

THE TERRITORIAL PRINCIPLE IN PENAL LAW: AN ATTEMPTED JUSTIFICATION

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When philosophizing in the study, we should be careful, it has been said, not to leave our common sense (along with our umbrellas) out in the hall. And in discussing the present topic we must beware of forgetting our criminology. The way in which the average discussion concentrates on state practice and its justification in terms of international law, completely overlooking the criminological aspects of the problem, can be seen from the following typical quotations:

[A]s a matter of convenience crimes should be dealt with by those states whose social order is most closely affected, and in general this will be the state on whose territory the crimes are committed [T]he territorial state has the strongest interest, the greatest facilities and the most powerful instruments for repressing crimes . . . committed . . . within its territory.¹

The third group [of states] rejects the territorial principle, and seems to base its law on the theory that crime, wherever committed, is a social evil which all civilized states are interested in suppressing.²

To say that the penal laws of a country can bind foreigners and regulate their conduct, either in their own or in any other foreign country, is to assert a jurisdiction over such countries and to impair their independence.³

Such comments show the emphasis placed upon practical considerations like power, convenience and state interest. They show, too, a failure to justify a state's extraterritorial enforcement of its penal law in moral terms and vis-à-vis individuals. At first sight this failure seems excusable: this is a question for moralists, philosophers and penologists, not for international lawyers. Unfortunately penologists are too concerned with the general justification of the inter-territorial criminal law to trouble themselves about its extraterritorial application. As a result, the job of providing moral justification for such an application never gets done. Consequently the penologist misses valuable insights

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¹J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 215 (6th ed. 1967).

²J. BRIERLY, *THE LAW OF NATIONS* 300 (6th ed. 1963).

³J. MOORE, *INTERNATIONAL LAW* 236 (1906).

which this kind of limiting case can throw on the central problem. At the same time, the international lawyer forgets that international rules about state criminal law, like the criminal law itself, ultimately involve individuals, and that the moral justification required for such rules concerns not so much the relations between the enforcing state and other states, but the relation between the enforcing state and the individuals against whom it is intervening.

Traditional justification in terms of interstate relationships is not enough. To show that the territorial principle is justifiable as between States *l.....n* on various grounds is not even to begin to show that it is justifiable as between those states on the one hand and Individuals *l.....n* on the other. To argue that State *A* can justifiably punish *X*, a national of State *B*, for an act committed on the high seas against its own national *Y*, on the ground that a state can rightfully protect its nationals abroad, or to argue the contrary on the ground that this would lead to jurisdictional anarchy, is to argue on a single plane. Indeed this is the least important plane. It is simple to argue that State *A* can or cannot do this without infringing the legal rights and interests of other states, yet the major problem surely is whether State *A* can punish *X* without infringing the moral right of *X* himself. In other words, does the overall justification of a penal law justify its extraterritorial application?

But why justify the criminal law at all? Can we not take it as given, as a practice found generally in societies and states? The answer is that penal law involves inflicting suffering on individuals. To prohibit conduct and punish its commission lessens the freedom of both those who are punished and those who are deterred. For the purpose of this discussion I take it as axiomatic that the gratuitous infliction of suffering is wrong and that the infliction of pain calls for justification because it is a *prima facie* evil.⁴ It follows that the practice of punishment in general, and the criminal law in particular, stands in need of defense. If *A* assaults *B*, what moral right has *C* to intervene against *A*? Would there be a greater moral right for a *group of C's* to intervene? Would such a group be in a stronger moral position if it constituted a state? Would a group of states have a better moral title? Or is the group, the state and the community of states each a case of a chain being no stronger than its weakest link?

Justifications of criminal law and punishment fall basically into two

⁴I take this as axiomatic, not because it cannot be established, but because space does not allow for its establishment here. That it can be established has been shown by a variety of recent writings in the field of moral philosophy; see, e.g., Anscombe, *Modern Moral Philosophy*, in THE IS/ OUGHT QUESTION 196 (W. Hudson ed. 1969); Foot, *Goodness and Choice*, in THE IS/OUGHT QUESTION 214 (W. Hudson ed. 1969).

kinds, depending on whether or not the institution is defended in terms of self-interest. According to the former view, we have a right to punish criminals as a means of protecting ourselves. Thus, criminal law becomes a weapon in the armory of self-defense. The alternative view is that punishing criminals is either good in itself or is a means to some goal which is unconnected with self-interest, but yet of some intrinsic value.

The oldest and most obvious version of the second argument is the contention that crimes deserve to be punished. The retributive doctrine is that there is intrinsic value in seeing that criminals get their just deserts. Wrong doing has upset the moral reckoning and the accounts must be put right. According to this view, a state may, and should, preserve the balance of justice. However,

[t]he difficulty with this suggestion is that of discovering the justification for this. If one man does some wrong or immoral act, it is not easy to see what right another man has to exact retribution for this. Edgar Wallace's "four just men" and other fictitious private agencies of justice might be said to be justified in punishing wrongdoers in order to prevent them committing further harm, but for one man to play at being god and to ensure that wrong should reap its reward involves an assumption of rights over others which surely needs positive justification. Such justification is hard to find and indeed few would seek to support such activities. But if individuals have no moral right to exact retribution it is hard to see how a society, a group of individuals, can acquire such a moral right either.

What holds good of retribution likewise holds good of expiation and atonement. The idea of expiation and atonement is that the wrongdoer by suffering pays the debt demanded by justice and owed to the authority inflicting the suffering, and so becomes reconciled once more with that authority. We see this idea at work in the conception of non-eternal divine punishments. It is sometimes said that punishment for crime enables the criminals to "pay their due in the hard coinage of punishment." The difficulty of justifying state measures aimed at making an offender pay such a debt is the difficulty of showing that this debt is owed to society. Just as it is hard to show that society any more than an individual is entitled to exact retribution, so it is difficult to show that society any more than an individual has a right that the offender should make expiation and atonement to it for his wrongdoing. With Blackstone we may urge that atonement and expiation should be left to the Supreme Being.⁵

⁵P. FITZGERALD, *CRIMINAL LAW AND PUNISHMENT* 203 (1962).

An alternative approach might be to argue that it is morally defensible to punish wrongdoers in order to "make the world a better place." This is not simply a claim that we can rightly punish people to deter them from committing crimes *against us* or *in our society*, but rather, without reference to any self-interest, this is an abstract assertion that it is justifiable to take steps to promote justice and virtue and to reduce wrongdoing simply because this should bring about a more desirable state of affairs. This argument is attractive because it avoids the metaphysical, if not theological, character of pure retribution and regards punishment as a means rather than an end in itself. All the same it is fatally open to the objections raised against retributivism. Suppose in Erewhon some highwaymen are robbing, assaulting and murdering people on the highways. Now there is no doubt that if *X*, a native of Utopia were to utilize his private crime disposal agency to apprehend and punish these highwaymen, Erewhon would become a safer and more pleasant place. Assuming, however, that *X*'s help has not been invited by the Erewhonians and that his services, therefore, are given quite gratuitously, and remembering that his activities will bear hardly on the highwaymen, we must ask "What right has *X* to officiously make Erewhon a nicer place at the expense of the highwaymen?" We can rationalize that the Erewhonians will be grateful to *X*, thus ratifying his conduct and adopting it as their own, or we can oppose the move by hypothesizing that the Erewhonians have no strong views on the matter or that they even resent *X*'s intrusion. In the latter case what possible title has *X* to the role of playing God?

There are attractions in improving the world as a hobby, but when it is at the expense of other people they must be resisted. Quite apart from the impossibility of establishing any moral right to indulge such a hobby, there are certain important and less theoretical dangers. If the aim is to make the world a better place, the question arises "better in whose opinion—that of the improver or that of the man at whose expense the improvement is to be made?" And of course in the former's opinion, the world might well be vastly improved by the latter's removal altogether.

One last question arises regarding non-self-interest justifications of penal law:

Could there be any right which is available to the state, but unavailable to an individual, to inflict punishment to further the aim of retribution . . . or to render the world a better place?

As regards retribution in and of itself a state seems to be in no better position than an individual. Even granted the fact that we understand that wrongdoing is supposed to be redressed by suffering, it would be untenable to argue that it is the right of a state to enforce such redress. The answer to the second part of the question is more difficult. Making the world better (*e.g.*, making it safe for democracy, safe from drugs, high-jacking, etc.) seems to be something not altogether outside the justifiable activities of a state. If Utopia moves to stamp out drug-trafficking in Erewhon or on the high seas to bring about a better state of affairs (*i.e.*, a drug-free world), this appears to be perhaps morally defensible. But the reason, we should notice, is the underlying possibility implicit in the example—that a drug-free Erewhon and drug-free seas will also preserve Utopia itself from the menace of narcotics. State moves in this direction seem more tolerable because they can be connected with self-protection. Given a situation where there was no evidence that criminal activity in State *A* could have any effect on State *B*, it would then become very difficult to justify the latter's intervention. It would be difficult, for example, to find any moral title to support Albania's clamping down hard on Norwegian tax evaders.

From the above we see that states are no more justified than individuals in inflicting punishment, for altruistic reasons. Justification must be sought on the basis of self-interest. Of the different strands in the self-interest argument, I shall consider only two. The first is the relatively simple view that since individuals have, within reason, the right to defend themselves against certain kinds of wrongdoing, particularly those involving physical violence, so too groups of individuals and, a fortiori, societies are entitled to collective self-defense. The second, more sophisticated view reasons that society is a necessary requirement for men. Therefore, men are morally entitled to set up, live in and protect societies. Society, however, would be logically impossible without certain fundamental rules. Both in a factual and a logical sense, a society could not exist without rules restricting violence and prohibiting falsehood. A state of affairs in which every man's hand could be turned against his neighbor and in which truth holds no primacy of respect would be unfit for social life and linguistic communication, and, however else we described it, we could not describe it as a society. Given the necessity for such rules, a society and its members have some right to preserve the rules in order to preserve the society. This in turn licenses some form of intervention against those who violate the rules and endanger society.

This does not mean that any and every society has a right to self-

preservation. A society dedicated to piracy, to the harrassment of neighboring territories and to the torture of minorities within its borders could show little moral title to continue to exist without changes. Nor would a society be justified in enforcing the observance of any and every rule to protect itself against every sort of attack. Just as there are limits to an individual's right of self-defense, so are there limits to the corresponding right of a society. The fact that *X* is put out by *Y*'s competition or by *Z*'s expression of views which differ from *X*'s in no way entitles *X* to use force against *Y* or *Z* in "self-defense." Likewise, the fact that persons outside a particular society live according to a different pattern from those within it (*e.g.*, they practice polygamy or worship fire) is no ground for intervention by those within the society in question. Furthermore, the fact that some people within a society may hold and express views which differ from the established wisdom on a variety of topics ranging from religion to education by no means justifies their being disciplined and put down. To say that a society, given no immorality in its own objectives, has a right to protect itself by upholding certain necessary rules only indicates the general direction of social use of penal sanctions.

To spell out in detail how far a society can rightly go in enforcing its rules lies beyond this paper. For the purpose of this discussion let me merely draw a distinction between four types of rules operating in society.⁶ First there are *fundamental* rules—rules so necessary to social life as to amount to preconditions of society (*e.g.*, rules against violence and rules about truth). We can clearly see the justification of sanctions for violations of such rules, remembering that sanctions need not necessarily be institutionalised: ostracism and other informal punishments may be quite effective as the main sanctions against lying. Next come *neutral* rules—rules to deal with situations where *some* rule is necessary though several alternatives are possible and equally acceptable (*e.g.*, the rule of the road). With these situations, no moral, logical or natural ground exists for choosing one side or the other, but uniformity is essential. Here, too, sanctions can be clearly justified. Given that a society accepts road traffic, it has a right and a duty to regulate the traffic so as to keep accidents below an intolerable level. Indeed, in many ways death on the roads is a greater social problem than murder. Then we have *auxiliary* rules, and most rules fall within this third category. These rules are neither fundamental nor neutrally necessary, but life in a

⁶Singer, *Moral Rules and Principles*, in *ESSAYS IN MORAL PHILOSOPHY* 160, 176 (A. Melden ed. 1958).

society would be far less bearable without them. Road traffic again gives an example: speed limits are not absolutely essential and one could get by without them, but at certain times and in certain places, roads might well be less safe without them. Environmental laws as a whole (*e.g.*, laws restricting noise, pollution of the atmosphere, etc.) fall into this category. While they serve to protect the quality of social life, they are not indispensable to that life—as yet. However, I would be surprised if this will still be the case at the turn of the century, when pollution of the land by pesticide, of the rivers and seas by oils and other effluents, and of the atmosphere by smoke and other gases may well make these laws more necessary than those against assaulting, wounding and murdering. Finally come *residual* rules, which societies observe for a variety of reasons and whose violation can be stigmatized as incorrect. Included within this category are dress, etiquette, spelling, grammar and a host of other rules that resulted partly from custom and partly from reason and principle. Here also, there are occasions when *some* rule is necessary though any rule would do, providing we stick to it. This may well be the case with spelling, where the only thing to be avoided is orthographical chaos. In many cases, however, these rules seem entirely dispensable—the bulk of Emily Post's prescriptions and maybe the bulk of English grammar (what there is of it) could be jettisoned, and life might well improve. This may also be true of some rules which have been elevated to laws: laws against working on Sunday, against swearing and blasphemy, against bigamy and against certain types of indecency. These may once have been, or were thought to have been, necessary but in my view are quite plainly no longer so.

Of these four types of rules, then, the first three clearly merit social enforcement. I would argue, however, that enforcement of the fourth type is not only unjustified but is counter productive and harmful to society. Enforcing petty and futile laws makes an ass of the law, brings the whole legal system into contempt, and therefore threatens the continued enforcement of other rules more vital to society.⁷

Yet the drawing of this distinction between the types of rules operating in society cannot be the sole justification for the institution of punishment as it exists within a modern state. To do this one would first have to consider just what sort of goal can be justified within the general context of social self-defense. The second consideration would be by what means the goal can be accomplished. A third and entirely separate consideration would be the price.

⁷P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

On these questions I can do no more than indicate what would be my own approach. Given, say, that violence must be prevented in general, the question arises whether a society's goal ought to be as total a suppression as the economy allows. A second alternative might be some form of reduction to what might be deemed a tolerable level. This could be consistent with Quetelet's thesis that crime is a toll which we pay annually.⁸ A third possible goal might be a reduction plus learning to live with violence as an inescapable evil, much as parents, thanks to Dr. Spock, have learned to live with their three year old's rambunctiousness, rather than fight it, or as invalids have learned to live with their disabilities. A fourth aim might be a reduction plus recognition that crimes and rule violations may, as Durkheim and others suggest, have positive value. Violence is said to be a creative force, because conflict-free societies may lack commitment, variety or dynamism. The answer to the question of what society's goal ought to be calls for more concern for criminological and sociological theory than is generally found among those most closely concerned with the penal law and its enforcement. My own view is that while precision bombing may not work in armed conflict, something analogous might well pay dividends in criminal law. Attacks by lawmakers aimed at certain major offenses on a narrow point with selected targets may possibly be the best way for a society to defend its rules, maximize freedom and initiative among individuals, minimize expense and remain open to change and development.

The means to be used is generally thought only to pose the problem of how to obtain the best mixture of deterrence and reform. The more you keep your sights on the potential offender the more you overlook the defendant; and the more you overlook *him*, the better chance you have of breeding yourself a recidivist. Yet the more you individualize the penalty for the offender and move from deterrence to reform, the less effect you have on the potential offender. On this subject let me content myself with two remarks. First, less is known about the deterrent value of punishment than we might wish. This emerges from discussions on the death penalty. Secondly, to view the problem as a conflict between the needs of the actual offender and those of the potential offender who requires a deterrence is to overlook completely the needs of that much larger group in society consisting of neither actual nor potential offenders. At certain times and in certain places it has been argued that one function of punishment is to satisfy the public demand for justice.

⁸H. JONES, CRIME AND THE PENAL SYSTEM 116 (3d ed. 1965).

One objection to this claim is that the mere existence of a demand to see justice done on the surface carries no more moral title to gratification than do many other of our desires, such as avarice or lust. An alternative, advanced by Professor Morton,⁹ views the main service of the criminal trial as that of a modern day morality play—a drama in which society can see the emphatic and authoritative underlining of its own basic views that certain types of conduct are unsupportable. In this way the criminal law, along with other forces, helps to maintain and continue that process of internalization begun during childhood in the home and in the school. Proof of the validity of Morton's thesis would take long and painstaking research, but it may well be that this theory points to the greatest success of the criminal law. It may well be that in reality conviction and sentencing has less to say to actual or potential offenders than to the ordinary law abiding citizen, just as posthumous awards for military valour serve less to inspire others to heroic feats than to preserve in the rest of us a healthy respect for bravery, or as canonization aims less to inspire to sanctity than to foster regard for virtue among ordinary people.

Finally, there is the price we pay. Here one particularly thinks of three things. One thinks of the conflict between the need to individualize punishment to best fit the particular case with an eye to the future reform of the offender and the requirement that like cases receive like treatment. Secondly, one thinks of the problems of strict and vicarious liability. Thirdly, one thinks of the limitations arising from considerations of humanity and proportion. Humanity rules out certain penalties as being too barbarous for infliction by any civilized society. Proportion requires that the penalty, however effective, must not be out of balance with the severity of the offense. Death for illegal parking would certainly be out of this count, if not on the first.

Under this program we may then, at last, begin to attack the problem of the territorial principle. The questions we may ask are these:

1. Given the above justification for the general criminal law, would a society organized as a state be justified in enforcing its penal law against all criminal acts within its territory?
2. Could a society ever be justified, in a general moral way and vis-à-vis individuals rather than states, in using its law to punish acts committed outside its territory?

Many publicists seem to accept completely the validity of the

⁹J. MORTON, *THE FUNCTION OF CRIMINAL LAW* IN 1962, at 30 (1962).

territorial and active nationality principles and to some extent accept that of the protective and universal principles. These publicists, however, generally reject the passive nationality principle.

Now the first of the two questions posed above, relating solely to the territorial principle, can be dealt with relatively quickly. Given the right of the individual to society, the necessity of certain rules and the consequent right of society and its members to enforce these rules, it follows that there is a right to punish infractions of these rules. What counts as an infraction will depend on the spatial extent of the society. If *X*, a member of a west European society, say England, uses violence in Brazil on a Brazilian, this could hardly qualify as a breach of any English social rule (though the same may not hold true of English law) against violence, any more than an Englishman who drops his aitches when speaking German could be said to have broken a rule of the English language. Still less would use of violence by a Brazilian against a compatriot in Brazil amount to a violation of England's rules prohibiting violence. Another way of putting it is that you can only break rules which apply to you—a point touched upon by Brierly when he argued that “. . . it is essential to the very notion of a crime that the act should be a contravention of some law to which the accused is subject”¹⁰

Quite clearly, however, the rules will apply to everyone within the territory of the society. In the case of England, the rules will apply to U.K. citizens living in the realm, but they will also apply to noncitizens. The English rule against violence is equally broken by any murder committed in England regardless of the murder's citizenship. But while international law accepts that aliens are subject to the law of the receiving state and while on a moral and philosophical plane this seems obviously justifiable, we should note that this is true basically because generally everyone within a state's territory forms part of one whole society. Given a situation where in one area there are two or more distinct societies, identified by race, religion or language, the case would be different. Suppose in the same territory there lived white men, brown men and yellow men with each sector forming a third of the population and each sector being scattered throughout the whole territory but each dealing exclusively with its own members. In this case we might well want to say that if one white man assaulted another, this infringed only the rules of the white society which alone was threatened by such conduct. The overall territorial rule would come into play only if the white man assaulted a brown or yellow man. Given then this kind of

¹⁰Brierly, *The 'Lotus' Case*, 44 L.Q. REV. 154, 161 (1928).

almost total social separation, if each society constituted a state sharing the same territory with the two other states, we might have a situation where the automatic application of a state's penal law to *every* act within the territory would not be justifiable. But this, of course, is far from the normal case. In the normal case such application is clearly right.

Can we go further and justify any of the other principles? Can we defend a state's extension of its criminal law? The general justification of the criminal law as a means used by society to protect itself leads well beyond the territorial principle. Although acts outside its territory may in general be of no concern to a state, when they cause harm to the state, it may be entitled to protect itself against them. I say "may" because not every harm-causing act will necessarily justify a counterattack. Just as there are some activities which may cause harm to an individual without entitling him to prevent them by force, so there are limitations on a state's right of social defense. In the case of individual self-defense, one draws a contrast between cases of assault and robbery on the one hand and business competition, argument and disagreement on the other. The analogous contrast in the case of the state is *not* between attacks on its territorial integrity on the one hand and commercial alliances against it on the other. These acts are by other states, and our concern is the acts of individuals. The proper contrast is between acts of individuals clearly likely to cause physical damage to persons or property in the state's territory (*e.g.*, the ship's captain who lets loose an oil slick which will clearly endanger a neighboring coast) and acts which may cause loss of income or of face without physical damage (*e.g.*, foreign traders who compete with the home state's traders in world markets and journalists and commentators who comment adversely on affairs in the home state). I would argue that a state would be completely justified in using the sanctions of its penal law against the oil slick type of case. Further one can imagine cases where such sanctions would be justified even though the offender's act was committed in the territory of another state rather than on the high seas.

In arguing this, I would like to make three caveats. Firstly, I am speaking here simply from the point of view of the relation between the state and the offender. What I am saying is that the ship's captain in the above example has no right to complain if punished. That the position will be affected by the possible rights of the captain's own state and by interstate rules, we are well aware. I am ignoring these in order to look at considerations of which we are not so well aware. Secondly, the example of the captain and the oil slick might, perhaps, be said to be a case of the objective territorial principle rather than of the protective principle.

Thirdly, in picking out types of harms against which the state can rightfully invoke its penal law, what criterion can we use? I take these last two points together since they are connected.

It is arguable that the oil slick case can be looked on as equally suitable for application of the protective principle. It can further be argued that the difference between pure territorial principle cases (*i.e.*, murder within the territory) and obvious protective principle cases (*i.e.*, counterfeiting a foreign country's currency) is only one of a degree; that is, that there is a continuum half way along which lie the objective territorial principle cases. But the kind of harmful act done abroad against which a state is entitled to protect itself is hard to elucidate. How is one to differentiate between forging English pound notes and underbidding English firms in foreign markets, when both will cause England economic losses? It is little help to distinguish between justifiable and unjustifiable harm. Nor is there much usefulness to be obtained from the Harvard formulation "provided that the act . . . was not committed in the exercise of a liberty guaranteed . . . by the [lex loci delicti]."¹¹ For one thing, the guarantee of a liberty by the lex loci is no guarantee that the act is morally justifiable; it is at best an indication. For instance, it is not logically impossible to have a law stating that counterfeiting home currency is a crime but that counterfeiting foreign currency is not an offense. The term "guaranteed" is also unfortunate if it suggests that the lex loci must positively state that one may do the act for the act to be justified. The notion that one may do only what the law allows is less liberal than the principle that one is only debarred from doing what the law forbids. But perhaps the best way to approach the problem of drawing the line would be to start with clear examples of deliberate attacks of a physical kind (*e.g.*, on the territory, ships, airplanes or in some cases on nationals of a foreign state). One could then move on to deliberate, but non-physical attacks on the institutions of the state (*e.g.*, currency forgeries), and look step by step at less obvious cases until reaching the case of an economic competition that is clearly justifiable conduct despite the financial harm it may cause. During this inquiry it must be kept in mind that the more deliberate, direct and physical the harm is, the clearer is the entitlement to the self-protection provided by criminal law.

This leads to a question already suggested: at what point would an attack on the national of a state qualify as an attack on the state itself and thus justify *Lotus* treatment? It is often said that an attack on a

¹¹*Jurisdiction with Respect to Crime*, art. 7, 29 AM. J. INT'L L. SUPP. 439, 440 (1935).

state's national is not an attack on the state, but this is not true. The truth is neither that it is, nor that it is not; the truth is that *it may be*. There is a substantial difference between the French couple who murdered an Englishman on holiday in France and the escaped English prisoner of war whose personal contribution to Britain's war effort was to kill a German a day. In the first case *X* and *Y* kill *Z*, who *happens* simply to be English. If English authorities punished *X* and *Y* in the unlikely event of their going to England, would this deter foreigners from killing Englishmen abroad? And is the murder victim's nationality of much interest to, or even known by, his killer? Contrast this with the second example where the nationality of the victims was the whole point of the killings. This act was an attack on Germany, and indeed was so meant to be. In this extreme sort of case I would maintain that the victim's state is quite entitled to use its penal law to defend itself against such attacks.¹² However, where the nationality of the victim is incidental, there is no justification for invoking the passive nationality principle.

Cases involving an attack on a state's national might well fall under the universal principle, particularly if the acts were committed in the regime of the *res nullius*. The justification for punishing piracy on the high seas, in accordance with the universal principle and regardless of the nationality of the offenders, is not simply that otherwise piracy would escape punishment or that every state has an interest in suppressing crime. Rather, the justification is that if pirates infest the high seas, then the members of different state societies are being denied free and peaceable use of the sea, and this is a denial which they are entitled to repel. In reality the universal principle is not far apart from the protective principle. Suppose, for the sake of illustration, that *X* kills *Y*, a fellow explorer, at the North Pole. Is this really of much concern to *Y*'s state or any other state? Yet suppose travel across the North Pole becomes far more common and suppose that a group of bandits frequently attack and kill people crossing the Pole. This now turns into an attack on safe travel. It is thus an attack on all states and arouses their concern accordingly.

As time goes on, I would hazard the prediction that the universal principle will become even more important with the growth of the need to protect the environment against depletion and pollution. Meanwhile it is worth observing that this principle cannot necessarily be justified on

¹²In the actual case in mind (that of a distinguished Second World War pilot of the R.A.F., who shall remain nameless) the murders were committed in Germany, but one can hypothesise a case where they are committed in neutral countries.

the ground that this action is an example of a group of *states* engaging in social defense. The "group of states" argument holds only as a justification for moves against other states, just as the "group of individuals" social defense argument justifies using only the criminal law against individuals. One reason it may not justify moves against individuals is the fact that the fundamental basis of the social defense theory that society is necessary for man is not applicable to groups of states. *Societies of states* are neither necessary for states nor for men. Logically and in fact, state existence could continue in isolation; individual life could not—at least not for any appreciable time.

We come finally to a principle that seems generally accepted without question, but which I, nevertheless, find difficult: the active nationality principle. "A state has a right to punish its own nationals." *Vis-à-vis* other states perhaps yes, but what about *vis-à-vis* the individuals themselves? Suppose *X*, an Englishman, kills *Y*, a Frenchman, in Switzerland. Most writers maintain that Switzerland has the main right to punish *X*, that England has the next best right and that France might have some right. In my view, the case for Switzerland is obvious, that for France can be argued, and that for England is untenable. If the justification for society's punishment of crime is the attack on society involved in the criminal act, then it is hard to see how *X*'s conduct constitutes an attack on his own society.

It could be argued that a society, like a club, is entitled to discipline its members, but there are difficulties in this. Firstly, is it justifiable and in accordance with reality to equate membership in a society with the possession of a nationality? *X* may have lived in Switzerland for 50 years, retaining only his nationality. *X* might not even know he was a British subject. Secondly, the analogy between a state society and a club is misleading. One need not join the club, and one is certainly not born into it. Moreover, the ultimate sanction of the club is mere expulsion. Thirdly, what is the justification for society's claim to discipline its members? Surely the only justification is that members who break the rules are a danger to society, either because rule breaking done at home harms society or its members, or because rule breaking done abroad makes the breaker a potential danger when he returns. A man who commits murder abroad may well do the same at home, but this justification has nothing whatever to do with nationality. This justification, which has much to commend it, would license a state's punishment of any individual living within it for committing a violent crime abroad regardless of the individual's citizenship. But it would not license the punishment by a state of its national for a violent crime

committed abroad if the national did not live in, had not returned to, and had no intention of ever returning to that state. As in many other areas the link of nationality here is a vastly overrated and inflated concept.

My conclusion, then, is that a social defense theory can serve several useful functions. It can provide a justification for the territorial, protective and universal principles. Moreover, it suggests some justification for the passive nationality principle. Finally, it implies that the active nationality principle is without any justification.