematic examples for Duff shortly.) Duff's approach does not necessarily serve to rebut such an intuition, but is potentially threatened by it.

Here is a general thesis (call it 'reason dependence of standing' [RDS]): a tribunal's standing to prosecute and penalize a defendant is a feature of its ability to respond to reasons for criminal liability. Liability to prosecution obtains to the extent that there are reasons for criminal liability with respect to the purported act,<sup>32</sup> the defendant ought to have been aware that the behaviour invited criminal liability and somebody can properly respond to those reasons and exploit the liability.<sup>33</sup> Normally, whatever the character of the reasons, the last condition will require adequate and fair process since, at the very least, it will be crucial to establish the propriety and suitable character of penal treatment. According to RDS, if all reasons for criminal liability were relationship dependent, then we would face the justificatory burden of establishing a relevant relationship since proper responsiveness would require being party to it. Hence, the thesis captures why relational standing appears as a special obstacle to ICL on Duff's theory. Moreover, it articulates a plausible conclusion as a corollary of the above analysis. If a procedure can correctly serve the reasons for burdening one's moral status with criminal liability in the first place, there is no credible objection a criminal wrongdoer can raise against prosecution. We might doubt that there are reasons for criminal liability at all, but this would amount to something close to general abolitionism.<sup>34</sup> It would not raise a special challenge of standing. We might also assert a special prerogative on the part of certain persons or institutions to carry out the penal process. A variety of moral considerations could be adduced to substantiate such a claim: self-determination, the interests of a political community in maintaining juridical order (that is, potentially the same sorts of considerations that forbid vigilantism), the interest in victims having access to the proceedings, a state's interest in demonstrating its commitment to certain values. All of these, and there could be others, seem plausible,<sup>35</sup> but none generate a claim on behalf of the offender. If a tribunal intrudes without the warrant of institutions that have a prerogative, it is

<sup>32</sup> And where the reasons for liability are sufficient to establish criminal liability. I am grateful to Mattias Iser for urging this clarification. Also, I assume here that any procedure with standing does not violate individual rights (e.g., by engaging in torture to coerce a confession).

<sup>33</sup> The thesis bears some similarity to Luban's claim, described above, that international tribunals can attain rightness through their fairness. However, it is a more general claim about adjudicative standing that is suggested by the preceding analysis. Moreover, it explains why courts can, sometimes, answer the question 'By what right do you try me?' with the answer 'Because our procedures are fair'. Procedural fairness will be part of the story of why a tribunal is capable of appropriately responding to the reasons for criminal liability. Slightly differently, my diagnosis of why it seems obvious to Luban that international tribunals can bootstrap themselves into legitimacy by respecting natural justice is that he considers the norm expression that a proper public trial accomplishes as competently responding to some reasons for criminal liability, reasons that do not depend on the kind of relationships of concern to Duff.

<sup>34</sup> 'Close' because it depends on how we understand a deterrence theory that does not indicate special liabilities but only says deterrence-effecting punishment is justified, and the (normal) preference for the guilty is merely a function of what (normally) happens to deter criminal acts in a world like ours.

<sup>35</sup> And such considerations could be used to justify the practice of complementarity in international criminal law.

those institutions that are wronged, not the offender. The prerogative is not a feature of the offender's liability. An offender could reasonably complain that there is a more capable institution that can feasibly conduct the prosecution. This would, though, be to articulate an objection premised upon RDS. Moreover, it is not an objection that would categorically disfavour international tribunals – it would depend on the relative capacity of the institutions in question.

It is worth emphasizing that state institutions will sometimes have powerful moral prerogatives to control how and whether a defendant is prosecuted and so consistent with RDS. For instance, there are significant reasons in some contexts for domestic institutions being capable of offering amnesty for international crimes. Such a power can, for example, put the state in a position to negotiate a peace settlement in the midst of civil strife.<sup>36</sup> Yet, again, this is not to speak to the offender's liability to international prosecution; it is, rather, to speak to the rights of domestic authorities. If international law fails to accord domestic authorities such a power, and those institutions deserve it, it is not the offenders who can complain but, rather, the authorities and their constituents. Somewhat differently, treating relational standing as a general justificatory hurdle has the potential to convolute our concern with the legitimacy of international courts. If what motivates allegiance to the idea of special standing as a condition of criminal liability is a concern for domestic institutions' ability to see to proper state interests free of interference, then our insistence on relational standing as a condition of the criminal liability will encourage us to have the wrong conversation. What may sometimes concern us is whether the prosecutorial purview of international criminal law burdens the legitimate exercise of domestic institutional functions. If so, then the conversation ought to centre on the scope of those functions rather than on the criminal liability (as such) of the offender.

The general significance of RDS for liability to prosecution by international tribunals is, in one sense, unsurprising. Criminal liability will largely depend on how far justificatory theories of punishment successfully show there are reasons for criminal liability that obtain, and can be responded to, in an international context. More plainly, we need answers to the questions: what are the moral purposes of criminal prosecution and how far does international prosecution serve these purposes? Yet RDS clarifies the nature of a claim of universal jurisdiction. The claim properly says: the capacity to be reason responsive to some important reasons for criminal liability is not jurisdictionally dependent with respect to the matter in question, and a special prerogative does not obtain.<sup>37</sup> Relatedly, RDS disaggregates the roles of special jurisdictional claims: they function either to indicate a distinctive capacity or to assert a prerogative. Once we have shown that an international tribunal is procedurally fair and non-intrusive upon another's prerogative, we do not then face a further justificatory task of establishing relational standing, unless the dominant reasons for criminal liability

<sup>36</sup> For discussion of domestic amnesties and ICL, see Pensky, 'Amnesty on Trial: Impunity, Accountability, and the Norms of International Law', 1 *Ethics and Global Politics* (2008) 1.

<sup>37</sup> Or, more precisely, does not obtain to a degree that rebuts the reasons we have for exploiting the criminal liability.

require it. Duff claims that the ‘legitimacy of [the criminal trial] depends both on its procedural fairness, and on the court’s authority to call the defendant to answer; a deficiency in one of these dimensions cannot be compensated by adequacy, or even by perfection, in the other’.<sup>38</sup> Only on the controversial view that relationship-dependent reasons are the only reasons for criminal liability are we warranted in treating these elements of a tribunal’s legitimacy as entirely heterogeneous. Insofar as we have other significant reasons for criminal liability operative in an international context, we can justifiably relax our concern with a suspect’s question of ‘By what right do you try me?’ So long as no prerogative is contravened, an international trial will act permissibly if it is capably seeing to these reasons. This is just to say that the trial is legitimate.

To notice the broader importance of the clarification here, consider first Massimo Renzo’s theory of crimes against humanity. Renzo contends that we must address both a conceptual question of what a crime against humanity is and a normative question of what justifies international prosecution: ‘[W]hy does the international community have the right to prosecute and punish crimes against humanity?’<sup>39</sup> The ensuing discussion makes clear that by ‘right to prosecute’ Renzo means not merely the ability to sometimes overcome a normal state prerogative (though, he means this too) but also standing to address criminal liability at all. Consequently, he invests considerable theoretical labour into showing that crimes against humanity deny victims their human status in a way that grounds a legitimate interest in prosecution on the part of humanity as a whole. Renzo does adopt Duff’s relational view of criminal accountability, but he does so ‘in order to explain why the international community has a right to punish crimes against humanity’.<sup>40</sup> Rather than seeing relational standing as a special justificatory burden generated by his assumptions about criminal responsibility, he uses a particular view of criminal responsibility as a solution to a general theoretical problem. But, there is no such problem. Renzo’s discussion is still interesting and worthwhile, but as a denominational one. Slightly differently, it is important for us to be clear in our theorizing that a commitment to a substantive theory of relational accountability generates the hurdle of relational standing – it is not an independent problem that relational accountability could be a solution to.

Consider next the earlier described assumption that universal jurisdiction requires a special ground (for example, heinousness or international harm). As I hope is now apparent, this assumption is unwarranted. A tribunal can have standing merely by virtue of being capable of responding to ordinary reasons of criminal liability. Universal jurisdiction does not require special considerations. To illustrate, May’s discussion of the special harm of crimes against humanity is interesting in its own right, but treating such harm as a precondition of legitimate prosecution again supposes that there is a general theoretical task of establishing special standing, rather than one specific to particular views of the justification of punishment. If local reasons for criminal liability can be served by a non-local procedure, then an offender is in no

<sup>38</sup> Duff, *supra* note 26, at 592.

<sup>39</sup> Renzo, *supra* note 27, at 448.

<sup>40</sup> *Ibid.*, at 454 (emphasis added).

position to complain from view of her liability. What will normally be at issue in claims of universal jurisdiction is whether some specific institution has a prerogative. Slightly differently, the kinds of interests (for example, international harm) to which many of the theorists above appealed could simply operate at the level of either justifying a *pro tanto* claim on the part of international institutions to prosecute or disabling otherwise competent state prerogatives to control an offender's treatment. The alternative picture of penal authority defended here helps us effectively direct our justificatory efforts. The general framework first identifies potential penal authorities by their institutional capacity to respond to important reasons of criminal liability – and, here, we must certainly attend to what kinds of reasons are at issue and to the differential capacity among institutions. This is the question of to whom an offender is criminally liable. We then, as a separate inquiry, consider who has a special claim (or, among claimants, who has the strongest claim) to control the prosecution. This is the question of the claim right to prosecutorial control.<sup>41</sup>

We should welcome this analytical result, at least insofar as we are confident that piracy is rightly a matter of universal jurisdiction. We do not have to characterize, implausibly, piracy as a special sort of crime. Rather, piracy can be understood in pedestrian terms as a kind of brigandry, a property crime on the scale of armed robbery, not genocide. It generates ordinary criminal liability, but no state claims any special prerogative, and, hence, the crime is candidate for consideration in any competent court. Further, it explains how privateers, who often engaged in qualitatively similar behaviour, could be thought not subject to universal jurisdiction.<sup>42</sup> Despite the similarity of their conduct, states could be understood to have a legitimate interest in controlling privateering licences and behaviour, and (perhaps) in their privateers' welfare. (This is not to endorse those as legitimate state prerogatives, but just to note how a differentiation in terms of jurisdiction was conceptually available.)

Perhaps Duff is correct, though, in characterizing all reasons for criminal liability as relationship dependent in his substantive theory of punishment. Indeed, I have not quite refuted the idea, and I am not interested in showing that all reasons for criminal liability are relationship independent. Nonetheless, the challenge I began this section with has some force here. If all important reasons for criminal liability are relationship dependent, then an offender suitably convicted of a proper crime in the wrong jurisdiction can rightly complain against his punishment with the same force as someone convicted by unfair procedures. The oddness of positing such a parity is explained if we grant that there are some significant relationship-independent reasons grounding criminal liability. Without denying that there may be some relationship-dependent reasons that only a murderer's (for example) political community can address, we can acknowledge that there are other respects in which the extra-national tribunal

<sup>41</sup> As partly indicated earlier, complementarity is easily accounted for on this model. A state may have a defeasible prerogative, but not one that resists whatever reasons extra-national actors have for seeing the prosecution competently conducted at all. Hence, if the state is unwilling, the International Criminal Court (for example) can permissibly get involved.

<sup>42</sup> For a discussion of privateers and international law, see Kontorovich, *supra* note 1.

is competent. Moreover, Duff's view (as comprehensive account of criminal liability) faces further challenges. If Duff were wholly correct, piracy would not (as just noted) be candidate for universal jurisdiction, and we would be ill-placed to justify a historically core crime of international criminal law. Also, as Alejandro Chehtman points out, Duff cannot account for the principle of objective territoriality, which grants a state jurisdiction over a non-national offender when the result of the conduct performed abroad occurs on the state's territory (for example, A shoots B across a national border). Similarly, Duff cannot ground an affected state's jurisdiction over counterfeiting and Internet fraud conducted by aliens abroad or terrorist activity involving non-nationals.<sup>43</sup> Chehtman's cases are not matters of universal jurisdiction, but the point is that in these cases legitimate state interests seem sufficient for generating a prerogative to prosecute despite a lack of a civic relational bond. This could only be so if punishment were permissible, and, thus, only if at least some reasons for criminal liability are relationship independent.

Duff could respond by biting some bullets or by thinly defining the relevant moral relationship (at least for a broad array of crimes) in terms of shared humanity.<sup>44</sup> The problem with the first avenue is that Duff is not arguing from an Archimedean point but, rather, from a set of intuitions that are vulnerable to competing judgments. The above jurisdictional rules are legally entrenched and, *prima facie*, intuitively acceptable. The more we are asked to set them aside to accommodate the relationship dependence of all reasons of criminal liability, the more we should question the thesis's credibility. Further, the force of the core intuition that the German thief is not the business of English courts is somewhat ambiguous once we have the proper distinctions in hand. Is our judgment here really (entirely) about the criminal liability of the thief or is it (at least partly) about the prerogative of German courts? After all, the Dutch pirate's threat to Spanish vessels is very much the business of English courts (at least, per international law).

The second avenue of defining a moral relationship broader than political community is also problematic. We can put a main worry in terms of a dilemma. The thinner the relationship (for example, shared humanity), the less the idea of relational responsibility seems to do any work. I am responsible to anyone who could conceivably hold me to account, and I am accountable for a broad host of crimes – for instance, theft, murder, fraud and so on. This consequence is surely in tension with some of the basic motivations for relational responsibility. On the other hand, the thicker the moral relationship posited for criminal answerability, the more offenders it will in principle exclude and, consequently, the more the theory will be forced to bite the above sorts of bullets.<sup>45</sup>

<sup>43</sup> A. Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (2010), at 84–85.

<sup>44</sup> Duff, *supra* note 26, at 599–604. For a similar strategy, see Renzo, *supra* note 27.

<sup>45</sup> For similar points, see Chehtman, *supra* note 43, at 125–128. It is worth mentioning that Davidovic attempts a middle course by defining the fact of the international community in terms of its actual acceptance of *jus cogens* norms. This community, on her account, has relational standing with respect to these norms. Davidovic, *supra* note 15. This is a nice move, but the approach faces some jurisdictional bullet biting for non-*jus cogens* crimes.



And rather than trying to make it all or none, why not think that there are a plurality of reasons accounting for criminal liability? It could be the case that an international tribunal can respond to some, but not all, reasons for criminal liability, and this may affect the character of the liabilities the penal process can justifiably exploit. If part of punishment's point is to bring about a reparative apology on the part of the offender, then those aspects of penalization solely related to this purpose are likely not within the capacity of the international court to effect. We need not treat the domestic and international trial as wholly isomorphic moral endeavours. To illustrate, consider the kind of everyday scenarios Duff draws upon. I (counterfactually) am rude to my aunt on the airplane. I belittle her, deny her basic courtesies, refuse to help her load her overhead luggage, ignore her requests and her conversation, do not see to her comfort – all in ways that are evident and evidently unjustified to unrelated passengers and crew. As a consequence, someone sitting adjacent tells me that the way I am treating my aunt is 'not cool', the couple behind glowers in my direction and the flight attendant is short with me and perhaps skimps on my beverage service. Were I behaving decently, I could reasonably complain of, or justifiably resent, such treatment. They would be minor mistreatments, but I deserve to be treated with respect, as a responsible moral agent. As it stands, my public abuse of my aunt compromises my ability to forcefully complain to, or justifiably resent, these strangers – I am liable, so to speak. Of course, I am liable to much more from my aunt, she can (for example) permissibly disinvite me to a family holiday she hosts, chastise me in strong terms, convey my maltreatment to my cousins. Moreover, we could plausibly construe these special liabilities as having relationship-restoring functions. She can, in ways strangers cannot, respond to the reasons for restoring our relationship that my mistreatment breached. If unrelated others were to attempt to hold me to account in similar ways, I could plausibly complain that it is none of their business. My neighbour's criticism of my rudeness, however, does not appear equally vulnerable to such rebuttal.

Consider also why we might worry about unrelated others exploiting acquired liabilities. In general, we do not want diffuse neighbourhood accountability practices for marital infidelities or (at least some range of) child-rearing differences. Neighbours are typically epistemically ill-suited to assess the degree or nature of the wrong and its accompanying liability. There will be no reliable shared sense of how much the liability has been exploited and, thus, a tendency to over-account. The motivations behind much neighbour interest are untrustworthy in their care for any actual reasons for liability (for example, such concern could be prurient or busy-body and tending more to salacious delight or self-satisfaction than achieving a reasonable response). Here jurisdictional claims function not only to assert relationship-dependent reasons for liability (though, they probably do that too) but also to police response to relationship-independent reasons to capable respondents. The upshot for an institutional context is that we might account for our sense of what counts as a public versus private liability not only in terms of relationship dependence but also in terms of capacity to address the character of the liability.

The point in the above two paragraphs is narrow. Duff has developed an illuminating and sophisticated account of many of our penal practices, and I have no interest

here in comprehensively refuting him. Rather, the argument is merely that it is not the whole story of criminal liability and that we can see international tribunals carrying out other parts of that story. Additionally, if this is right, then we need an account of penal authority capacious enough to tell all of these stories, and the reason-based account described above is up to that task. It can tell us why relationships sometimes matter to criminal accountability and why sometimes they do not.

Even if these points are granted with respect to positions like Duff's, one might still worry that I have neglected the view that there is (*contra* John Locke) no natural right to punish. Elizabeth Anscombe, for instance, denies that there is a private right to punish in the state of nature that can be transferred to civil authority, asserting that 'civil society is the bearer of rights of coercion not possibly existent among men without government'.<sup>46</sup> She grants that there may be natural rights to self-defence but that this does not justify, she contends, more ambitious coercive interference aimed at retribution or deterrence. Absent a state, a punished wrongdoer could reasonably complain that the private party had no right to deliver her just deserts or to make use of her in the party's project of deterrence.<sup>47</sup> This view suggests that a political relationship could be required by all theories of punishment, not merely those that are furthering some purpose specific to a relationship.<sup>48</sup>

One response here would be to challenge the claim that principles of self-defence and related norms of interpersonal morality cannot ground the prospective, protective functions of state punishment.<sup>49</sup> However, to sustain the general picture of prosecutorial authority that I advocate here, we should instead seek clarity about what it is to deny a natural right to punishment, and Anscombe's defence of the denial is helpful. Anscombe maintains that the ultimate justification for penal practices is the need to protect people. Locke's contention that there exists a private right of punishing wrongdoers is mistaken, she argues, because those seeking justice and enacting punishment in the absence of a state will be acting on their own biased judgment of when and how much punishment is warranted. Similarly motivated others are likely to disagree with that judgment in such a circumstance and, hence, will retaliate in the interest of doing justice: 'And so instead of procuring a peaceful normality, such a principle [that there is a private right of punishment] would promote a general warfare within which even the quietest ... could hardly hope to go safely. Hence I denied that right of punishment.'<sup>50</sup>

On Anscombe's account, then, it is precisely because private parties would undermine the aim of punishment ('protection of the people') that they are not authorized to engage in it. The state can have rights of punishment not possessed by individuals in the state of nature not because of some moral alchemy involved in moving to collective authority but, rather, in virtue of its distinctive capacity to respond to the reasons for

<sup>46</sup> Anscombe, 'On the Source of the Authority of the State', 20 *Ratio* (1978) 1, at 19.

<sup>47</sup> *Ibid.*

<sup>48</sup> I am grateful to an anonymous reviewer for pressing this issue.

<sup>49</sup> See V. Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (2011).

<sup>50</sup> Anscombe, *supra* note 46, at 21.

punishment. If this is what is intended by the denial of a natural right to punish, then the theory of penal authority I advocate, which makes institutional capacity central to standing, is well suited to understand it – it is essentially an assertion concerning what reasons there are for punishment and what agents can respond to them. Moreover, we could even grant some of Anscombe's substantive claims on these matters and expect public, impartial and well-ordered institutions to sometimes have a right to punish non-nationals in virtue of those institutions' capacity to genuinely provide protection.

On the other hand, if the claim is that the state makes a moral difference because it constitutes a relationship between persons absent in the state of nature, and that relationship is the sole basis of penal authority, then we are essentially affirming a version of Duff's relationship dependence of standing thesis. To this, we should say all the things said already: that the view that there are only relationship-dependent reasons for criminal liability is inadequately motivated, that it delivers a strange parity in the moral complaints of non-national wrongdoers and those wrongly convicted without process, that it cannot handle the standard case of universal jurisdiction (piracy) and that it cannot accommodate certain other principles of jurisdiction recognized by international law. In sum, two promising ways of understanding the denial of a natural right to punish (that avoids entailing abolitionism) is that it asserts either a distinctive capacity on the part of certain institutions to see to the ends of punishment or the dependence of all penal authority on relational facts that only obtain between an individual and her state. The first (accurate or not) does not challenge my account, and the second we have good reason to reject. There could be other possible interpretations, I suppose, but they would have to tell a plausible alternative story about how the state could have moral powers that individuals in the state of nature do not – that is, how the state can make a basic moral difference in terms of how we can treat each other.

I should also say that it is not my position that the entire body of thought concerning the right to punish has been deluded about its justificatory task. Given the sophistication and extent of that theory, such a position is *prima facie* untenable. Rather, I have attempted to illustrate why the standard picture has seemed attractive, despite its error. Also, some have implicitly accorded with the approach I describe here. For example, Chehtman's sophisticated approach to criminal jurisdiction recognizes the tight connection between a substantive theory of penal practices and jurisdictional boundaries. The jurisdictional conclusions he arrives at are explicitly grounded in his interest-based theory of punishment.<sup>51</sup> To take another instance, Andrew Altman and Christopher Heath Wellman consider it to be so obvious that international tribunals are permissible when a state has no legitimate sovereign interest in barring them that they do not extensively argue for the position. Once the veil of sovereignty of a state is rightly overcome, penal intervention against the criminally culpable for the sake of protecting rights is permissible.<sup>52</sup> Otherwise said, the major obstacle to

<sup>51</sup> Chehtman, *supra* note 43.

<sup>52</sup> A. Altman and C.H. Wellman, *A Liberal Theory of International Justice* (2009), at 69–95.

international criminal law is understood by them to be the legitimate prerogatives of state institutions.

Lastly, the theorists I mention at the start are not, in my view, spinning their wheels to no theoretical effect. There is much to learn from their substantive points. Davidovic and Song may be quite right that international tribunals are implicated in a desirable form of the international rule of law. May's contention about boundary crossing could, in some circumstances, generate a special concern on the part of the international order. And the heinousness of many international crimes can call for response (that is, the criminal liability of offenders may itself give rise to active reasons to respond, especially if 'positive' retributivists or expressivists are at all right). Yet these are considerations that must compete with other considerations, like a legitimate state interest in achieving local peace, in any particular circumstance. Moreover, the considerations will vary in applicability and strength – in some cases, for instance, boundary crossings may not be at issue, or the heinousness may not be particularly great. In fact, universal jurisdiction, as we can see now, could obtain without any of these theorists' considerations being at issue. None of these considerations, then, are properly thought of as a foundation or special ground for universal jurisdiction. Rather, they are the sorts of matters that can typically compete with the normal, legitimate prerogatives of a state. In our thinking about criminal jurisdiction, they should be treated as such.

## 5 Conclusion

I have argued that much theory concerning universal jurisdiction inadequately distinguishes criminal liability from state prerogatives to prosecute and mistakenly assumes a need for a special ground or relationship to establish such jurisdiction. The argument proceeds by considering what criminal liability consists in and indicating its tight connection to substantive justifications of punishment. This shows us that a court's standing with respect to an offender is a feature of its ability to respond to the reasons for criminal liability, though its standing with respect to other courts might bar a jurisdictional claim. For Court X to claim universal jurisdiction over a crime, then, is to claim a capacity to respond to some substantial reasons for criminal liability and to claim that no other institution has a prerogative (or a prerogative strong enough to challenge the importance of Court X's penal response). Moreover, we have good reason to think that significant reasons of criminal liability are relationship independent, even for ordinary crimes. An important upshot is that a large part of our jurisdiction-related conversation in criminal law theory ought to be focused on the various legitimate aims and interests of states and other international institutions.

More broadly, I hope to have loosened the grip of what, at the start, I called the standard picture of authority. The attraction of the idea that penal authority is grounded on a tie between a tribunal and offender is, I suggest, a function of both a sense that some reasons for criminal liability are relational in character and the notion that sometimes we will need to appeal to powerful considerations to overcome operative

state prerogatives (for example, that a crime is heinous or likely to negatively affect the international order). As we can now see, however, neither of these two ideas is appropriate for characterizing the general nature of the authority to punish. The alternative account offered here, which articulates the right to punish as a capacity to respond to the reasons for punishment, accommodates these two (likely sound) points and permits us to account for the plurality of our legitimate penal practices.<sup>53</sup> According to my view, appeal to special relationships operates at a different level than a general theory of how to establish a right to punish. Such appeals indicate substantive matters pertaining to the content of our reasons, not formal characterizations of the nature of tribunal authority. The analysis of universal jurisdiction shows us, moreover, that having a correct model is important for theoretical purposes – again, it identifies the types of questions we should ask at the various points in our justificatory undertaking (and, conversely, which ones we should not). We learn, for instance, that a quest for a foundation of universal jurisdiction is likely misguided.

<sup>53</sup> And, strictly speaking, can hold even if all reasons for criminal liability are relationship dependent.