

TRANSNATIONAL SURROGACY, ACTIVE NATIONALITY PRINCIPLE, AND THE LEGITIMACY OF (TRANSNATIONAL) CRIMINAL LAW

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ABSTRACT: This article starts from the heated political and cultural discussion stirred up in Italy by a draft law criminalizing gestational surrogacy carried out by Italian citizens abroad. Extraterritorial punishment would be then enforced beyond the limiting requirements set out by the current domestic system of extraterritorial criminal jurisdiction, that is, unconditionally. While the domestic debate is mainly concerned with classical operational aspects of extraterritorial criminal jurisdiction (for example, content and scope of the double criminality requirement; interstate cooperation especially in evidentiary issues), this contribution intends to underline the relevance of the case-study for the broader issue of legitimacy to impose criminal punishment. In this vein, it provides a critical overview of conventional foundations of the nationality principle from an analytical standpoint, accounting for a human-rights oriented reconceptualization. After considering authoritative philosophical criticisms of extraterritorial jurisdiction in general, with special reference to Duff's 'citizen theory of criminal law,' the article maintains that legitimacy does not lie in the concept of citizenship (regardless of how that may be defined), but rather in the actual relationship between any authority vested with a legitimate criminal power and the complex 'situation of life' set up by the behaviour carried out by individuals. This leads to an innovative functional reading of criminal jurisdiction that, while overcoming a purely geographical notion of territory, overcomes the very distinction between territoriality and extra-territoriality in the legal space built through social relations that fall within the remit of criminal law.

Keywords:

- Extraterritorial jurisdiction
- Extraterritorial punishment
- Active personality principle (philosophical foundations and legitimacy of)
- Citizenship and criminal law

1. INTRODUCTION

1.1. Setting the Scene

In 2004, the Italian legislature enacted a criminal statute threatening punishment to anyone who, in any form whatsoever, carries out, organizes, or advertises the commercialization of gametes, or embryos, or maternity surrogacy (surrogate motherhood: surrogacy). The penalty for these acts is imprisonment of three months to two years and a fine of between EUR 600,000 and EUR 1 million. Practising surrogacy is therefore punishable in Italy,¹ regardless of the specific form in which it is carried out, with the sole interpretive qualification that the form in which it is carried out presupposes the use of medically assisted procreation techniques.

For a while, in a relatively quiet political context, the discussion has been centred upon the *Strafwürdigkeit*, that is, whether surrogacy deserves to be criminalized (punishability); that is, the bulk of scholarly debate revolved around the legitimacy of criminalizing such course of conduct, or – to put it otherwise – whether surrogacy is a criminalizable wrong.² Apparently,

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¹ The man or woman 'to whom' the reproductive techniques are 'applied' is nevertheless declared 'not punishable.' I will not delve into the contentious issue of the legal nature of such exemptions. It must be stressed here that it refers to the man who donates gametes and to the surrogate woman (gestational mother).

² See, for references, Tommaso Trinchera, '*Limiti spaziali all'applicazione della legge penale italiana e maternità surrogata all'estero*' 4 (2017) *Rivista italiana di diritto e procedura penale*, 1391, 1400 fn 13. Moreover, with special

the conditions of extraterritorial application of the domestic ban on surrogacy did not seem either theoretically interesting or relevant in practice.³ However, it soon turned out that the very prohibition of surrogacy by a domestic criminal statute brought about (or was at least a pivotal factor of) the so-called procreative tourism or fertility tourism, that is – leaving aside some criticism of the accuracy of such a label – it determined the typically cross-border character of the crime.⁴ Couples striving to get a child through this practice are induced to proceed abroad and then, as a rule, they return to Italy to apply for recognition of the newborn child. In light of this factual situation, it has become clear that the value (however defined) protected through criminal law cannot be effectively safeguarded, except through the transnational extension of jurisdiction.

Thereinafter, this complex situation of life, that is, the conjunction of the prohibited practice carried out abroad with the request for recognition of the child by the domestic legal order, has opened a different avenue of discussion. Alongside the broader question as to whether surrogacy should still be a crime, and, if the answer is yes, what conditions would underpin a ‘principled’ criminalization,⁵ the practice of circumventing the prohibition by carrying out maternity surrogacy abroad has come to surface, with its potential to impair the effectiveness of the domestic rules. Hence, the different but related issue of the application of domestic criminal law to surrogacy practiced outside the borders has emerged at the centre of the renewed discussion at political level. Meanwhile, right-wing parties gained political majority and wanted to nail their colours to the mast: the extraterritorial application of the criminal statute became (oddly enough) an identity flag. Consequently, how to widen the spatial scope of the prohibition, especially to avoid the *fraude à la loi* (evasion in law), has become the focus of a particularly virulent criminal policy debate. In fact, some draft bills have

focus upon the offence definition of surrogacy, Antonio Vallini, ‘*La schiava di Abramo, il giudizio di Salomone e una clinica di Kiev: contorni sociali, penali e geografici della gestazione per altri*’ (2017) *Diritto penale e processo* 899 (especially 902–7); Alessandro Spena, ‘*Una storia semplice? Surrogazioni, alterazioni, falsificazioni*’ 37(4) (2015) *Rivista italiana di medicina legale* 1542.

³ Under the general provisions in force, this fact is punishable even if committed abroad under the general rules of transnational criminal law, with a few limits provided for by the same rules (more commonly referred to as transnational criminal jurisdiction, *Strafanwendungsrecht, derecho penal internacional*; but see Alberto di Martino, *La frontiera e il diritto penale. Natura e contesto delle norme di ‘diritto penale transnazionale’* (Giappichelli 2006)); Florian Jeßberger, *Der transnationale Geltungsbereich des deutschen Strafrechts* (Mohr Siebeck 2011). Articles 9 onwards of the Italian criminal code confer jurisdiction on Italian authorities over surrogacy committed by an Italian citizen abroad, provided that a request is lodged by the Minister of Justice (or a complaint by the offended person; but this is not a concretely relevant limit in this case). If the fact is committed by a foreigner, on the other hand, it is not punishable because the penalty limits are lower than those laid down for the punishability of the fact of the foreigner abroad. Indeed, offences committed ‘between’ foreigners abroad are punishable under Italian law – only at the request of the Minister – if the person is in the territory of the state, if it is a crime for which a prison sentence of not less than three years is prescribed, and if extradition is not granted or is not accepted by the government of the state in which the fact was committed or of the state of nationality of the perpetrator. Moreover, it must be acknowledged that surrogacy as an ‘act type’ is not an act committed to the detriment of anyone, nor can it be considered to have been committed to the detriment of the state. On the concept of act type (*condotta tipica; Tatbestandliche Handlung*) as hinting at ‘whole categories of conduct,’ envisaged by an offence definition, see Ambrose YK Lee and Alexander F Sarch, *The Moral Prerequisites of the Criminal Law* (CUP 2023) 15.

⁴ See, for example, Naomi Pfeffer, ‘Eggs-ploiting women: a critical feminist analysis of the different principles in transplant and fertility tourism’ (2011) 23 *Reproductive BioMedicine Online* 634, 638.

⁵ Here, the term ‘principled’ criminalization means a criminalization that follows a set of principles that underpins the legitimacy of the criminal law and constrain the discretion of the legislature in criminalizing human behaviour: see Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2008), especially ch 2 (‘internal constraints on criminalization’) and ch 3 (‘external constraints’). Of course, there is a staple of literature on the subject of overcriminalization even in continental countries. Here I will limit myself to mentioning (within Italian and Spanish scholarship) the foundational book by Luigi Ferrajoli, *Diritto e ragione: Teoria del garantismo penale* (Laterza 1990); Carlo Enrico Paliero, ‘*Minima non curat praetor*’: *Ipertruffa del diritto penale e decriminalizzazione dei reati bagatellari* (Cedam 1985); Jesús-María Silva Sánchez, *La expansión del derecho penal: Aspectos de la política criminal en las sociedades postindustriales* (2nd edn, Civitas 2001). As regards the instant case, some argue that criminalization should only encompass commercial surrogacy.

been tabled to punish the act committed abroad, either without limits,⁶ or when the act is committed on foreign soil by Italian citizens.⁷

Gradually, the idea of introducing a special provision on extraterritorial jurisdiction based on the nationality principle has gained momentum. Unrestricted resort to this jurisdictional ‘nexus’ specifically removes the procedural obstacles to punishment, allowing Italian authorities to prosecute and adjudicate any act of surrogacy committed by a citizen abroad beyond the ordinary requirements, and, following a widespread interpretation of the rule based on the intent of the draft proposal, regardless of the double criminality requirement. Eventually, the new law sets forth that, ‘[i]f the acts ..., with reference to maternity surrogacy, are committed abroad, Italian citizens are punished according to Italian law.’⁸

This way, the general question of whether it is legitimate to criminalize surrogacy has somehow smoothly morphed into the conceptually and practically different question about the legitimacy of extending such prohibition to acts committed abroad, especially where surrogacy is deemed lawful by the local state. Nevertheless, the choice in favour of extraterritorial punishment understandably exacerbated the debate on the criminalization decision: the two aspects, namely the criminalization decision and its spatial scope, are considered inseparable to the extent that opinions on (and criticisms against) the first are prerequisite of, or at least instrumental to, arguments about the second.

1.2. Every Territory is a Border, Every Border is a Territory: Scope and Purpose

This contribution aims at disentangling the issue of criminalization from that of the legitimacy of extraterritorial punishment and focuses on the latter. A clarification is appropriate at this point. I do not intend to directly address the general issue of whether criminalization of surrogacy is consistent with the most modern and rigorous criteria of criminalization.⁹ Rather, I acknowledge how the case of surrogacy and its labelling as a criminalizable moral wrong has triggered a renewed debate on heads of jurisdiction in criminal matter. In Italy, I maintain, scholars seem mainly concerned with classical operational aspects of the topic: content and scope of the double criminality requirement; interstate cooperation especially in evidentiary issues, and the like.¹⁰ I take a slightly different route, underlining that at the core of the contingent discussion lies the more fundamental question about the philosophical legitimacy of the principles of transnational criminal law. In fact, this controversial issue constitutes a particularly suitable vantage point for reflecting on how deeply the issue of extraterritorial

⁶ That is, by whoever and wherever committed, without any previous authorization by the competent political authority (n 2); see ‘Proposta di legge d’iniziativa dei deputati Meloni [ed altri]’, in *Camera dei deputati: Atti parlamentari*, XVIII Legislatura, C-306: ‘Le pene stabilite ... si applicano anche se il fatto è commesso all’estero’; ‘Proposta di legge d’iniziativa dei deputati Varchi ed altri’, in *Camera dei deputati: Atti parlamentari*, XVIII Legislatura, C-887: ‘le pene previste ... si applicano anche se il fatto è commesso all’estero.’

⁷ ‘Proposta di legge d’iniziativa dei deputati Carfagna ed altri’, in *Camera dei deputati: Atti parlamentari*, XVIII Legislatura, C-2599: ‘Il reato di surrogazione di maternità è perseguibile anche quando è commesso in territorio estero da un cittadino italiano’; ‘Proposta di legge d’iniziativa dei deputati Candiani [ed altri]’, in *Camera dei deputati: Atti parlamentari*, XVIII Legislatura, C-342: ‘Al fine di ostacolare qualunque pratica che possa configurarsi come traffico commerciale di bambini, è vietato accedere alla surrogazione di maternità all’estero. Al cittadino italiano che ricorre alla surrogazione di maternità all’estero si applicano le pene previste ...’; ‘Proposta di legge d’iniziativa dei deputati Lupi [ed altri]’, in *Camera dei deputati: Atti parlamentari*, XVIII Legislatura, C-1026: ‘Le pene stabilite ... per la surrogazione di maternità si applicano altresì quando il fatto è commesso all’estero da cittadino italiano’.

⁸ Law No 169 (4 November 2024).

⁹ See Husak (n 5); Lee and Sarch (n 3), especially 10–3.

¹⁰ See, for instance, Gianluigi Gatta, ‘Surrogazione di maternità come reato universale? A proposito di tre proposte di legge all’esame del Parlamento’ (2023/5), in *Sistema penale*, 153; Marco Pelissero, ‘Surrogazione di maternità: la pretesa di un potere punitivo universale’ (2021/2), in *Diritto penale contemporaneo*, 30; for a deeper analysis, see the thoughtful article by Antonio Vallini, ‘La rana che voleva farsi bue e il reato di surrogazione di maternità che voleva farsi universale’, in *GenIUS* (2024) <https://www.geniusreview.eu/wp-content/uploads/2024/02/Vallini_Rana.pdf> accessed 11 March 2025.

jurisdiction is intertwined with the philosophical foundations of the spatial and personal remit of criminal law.

Raising the issue of legitimacy (or legitimation) in this context, beyond a mere analytical or expository endeavour, means striving to explain both criminal law's territorial ambit and (extra-)territorial jurisdiction according to a general account of criminal law. In other terms, it is necessary to inquire what principles are coherent with the nature of, and the values protected by criminal law itself as a mechanism of 'punishing,' or, more precisely, of allocating individual responsibility to alleged wrongdoers.

One distinctive feature of the issue at hand is the intersection of two planes of legitimation.

The first pertains to the legitimacy of the heads of jurisdiction with special reference to the nationality (or 'active personality') principle but also, as we shall see, to the otherwise seemingly uncontroversial territoriality principle. Whilst scope and content of these criteria of jurisdiction are rather uncontroversial in the penal doctrine or 'legal theory' (*Strafrechtswissenschaft*),¹¹ they have come under some radical criticism by proponents of a growing current in criminal law 'philosophy' (*Strafrechtsphilosophie*), whose claims would become more forceful in a subject matter pregnant with moral significance. According to this orientation in scholarship, the positivistic consideration of actual widespread legal acceptance of those 'genuine links,' under both domestic and international law, is not sufficient to grant justification. Extraterritorial criminal jurisdiction should be rather justified from a critical perspective, which welds the broad issue of the scope of criminal law to the fundamental principles of this body of law. Conventional analytical accounts of legal theory about the rationale not only of the nationality principle but of all principles of jurisdiction – above all, the territoriality principle – have come under serious criticism.¹² Within this broader horizon of reflection on the allocation of the authority to punish, this paper will take issue with both analytical and philosophical objections to the active personality principle and to extraterritorial jurisdiction itself.

The second avenue of reflection, following a critical assessment of some authoritative philosophical accounts that question the very legitimacy of extraterritorial jurisdiction itself, tentatively explores the viability of a paradigm shift in conceptualizing the spatial scope of criminal jurisdiction beyond the geographical meaning of 'territory,' deeply enshrined in the history of this body of law. Deeply enshrined, admittedly, but with the crucial qualification made by Lindsay Farmer that:

... to apply [the principle of territoriality] not only had to be determined where a crime had taken place, but also that there was a *relation between the conduct and the norms of the broader community* in the name of which the law was enforced. By the late eighteenth century, this was, in most cases, straightforward: the territory was understood in geographical terms as the territorial nation state.¹³

¹¹ Recalling Alf Ross, *On Law and Justice* (University of California Press 1974), by doctrine I mean any scholarship concerned with conceptual elaborations starting from concrete legal systems, irrespective of the resort to domestic or comparative perspective.

¹² For an in-depth, comprehensive analysis, see Kenneth S Gallant, *International Criminal Jurisdiction* (OUP 2022); on critical approaches to jurisdiction in international law scholarship see Shaun McVeigh, 'Critical Approaches to Jurisdiction and International Law', in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 183.

¹³ Lindsay Farmer, *Making the Modern Criminal Law. Criminalization and the Civil Order* (OUP 2016) 118–38 and especially 124, 126 (emphasis added); moreover, 'it is not possible clearly to distinguish between territory and persons as a basis for jurisdiction because the understanding of territory has always included persons and it is the articulation of the relationship between territory and persons – or civil order – that is key' (132).

In what follows, I start considering criticisms levelled against the nationality principle from an analytical standpoint.¹⁴ On the one hand, I acknowledge that most of the normative claims by legal philosophers aptly shed light on shortcomings of conventional legal theory of criminal jurisdiction. On the other hand, I maintain that those criticisms are not able to challenge the legitimacy of the nationality principle, really. In my view, these criticisms are rooted in a fundamental misunderstanding. They account for the exclusive character both of each head of jurisdiction and of each possible explanation of their rationales, whilst they are rather cumulative. I contend that asking the question of why punitive power should be specifically attributed to a particular state is important, but to rephrase it as asking: ‘Why this power is held by one state *rather* than another?’ turns out to be an ill-posed question.¹⁵ There is no such alternative, because an extraterritorial claim does not negate the legitimacy of other states’ claims based on different legitimate criteria of jurisdiction (see s 2 below). Subsequently, the analysis shifts from the analytical perspective to the philosophical, more radical objections to conventional accounts on the scope of criminal law. While a comprehensive discussion of the general conception of the punitive power is entirely beyond the limits of this paper, I will focus on the fundamental philosophical assumption that the punitive power’s legitimacy – as well as its personal and geographical limits – is to be founded in the citizen’s membership in a political community living *within* a given territory (see s 3). Finally, I tentatively propose a reinterpretation of the spatial dimension of criminal jurisdiction from a functional perspective. I argue that a functional reading of (extra-territorial) jurisdiction ultimately affects the key concept of the scope of criminal jurisdiction, that is, territoriality. Drawing upon insights from recent studies that account for a ‘complete overhaul’ of our understanding of territory,¹⁶ I suggest considering that neither citizenship nor a generic moral agency of the perpetrator alone can underpin such legitimacy; instead, the *situational specificity* of material acts performed by human beings building relationships with each other and with the legal interests of a given political community plays the pivotal role in the justificatory endeavour. Based on this functional understanding, it is argued that between territoriality and extraterritoriality there is no such thing as a rule-exception relationship. The argument goes as follows. Firstly, I will argue that extraterritoriality is a gradable concept that modulates differently in relation to the degree of importance of the public interest protected by the legal system and is signalled by, among other indicators, the extent of the threatened punishment (see s 4). Secondly, I contend that territoriality itself must be understood functionally, as jurisdiction over a *space* (see s 5). This space consists of social relations relevant to the criminal law that governs them through its own provisions. Consequently, legitimacy of (extra-)territorial jurisdiction is underpinned by a functional – rather than a geographic – understanding of the ‘scope’ of criminal jurisdiction (see s 6). Thirdly, I will sketchily show how this account could fit in the broader discussion on the ‘crisis’ of the territory and the move, conceptualized by the groundbreaking work of Teubner and Fischer-Lescano,¹⁷ towards defining jurisdiction along issue-specific rather than territorial lines. I draw largely upon the recent comprehensive work by Gail Lithgoe, who, building in turn upon interdisciplinary insights, carves out a broader theoretical

¹⁴ The term ‘analysis’ is meant here ‘in its broadest sense, ... as a process of isolating or working back to what is more fundamental by means of which something, initially taken as given, can be explained or reconstructed’, Michael Beaney and Thomas Raysmith, ‘Analysis’, *The Stanford Encyclopaedia of Philosophy* (Fall edn, 2024) <<https://plato.stanford.edu/entries/analysis/index.html#6>> accessed 1 July 2025.

¹⁵ Alejandro Chehtman, ‘Citizenship v Territory: Explaining the Scope of the Criminal Law’ (2010) 13 *New Criminal Law Review* 427, 430 (emphasis added).

¹⁶ Gail Lithgoe, *The Rebirth of Territory* (CUP 2024).

¹⁷ Andreas Fischer-Lescano and Günther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Mich J Intl L* 999.

framework on the concept of territory in international law, and explains why and how territory still matters ‘*alongside* the move to functional ordering’ (see s 7).¹⁸

2. NATIONALITY PRINCIPLE AND ITS DISCONTENTS: A SHORT REASSESSMENT OF SOME ANALYTICAL CRITICISMS

2.1 Sovereignties Clash through Prescriptive Jurisdiction?

The legitimation of the nationality principle must be rethought on the analytical level, before addressing its philosophical hold. Criticisms of the various accounts that are cumulatively provided in criminal legal theory to justify the use of the nationality principle are meritoriously pushing theorists to reconsider in depth the philosophical foundation of this head of jurisdiction beyond conventional accounts. This is all the more compelling when criminalization refers to a moral wrong which is not universally recognized, as it does in the instant case of surrogacy. In such an instance, extraterritorial jurisdiction may appear already at the very legislative level, that is, as jurisdiction to prescribe, expressive of a colonial attitude hardly compatible with a fair interpretation of the internationally recognized head(s) of jurisdiction.

Indeed, a traditional objection to the nationality criterion maintains that prescriptive jurisdiction abroad potentially creates international tensions and encroaches the authority of other political communities. This should be true even more when there is disagreement over the values that extra-territorial jurisdiction is intended to protect. However, I maintain that this objection could only negate the *opportunity* of the nationality principle, whilst failing to challenge the very *legitimacy* of this head of jurisdiction. First, it is necessary to reiterate the importance of distinguishing between establishing and enforcing criminal jurisdiction. As to this conceptual distinction, the famous decision in the *Lotus* case is still to be followed.¹⁹ As Neil Boister notes, this distinction ‘is only rarely drawn in common law countries ... though it is a sharp distinction in civil law countries.’²⁰ On this basis, while it is true that the extension must be reasonable (that is, it must presuppose the existence of a certain link – or nexus – between the crime and the prescribing state), it is widely acknowledged that principles of jurisdiction recognized in international law constitute per se such a reasonable link. Active nationality principle is undoubtedly one of such principles upon which the prescriptive jurisdiction can be legitimately based.²¹

Moreover, the principle of active personality is quite different from the principle of universality, which would underpin the application of a domestic provision to whomever performs the prohibited behaviour, wherever. The principle of active personality appears, in this respect, to be *limiting to* citizens the binding nature of value judgments underpinning the domestic criminalization made by their political community.

From this perspective, it can transpire, as a matter of fact, that establishing extra-territorial jurisdiction has material effects abroad, but it must conceptually be kept distinct from these.²² Hence, the mere fact that the concerned states see things differently is not apt to delegitimize the principle of active personality. Actually, citizens of the territorial state, as well as other foreigners, are certainly not punished, and would not be punished even if they were in the state claiming jurisdiction, precisely because it exercises it only against its own citizens. Thus, undue interference through prescriptive jurisdiction in the authority of another political community, that is, in the sovereignty of another state, as well as in the interests of the citizens of that state, is not discernible.

¹⁸ Lythgoe (n 16) 6 (emphasis in original); for a reassessment of extraterritoriality see now: Micheál Ó Floinn and others (eds), *Transformations in Criminal Jurisdiction: Extraterritoriality and Enforcement* (Hart 2023).

¹⁹ Permanent Court of International Justice *France v Turkey* PCIJ Report Series A No 10 (1927).

²⁰ Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, OUP 2018) 246.

²¹ For example, Douglas Guilfoyle, *International Criminal Law* (OUP 2016) 31.

²² Boister (n 20) 246: ‘the establishment of extraterritorial jurisdiction must be distinguished from effects that domestic steps have abroad.’

Applying these considerations to the case of gestational surrogacy, it may be observed that an indirect actual effect of the nationality principle might be that fewer Italian citizens will be clients of the territorial state's clinics. But the claimed prejudice to the commercial interest by private individuals or entities – and possibly also by the territorial state – in attracting foreign clients is, in the first place, a mere factual element that does not affect the content of state's sovereignty. Second, if this interest had the capacity to delegitimize the value judgment made with respect to its citizens by the prescribing state, this would paradoxically end up affirming the extraterritoriality of the entrepreneurial choices exercised or permitted by the territorial state for its citizens. For them to have an unfettered interest in making entrepreneurial choices aimed at foreign individuals would be tantamount to asserting the extraterritorial validity of these choices and the related legal or regulatory framework vis-à-vis anyone, and thus in a legal claim of extraterritoriality.

In conclusion, it must be held that the mere establishment of extraterritorial prescriptive jurisdiction on domestic crimes cannot in itself be considered an unlawful interference in the authority and sovereignty of the territorial state.

2.2 'Crazy Law' Thought Experiment: Risks of Colonialism through Active Personality Principle?

What has just been observed would help counter a further, connected objection that stresses the inherent "colonial" potential of the nationality principle. That is, a legal order could claim to exert control over its own citizens living abroad through liberticidal laws with extraterritorial effect (in particular, some "crazy laws" in striking violation of human rights), which the local state would not recognize under any terms.²³ Danielle Ireland-Piper, for instance, observes in a similar vein that '[n]ationals of states who do not guarantee those same human rights could equally assert jurisdiction over the conduct of their nationals overseas, thereby depriving a person of those rights.'²⁴ This risk, it could be argued, would be only curbed by denying the legitimacy of the criterion as such. One instance of such a situation is provided by the Canadian Supreme Court in *R v Hape*, a (contested) decision on the extraterritorial application of the Canadian Charter of Rights and Freedom: 'Parliament might pass legislation making it a criminal offence for Canadian nationals to smoke in the streets of Paris, thereby exercising extraterritorial prescriptive jurisdiction on the basis of nationality.'²⁵ Many other examples could be provided, especially in the context of contemporary multicultural societies.

However, I maintain that delegitimizing this jurisdictional link would not be the solution to the problem raised by the objection. Firstly, it is worth recalling that no jurisdiction to enforce domestic criminal law extraterritorially is allowed, so a foreign national would still be protected on the territory of residence against any coercive action by the state claiming jurisdiction.²⁶

Secondly, other forms of safeguards would also be provided by various legal instruments, such as the statutory prohibition of, or the governmental decision not to grant extradition; the possibility of seeking formal international protection against the risk of

²³ I would like to thank Neil Boister for raising this objection and for a fruitful discussion on this point after the presentation of an earlier draft of this paper at the TCLR Conference in Windsor, Ontario (June 2024).

²⁴ Danielle Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?' (2012) 13 MJIL 1, 13.

²⁵ *R v Hape* [2007] 2 RSC 292, 328, para 63. See critically, for instance, Ireland-Piper (n 24) 20–2, with further references at fns 69 and 75.

²⁶ Suffice here to quote the words of the Supreme Court of Canada in *R v Hape* (n 28) 327, para 60: 'The nationality principle is not necessarily problematic as a justification for asserting prescriptive or adjudicative jurisdiction in order to attach domestic consequences to events that occurred abroad, but it does give rise to difficulties in respect of the extraterritorial exercise of enforcement jurisdiction. Under international law, a state may regulate and adjudicate regarding actions committed by its nationals in other countries, provided enforcement of the rules takes place when those nationals are within the state's own borders.'

persecution; and the like. The actual difficulty, thereby, would arise only if the person willingly returns to the state of which that person is a citizen. Indeed, since this thought experiment assumes that the targeted person has only abode or residence in the place of the act, the territorial state could not provide, for example, the usual diplomatic protection afforded to its citizens. Yet, in this case, simply asserting the illegitimacy of the jurisdictional link would not be an adequate solution at all, as this declaration would amount to a mere *flatus vocis*, that is, to a prohibition deprived of direct means of enforcement. Admittedly, the state that enacted the extraterritorial “crazy law” would likely not recognize the ban.

Moreover, and more importantly, it can be contended that the problem at hand concerns a different and broader aspect which is not adequately captured by restraining the discourse to jurisdictional issues. If one deals with a criminal law which is in flagrant violation of human rights and claims extraterritorial validity to boot, the main concern of those who aspire to the protection of rights is not, at the earliest, to discuss the legitimacy of its spatial scope, but rather that of its criminalization decision. To deal with this issue lies beyond the scope of this article.

2.3 From the Duty of Allegiance to a Human Rights-Oriented Reconceptualization

A further criticism could be levelled against the nationality principle as contingently applied by Italian legislature in the concrete case of surrogacy. Under the relevant provision no further limitations are provided, such as the gravity threshold of the threatened penalty, the double criminality requirement, the extradition’s refusal or non-acceptance.²⁷ Such unrestricted extraterritorial application of the active nationality principle would confirm the broader general criticisms against the risks associated to the potentially indiscriminate use of such jurisdictional link.

A reply must not be too difficult if one sticks to a strictly legal-positivistic account. Indeed, it is usually recognized that international law, as it currently stands, does not provide for any rule against its indiscriminate use.²⁸ This statement can certainly be taken at face value even if conventional explanations of the foundation of this principle appear no longer tenable in their original form.

This is true in the first place for the general *duty of allegiance*, perhaps the most objectionable among the analytical explanations of the nationality principle. The citizens’ bound to a legal order cannot be equated with a general, unlimited duty of loyalty and obedience to the state – a philosophical-political attitude demanded from ‘subjects’ (*Untertane*) by an absolute sovereign, like the Nazi totalitarian regime (and the fascist one, to speak of Italy). This opinion is nowadays largely uncontroversial in the penal theory.²⁹ In this vein, a ‘realignment in the relationship between the citizen and the state’ is necessary, as Paul Arnell has pointed out. The relationship between the citizen and the state must be strengthened,

²⁷ On extradition’s rules see the recent publication by Harmen van der Wilt, *The Law and Practice of Extradition* (Routledge 2022); specifically on protection of rights in transnational criminal proceedings see, Martin Böse, Maria Bröcker, and Anne Schneider, *Judicial Protection in Transnational Criminal Proceedings* (Springer 2021).

²⁸ Jeßberger (n 3) 240; among general international law textbooks see for example Malcolm N Shaw, *International Law* (9th edn, CUP 2021), pointing out that ‘the common law countries have never protested against the extensive use of the nationality principle to found jurisdiction in criminal matters by other states’ (Kindle edn, 570); Christopher Staker, ‘Jurisdiction’, in Malcolm D Evans (ed), *International Law* (5th edn, OUP 2018) 289–315, stressing that ‘this type of jurisdiction has a longer history than jurisdiction based upon the territorial principle’ (299–300); Jan Klabbers, *International Law* (4th edn, CUP 2024) 100. See extensively on the ‘Standard Model’ of the nationality principle also Gallant (n 12), ch 5 (181), see moreover ch 9 for an in-depth discussion on the ‘challenges to the Standard Model’ (528).

²⁹ Jeßberger (n 3) 242; Markus D Dubber, ‘Citizenship and Penal Law’ (2010) 13 *New Criminal Law Review* 190, 207–14. The opposite position is taken by Michael Pawlik, *Person, Subjekt, Bürger. Zur Legitimation von Strafe* (Duncker&Humblot 2004). It has to be pointed out that, from a strict, positivistic account, it is still uncontroversial that ‘international law allows each nation-state to determine whom it regards as citizens ... because the classification is of the essence of sovereignty’; see, for example, Kim Rubenstein, ‘Citizenship in an Age of Globalisation: The Cosmopolitan Citizen?’ (2007) 25 *Law in Context* 88, 93.

according to Arnell, insofar as the citizen is guaranteed a ‘constitutional framework of civil and political rights, which also encourage them to better fulfil their responsibilities.’³⁰

Along this line of thought, I would account for an updated reading of the resort to the nationality principle. In this vein, I suggest considering this principle in the abstract as one of the options (albeit not exclusively) whereby the state can fulfil human rights obligations, or at least a commitment to human rights that, due to the characteristics of the contemporary world, extend beyond national borders. Indeed, as Mark Gibney and Sigrun Skogly underline in their effort to theoretically underpin extraterritorial human rights obligations of states,³¹ in an increasingly interdependent and globalized world, the actions of public and private international actors can heavily affect the lives and living conditions of individuals anywhere on earth. Against this background, triggering extraterritorial jurisdiction based on a human rights-oriented interpretation of the active nationality principle could bring about a protective effect beyond a specific obligation under international law. This protection can operate in two directions. First, it enables safeguarding the protected interests of vulnerable persons abroad *against* the behaviour of natural or legal persons and their actions which the state seeks to control beyond ‘its relatively narrow self-interested territorial purposes.’³² Second, it might enhance the protection of human rights of the alleged perpetrator in a reality of multiple systems with a different degree of commitment to human rights.³³

This line of argument should not be understood as descriptive of the reality nor naively optimistic as regards the task of criminal law in the broader context of political, social, and economic relations in a globalized arena, but rather in the decidedly deontological perspective of raising the overall protection of rights whenever possible, even by resorting to the assets of guarantees typical to criminal law. I intend to argue that the concept of citizenship as a trigger of extraterritorial jurisdiction can deploy a twofold function, that is, protective of rights and compensative of inequalities.

The protective function is, in turn, multifaceted. Looking, on the one hand, at the side of the individual or legal entity subject to jurisdiction, the protective function is twofold. Firstly, as mentioned just above, the human rights-oriented interpretation of the jurisdictional claim based upon the nationality principle requires the prosecuting state to soundly ensure the due process of law (both in its substantive and procedural limb). This would mark the distinctiveness from other states that would have jurisdiction over the same facts.³⁴ This way, best practices in the protection of rights can be publicly highlighted, possibly entailing the effect of raising the standard of protection of rights *in* the state that claims concurrent jurisdiction on a different link. This is the positive side of a general mechanism of extraterritorial practices by state and non-state actors known to political scientists:

... being on the receiving end of extraterritorial assertion of legal authority may prompt governments with generally cooperative relations to initiate or accelerate

³⁰ Paul Arnell, ‘The Case for Nationality Based Jurisdiction’ (2008) *International and Comparative Law Quarterly* 955, 960.

³¹ M Gibney and S Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010). The fact that behaviour occurs outside the domestic jurisdiction might easily become an excuse: see the book review by G Basnet, (2011) 11(4) *Human Rights Law Rev* 800, 803. On the ‘Human Rights-Led penal Extraterritoriality’ see, however, Mattia Pinto, ‘Human Rights as Penal Drivers across the World’, in Micheál Ó Floinn and others (eds), *Transformations in Criminal Jurisdiction: Extraterritoriality and Enforcement* (Hart 2023), especially 146–8 and 158–62.

³² Arnell (n 30) 960.

³³ *ibid* 959: ‘a method whereby these rights could be applied to those who are accused of crimes abroad and may not otherwise be afforded this protection.’

³⁴ This issue became extremely relevant in the EU context when decisions were being repeatedly issued not to execute European Arrest Warrants due to insufficient safeguard of human rights in the issuing state: see extensively on that, Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart 2021) especially 63–77 and 98–106.

efforts to bring their laws in line with those of the extraterritorial regulator, or to undertake international-level coordination around the issue.³⁵

Secondly, extraterritorial jurisdiction might underpin the effectiveness of crucial, non-criminal regulatory instruments often based on public-private cooperation to enforce compliance. Such mechanisms especially govern, for example, economic activities abroad. In this respect, consider the case of due diligence requirements in supply chains of a transnational nature.³⁶

On the other hand, it is important to highlight the protective function that triggering human rights-oriented extraterritorial jurisdiction might accomplish for the benefit of non-privileged citizens: the compensative function. This attitude must be briefly explained against the backdrop of the authoritative, strong position advocated against the current dimension of citizenship especially by Dimitry Kochenov. Citizenship is the key instrument to set up and preserve ‘differences in the quality of the world’s nationalities.’³⁷ It serves as a ‘totalitarian excuse for ethno-racist exclusion from rights all around the world.’³⁸ Indeed, in Kochenov’s view, ‘today’s citizenship function precisely is to promote racism in the world, where rights are de facto distributed based on blood. Those, whose blood is good enough, get the privileged citizenship of the global West.’³⁹ Citizenship, and especially EU citizenship awarding a multilayered protection to EU citizens and other so-called super-citizens of Western countries, is discriminatory of other citizens (mainly from formerly colonized parts of the world), as this is the pivotal legal device for ‘locking the population’ of formerly colonized and ‘non-civilized’ parts of the world ‘into a territory of no opportunity at all.’⁴⁰

Against this backdrop, let us now consider the mode of operation and the effects of the human rights-oriented conception of the nationality principle: protection and compensation. I suggest that adjudicating alleged offences – although neither unique nor the best, definitive, or even the most appropriate option – would nevertheless be one visible means of compensating that specific, indeed limited part of global inequalities that makes a victim vulnerable, where vulnerability enables or eases the commission of criminal offences against those victims. Hence, extraterritorial jurisdiction would entail a limited but possibly eloquent rebalancing of those discrepancies, even though in a seemingly paradoxical way. Consider, for instance, the topic of sexual crimes committed against children abroad; sexual exploitation of women and related crimes such as trafficking; or again, to return to the example of surrogacy that is the occasion of this study, the situations of commercial surrogacy in which surrogate mothers are essentially subjected to exploitation of their body, to which they consent to supply economic needs in the broadest sense, as controversial as the issue is.⁴¹

³⁵ Tonya L Putnam, ‘Political science and extraterritoriality’, in Austen Parrish and Cedric Ryngaert (eds) *Research Handbook on Extraterritoriality in international Law* (Edward Elgar 2023) 70.

³⁶ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (16 December 2022) OJ L322/65, 15; see, for instance, Vincenzo Mongillo, ‘The Jurisdictional Reach of Corporate Criminal Offences in a Globalised Economy: Effectiveness and Guarantees “Taken Seriously”’, in: Micheál Ó Floinn and others (eds), *Transformations in Criminal Jurisdiction: Extraterritoriality and Enforcement* (Hart 2023) 85.

³⁷ Dimitry V Kochenov, *Citizenship* (MIT Press 2024) 10.

³⁸ See also Dimitry V Kochenov and Sara Ganty, ‘EU Lawlessness Law: Europe’s Passport Apartheid From Indifference To Torture and Killing’ (2 January 2023) Jean Monnet Working Paper No 2/2022 (NYU Law School), 13 <<https://ssrn.com/abstract=4316584>> accessed 19 August 2024.

³⁹ For this quotation, see the interview on Review of Democracy, ‘European Citizenship, Passport Apartheid and Enlargement: What Is the Future of the EU? – Professor Kochenov’s Approach’ (*RevDem*, 2024) <<https://revdem.ceu.edu/2024/06/21/european-citizenship-passport-apartheid-and-enlargement-what-is-the-future-of-the-eu-professor-kochenovs-approach/>> accessed 19 August 2024.

⁴⁰ *ibid.*

⁴¹ For a comparative overview of the attitude of legal systems of the world, see Jens M Scherpe, Claire Fenton-Glynn, and Terry Kaan, *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019); for a review of the objections to surrogacy based on commodification, exploitation, gender inequality, and children’s interests, hence decidedly in favour of the ‘right to sell and buy sexual reproductive services by way of surrogacy contracts,’ see Cécile Fabre, *Whose Body*

If we start from the premise that the system where the crime is committed does not adequately protect the life, integrity, or living conditions of its citizens, we are faced with vulnerable victims for structural contextual reasons. These marginalized individuals are precisely those ones for whose protection Kochenov radically challenges current citizenship practices. Yet such vulnerable persons are, at the same time, precisely those who might instead be protected by the human rights-oriented version of the active personality principle. On this basis, not to take into consideration the different – absent, or flawed – *lex loci* while enforcing extraterritoriality, alongside being acknowledged by the current state of international law (see above, para 1) acquires an intrinsic rationality beyond a strict positivistic account. In fact, the protective function can deploy its most expansive potential in a situation in which, for whatever reason, there would be no adequate protection of human rights. For instance, because ‘the authorities of the *loci delicti* were unable or unwilling to prosecute the crime due to financial constraints, technical or evidential difficulties, the sophistication of the crime etc.’⁴²

In other terms, the shortcomings in the protection of vulnerable victims’ human rights by the territorial state could be rebalanced through the exercise of extraterritorial criminal jurisdiction (which in turn could and should be accompanied, in the ‘best of all possible worlds,’ by protective measures activated precisely under the very presupposition that they are victims of a transnational crime). This exercise would express the compelling acknowledgment that the lack or insufficient protection of rights by the territorial state is not a reason to authorize citizens of other states to violating them with impunity.

Two objections could be raised against the line of argument used so far. On the one hand, it is controversial that states do have, as a matter of international human rights law, any obligations towards individuals who are outside their jurisdiction on the basis of acts perpetrated by the state’s own nationals. This statement is correct but misses the point, because I argue that triggering the principle of nationality for the sake of protecting alleged vulnerable females is a matter of political choice, not of an international law *obligation*. In other terms, to consider certain individuals as vulnerable is a political choice consistent with a previous value choice (for example, about what is consistent with a moral concept of human dignity). This axiological assessment can certainly be made by a given political community independently of any international obligation. In addition, it should be acknowledged that criminalization is not aimed at *directly* protecting individuals who are outside the jurisdiction; therefore, it does not interfere with the political community of the territorial state.

is it Anyway? Justice and the Integrity of the Person (OUP 2006) especially ch 8 (where the word ‘right’ is intentionally used ‘to mean “claim” or “power”’, 186, – a fairly debatable use, though); from a non-legal perspective (mainly sociological, anthropological, bioethical), with different orientations, I only quote here, Veronika Siegl, *Intimate Strangers: Commercial Surrogacy in Russia and Ukraine and the Making of Truth* (Cornell UP 2023); Vida Panitch, ‘Commodification and Exploitation in Reproductive Markets: introduction to the Symposium on Reproductive Markets’ (2016) 33 *Journal of Applied Philosophy* 117; Christine Straehle, ‘Is there a Right to Surrogacy?’ (2016) 33 *Journal of Applied Philosophy* 146 (discarding a right to assisted procreation, but accounting for a ‘contractual right’ with attention to vulnerability factors: see especially 151 onwards, 153: ‘The interests of surrogates not to be vulnerable ought to outweigh the interest of contractual freedom’); Stephen Wilkinson, ‘Exploitation in international paid surrogacy arrangements’ (2016) 33 *Journal of Applied Philosophy* 125; Amrita Pande, ‘Transnational commercial surrogacy in India: gift for global sisters?’ (2011) 23 *Reproductive BioMedicine Online* 618; Pfeffer (n 3); Elly Teman, ‘The social construction of surrogacy research: An anthropological critique of the psychosocial scholarship on surrogate motherhood’ (2008) 67 *Social Science & Medicine* 1104 (methodologically stigmatizing social researchers’ ‘tenacious pursuits ... to find the “real reason” for the surrogate’s choices, even when study after study reveals that surrogates are “normal” women who choose to become surrogates for fairly basic reasons’: 1110); but see more cautiously on methodological challenges, for example, Marcia C Inhorn, Zeynep B Gürtin, ‘Cross-border reproductive care: a future research agenda’ (2011) 23 *Reproductive BioMedicine Online* 665; of great interest, even if related to a different market for human materials, is the article by John M Dooley and Emily A Gallagher, ‘Blood Money: Selling Plasma to Avoid High-Interest Loans’ (2024), 37 *Review of Financial Studies* 2779, especially 2795–9, 2812.

⁴² Arnell (n 30) 961.

On the other hand, one could argue that the human-rights based argument does not address the question of who has the right to establish whether an individual is vulnerable, and according to which parameters vulnerability should be determined.

This objection is not decisive either, for two reasons. First, determining who the vulnerable (or the most vulnerable) individuals are, is less a legal judgment than a value judgment. There is no doubt that any political community has the right to affirm its own value judgments, and to attach to it the relevant legal consequences with respect to the subjects that belong to that community. These value judgments do not make any universal claim, but a relative one, that is, one that is limited to the state's own citizens (above, s 2.1). It can be acknowledged that the value judgment requires a reasonable, although not universally recognized, basis. As for gestational surrogacy, for example, such reasonableness cannot certainly be denied: the prohibition of commercial surrogacy is widespread, hence the problem would essentially arise for altruistic surrogacy. But even in this latter case, reasonableness of the value judgment based, for example, on human dignity is not implausible.

The second, perhaps more important reason, is that the criticism seems to presuppose that the argument based on human rights is the unique argument supporting the legitimacy of the principle of nationality. However, as already emphasized above, this avenue of arguing for legitimacy is not an exclusive one. Consequently, one can acknowledge that a given political community is certainly free, through its own democratic instruments, to consider gestational surrogacy schemes in the interest of the individuals who live within that community. But nothing takes away from this freedom the fact that another (foreign) political community considers some individuals as vulnerable (or in any case wrongly treated because they are treated in a way contrary to human dignity) and legitimately responds by criminalizing the behaviour of its own citizens, without attaching any penal consequences for the citizens of the territorial political community.

2.4 Bridging a Divide: Citizenship, Residence, and the Necessity of a Case-by-case Assessment

The human rights-oriented conception of the active personality principle may overshadow other traditional discussions in criminal theory on the relationship between citizenship and extraterritoriality. However, it is appropriate to touch briefly upon these aspects as well, not so much because they are still debated within criminal law theory, but because they can receive new insights from the reference to the foundational character of the respect for human rights enforced *through* criminal law and safeguarded *within* criminal law.

Consider, for instance, the contention that the concrete and actual relationship of a person to a legal order cannot be determined based on a purely formal *status*, such as that of citizenship, so that punitive power could be only justified with respect to a concrete and actual relationship between an individual and the legal order, such as that expressed, for example, by residence.⁴³

It has been observed that in a globalized world, the process of cultural-normative identification occurs no longer primarily through citizenship, as formalized membership in a collectivity, but rather on the basis of a subject's 'geographic link' to a legal order.⁴⁴ This is an accurate objection to the nationality principle which itself relies on or at least refers to certain domestic transnational criminal law (TCL) rules framed accordingly, but one that requires some qualifications. First, residence itself can have different forms, which may show even

⁴³ Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (OUP 2010) 61; for a proposal to afford legal relevance to domicile in a context of transnational migrations, see extensively Nicola Beyer, *Personelle Strafgewalt: Ein Plädoyer für das Domizilprinzip im Lichte grenzüberschreitender Migration* (Mohr Siebeck 2020).

⁴⁴ Jeßberger (n 3) 243: 'Näheverhältnis', 'enge Verbundenheit' of the citizen to their 'Heimatstaat', 251: 'geographische Bindung des Menschen an eine Rechtsordnung' as regards the domicile, *Domizilprinzip*.

substantially different degrees of closeness to the state (from study to working permit, short-term or long-term residence, domicile, residence split between different places, and so on). This variety of forms calls for a more cautious approach as to its possible significance as a univocal belonging to a legal order, hence its being about an appropriate substitute for citizenship in cross-border cases.

Overall (this is the second qualification), it is worth considering that residence requires a case-by-case assessment of the concrete life situation of the individual concerned, rather than being an abstract criterion; this ontological difference from the requirement of citizenship, however, does not *logically* compel to deem it *alternative* to that of citizenship. As it is not an either-or situation, it seems pointless to contrast in the abstract the element of residence (as a substantially legitimate link between the individual and the given polity) with citizenship (as a mere formal status), as if the former carried a stronger axiological (legitimizing) value vis à vis the latter. Rather, it would be more fruitful to acknowledge that referring to the residence criterion in addition to citizenship helps highlight the necessity of a case-by-case consideration in enforcing domestic law extraterritorially.

When I refer to the case-by-case solution in this specific context, I mean to emphasize the need to assess the individual circumstances of the person who engages in criminally relevant behaviour in light of the fundamental principles of criminal law that regulate and limit the use of force by the public authority entitled to punishment (for example, materiality that is, requirement of *actus reus*; culpability, or at least individual causation of prohibited results; non-retroactivity of both criminal statutes and judicial decisions). The professional behaviour of legal actors, especially of public prosecutors and judges, should consistently reflect this methodological attitude. To put it more clearly: if criminal provisions are applied under the nationality/residence principle, it might transpire that – beyond the formal link – more substantial ties are failing in the concrete situation. In that case, appropriate mechanisms for refraining from enforcement should apply either because general principles of liability require application or because opportunity reasons are explicitly taken into consideration (even in those systems where no discretionary prosecution is envisaged). It can be maintained that this is a theoretically sound account of the structural relationship between TCL principles and general principles of criminal imputation.

2.5 Avoiding Avenues of Impunity?

A further conventional account about the rationale of the active personality principle stresses that it would serve the purpose of cooperation against crime.⁴⁵ In essence, considering that very often the state does not extradite its own citizens, the punishment of the act committed abroad by them would avoid gaps in punishability. This is the conventional rationale behind those transnational law provisions (*Geltungsbereichsnormen*) that lay out personal jurisdiction conditioned upon the requirement that the individual either cannot be extradited, or the extradition has not been either requested, or accepted. This argument is of little practical importance as to the case of surrogacy, since the main problem of extraterritorial jurisdiction

⁴⁵ I do not consider in greater detail some conventional qualifications of the broader idea of crime-fighting, reaching back to common sayings of the late Middle Ages, yet most famously expressed by Jurist Albertus Gandinus' (1250–310) aphorism: '*rei publicae interest ne maleficia maneat impunita*.' See *Tractatus de maleficiis*, under the heading: '*De pœnis reorum in genere et de percussione et insult*,' in Hermann U Kantorowicz and Albertus Gandinus, *und das Strafrecht der Scholastik* (de Gruyter 1926) II, 210. One qualification, for instance, refers to the risk of recidivism of the citizen who commits the deed abroad, usually mentioned as autonomous rationale. It follows that the domestic legal order should be entitled to counter the danger that he will commit crimes, especially crimes of the same kind, upon their return in the state territory. Against this line of argument, it has been noted that it would justify the punishment of residents only, not citizens as such, as citizenship is a formal status that could not correspond to an actual relationship with the state territory: see Chehtman (n 43) 61. Nor would the argument of *cooperation* in crime-fighting to avoid impunity be relevant, especially when the state of commission either does not envisage as a crime, or specifically authorizes, the behaviour instead prohibited by the state unilaterally extending its criminal law extraterritorially.

arises precisely whenever the state of the place does not provide for the act as a crime. However, the general criticisms levelled against this criterion still deserve close consideration, because it could happen that the act is also punishable by the *lex loci*, albeit under different conditions.⁴⁶

Especially, Alejandro Chehtman argues, in insightful contributions on the topic, the extradition argument has no bearing on the legitimacy of the nationality principle. The moral duty not to extradite the citizen is sufficient to confer the power to try anyone, but then the nationality of the perpetrator would play no significant role in the argument in favour of giving the state jurisdiction over the crime merely because the perpetrator is not extradited:

If having a moral duty not to extradite offender O sufficed to confer upon the requested state the power to punish her itself, the nationality of the offender plays no significant part in the argument in support of conferring on that state the power to punish O.⁴⁷

This argument is right in saying that ‘the power to refuse extradition and the power to punish an individual are logically independent from each other.’⁴⁸ However, inferring from this independence a more general argument against the nationality principle seems too hasty a conclusion. One could take stock of Chehtman’s observation by rather arguing that non-extradition should not be interpreted to legally *justify* the principle of nationality of itself as a head of jurisdiction. Instead, the fact that an individual is not extradited is a *factual* occurrence envisaged by the law that discards, in such an instance, a limitation to the exercise of jurisdiction on that basis; this limitation is set out precisely by the provision laying down that jurisdiction is conditioned upon the non-extradition. Hence, the connection between extradition and the nationality principle shall be considered as an operational mechanism, which has no bearing on the issue of that principle’s legitimacy.

A further conceptual objection to the use of the criterion of active personality to plug jurisdictional gaps and, in this way, to fight against impunity has been raised with respect to the scenario of acts committed on a territory over which no state has jurisdiction, the so-called *terrae nullius*. It has been observed that the interest of avoiding impunity cannot entail that ‘only the state of which the offender is a national has a power to punish her. Rather, the logical implication of this argument is that any state would have the right to exercise criminal jurisdiction over that offender for her crime.’⁴⁹ This objection, however, refers to a claim (that *only* the state of nationality has the power to punish) which is not at all implied by the reference to the principle of active personality as a legitimate basis for jurisdiction. This approach ties in with Chehtman’s bold assertion that ‘very little work has been done ... on why [the power to inflict legal punishment] should be conferred upon a particular state ... rather than another.’⁵⁰ This claim is hardly shareable, at least from a continental European perspective, considering the heated historical debate on the jurisdictional links, dating back, if not to the middle ages,

⁴⁶ This situation could be relevant as regards surrogacy too, when one state punishes only commercial, the other also altruistic surrogacy.

⁴⁷ Chehtman (n 43) 64.

⁴⁸ Chehtman (n 43) 64. The author stresses that ‘some states systematically refuse to extradite individuals in the absence of a self-assumed conventional obligation ... and this does not provide them with the power to punish offences perpetrated (both by nationals and non-nationals) in countries with which they do not have an extradition agreement. Contrariwise, states that *do* allow for the extradition of nationals also often claim ... the power to punish their nationals for offences they may have committed extraterritorially’ (emphasis in original).

⁴⁹ Alejandro Chehtman, ‘Jurisdiction’, in Markus D Dubber and Tatjana Hörnle (eds) *The Oxford Handbook of Criminal Law* (OUP 2014) 406.

⁵⁰ *ibid* 430.

(as no concept of nation state had been developed at that time),⁵¹ to the 19th century.⁵² In light of this history and the many internationally recognized ‘genuine links,’ it will undoubtedly be possible to argue that the nationality principle is *one* of the possible links on which basis states can claim jurisdiction over the act committed in the *terra nullius*. Thus, it will be rather a matter of resolving a conflict of jurisdictions than of denying the legitimacy of that principle.

2.6 *Fraude à la Loi*

Along a different line of argument, active personality principle could be legitimately exercised to counter ‘circumvention tourism.’⁵³ Against this rationale, it has been contended that ‘criminal jurisdiction over circumvention tourists ... based on the principle of nationality ... would create problems.’⁵⁴ The precise nature of such problems is not clearly identified, though. Indeed, it is claimed that it is not obvious that a citizen who, for example, has lived abroad for many years should be punished by the courts of their own state and not, for example, by the courts of the state in which he lived.⁵⁵ But this is not a pertinent objection,⁵⁶ firstly, because the latter state might not envisage the behaviour as a crime; secondly, claiming extraterritorial jurisdiction based on nationality does not amount *per se* to contesting the legitimacy of the, say, territorial state. It is rather a problem of dealing with mechanisms aimed at managing situations of concurrent jurisdiction rather than of intrinsic legitimacy of the respective claims.⁵⁷

The problem of safeguarding the requirement of the awareness of the law in force where the person is acting is obviously irrelevant with respect to these facts, because the agent acts abroad precisely for the purpose of circumventing a law knowable to them (and that they actually know). It could be argued that they are in error about the rule of transnational criminal law, that is, they are in error about the punishability of the act. The question can be debated as to whether this constitutes an error of law, excusable only if it is unavoidable, or an error of fact and therefore excluding intent (*mens rea*); yet it is not interesting to resolve it in the abstract, because it depends on the concrete subjective attitude of the individual.

More broadly, issues related to the safeguarding of human rights affect the legitimacy of the legal order concerned (if it does not allow for mitigations, exculpation, defences, and the like), rather than the head of jurisdiction itself.

⁵¹ But still see the seminal book by Henri Donnedieu de Vabres, *Introduction à l'étude du droit penal international: Essai d'histoire et de critique sur la compétence criminelle dans les rapports avec l'étranger* (Librairie Recueil Sirey 1922).

⁵² For an in-depth, insightful reconstruction of such debate at least in continental Europe, see Jeßberger (n 3) pt 2, especially 86–107.

⁵³ Ivan Glenn Cohen, ‘Circumvention Tourism’ (2012) 97 *Cornell L Rev* 1309.

⁵⁴ Chethman (n 49) 413.

⁵⁵ Chehtman (n 49) 414.

⁵⁶ The observation that in the case of *fraude à la loi*, the punishment of the perpetrator responds to ‘territorial considerations, not considerations of nationality’ seems more pertinent.

⁵⁷ On ‘Mechanisms to control conflicts of jurisdictions,’ see the proposals by: Council of Europe–European Committee on Crime problems, *Extraterritorial Criminal Jurisdiction* (Strasbourg 1990) ch 4 (31–40 of the French printed version I could consult), reprinted (1990) 3 *Crim Law Forum* 441, 468–77 <<https://link.springer.com/content/pdf/10.1007/BF01096364.pdf>>; European Law Institute, *Draft Legislative Proposal for the Prevention and Resolution of Conflicts of Jurisdiction in Criminal Matters – Report* (2017) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Conflict_of_Jurisdiction_in_Criminal_Law_FINAL.pdf> accessed 21 August 2024: see especially art 4 of the Proposal: ‘Within the Area of Freedom, Security and Justice, each Member State shall only exercise jurisdiction in respect of offences committed in its own territory as determined by national law’; the explanatory note reads as follows: ‘Territoriality is the general rule for the allocation of exercise of jurisdiction in the Area of Freedom, Security and Justice. Extraterritoriality is therefore excluded. The definition of locus delicti is left to national law. The same applies for the rules on the location of the conduct of accomplices, instigators and other participants.’ As for scholarship in the EU context, see for example Martin Böse, Frank Meyer and Anne Schneider (eds), *Conflicts of Jurisdiction in Criminal Matters in the European Union* (Nomos 2013). Recently, see Mongillo (n 36) 108 and 114.

3. PHILOSOPHICAL ACCOUNTS ON LEGITIMACY OF THE HEADS OF JURISDICTION: MERITS AND CRITICISMS

3.1 Citizen Theory of Criminal Law: Basic Tenets

So far, I have considered the criticisms directed, mainly on an analytical level, at conventional accounts about the criteria of extraterritorial jurisdiction, and in particular those directed towards the principle of nationality. The main weakness of those criticisms, to sum up, is that they address individual paths of explanation as if they were exclusive of each other. Instead, diverse explanations are meant as concurring assessments, since the justification of the principle is not, as a rule, asserted exclusively based on one or another foundational reason.⁵⁸

Beyond the analytical way of discussing the rationale of each head of extraterritorial jurisdiction, a more accurate and deeper account about legitimacy requires confronting the radical consequences drawn by philosophical theories in the framework of general accounts of the right to punish and the relational structure of criminal responsibility. Within this stream of scholarship,⁵⁹ I limit my remarks to the most influential theory elaborated by Antony Duff, as recently exposed in the collective work *Philosophical Foundations of Criminal Law* as a sort of *summa philosophiae*.⁶⁰ Understandably, to do justice to Duff's complex, articulated, influential theoretical system would be beyond the space limits and the aim of this contribution. Nonetheless, it is worth attempting to summarize the crucial tenets of Duff's philosophical approach to the topic of extraterritorial jurisdiction.

In a nutshell, Duff starts from the general conceptual premise that individuals should be held accountable as citizens to a political community (visitors and temporary residents are included).⁶¹ It is the very fact that they belong to the political community that makes them accountable to a particular state for a criminal offence. In spite of its focus on citizenship, this assumption legitimizes, perhaps counterintuitively,⁶² the sole principle of territoriality: 'we are not answerable to our fellow citizens for wrongs that we commit abroad, and that while we may expect our fellow citizen to have some collective concern at least for serious wrongs that we suffer abroad, that concern should not extend to calling the wrongdoers to account.'⁶³

After rejecting the 'pragmatic or instrumentalist explanation of the jurisdiction of domestic criminal law,'⁶⁴ Duff contends that the fundamental thought about legitimating jurisdiction, above all the very territorial jurisdiction, is 'that "we" should try "our" wrongs and their perpetrators, and that trials by some foreign or international court, even if it produces

⁵⁸ Boister (n 20) 258, notes for instance that civil law states 'consider their nationals responsible to the state wherever they are because they benefit from its protection, owe it allegiance, and because their actions may injure its reputation. The principle's importance is increased by the fact that civil law states generally refuse to extradite their nationals.'

⁵⁹ To be quoted in a separate position is the controversial, worldwide renowned and debated essay of Günther Jakobs, 'Bürgerstrafrecht und Feindstrafrecht' (2004) 5 *Onlinezeitschrift für Höchststrichterliche Rechtsprechung zum Strafrecht* 88 <https://www.hrr-strafrecht.de/hrr/archiv/04-03/index.php3?sz=6#1_ftnref5> accessed 1 July 2025, English translation in Markus D Dubber, *Foundational Texts in Modern Criminal Law* (OUP 2014) 415.

⁶⁰ R Antony Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011); see R Antony Duff, 'Responsibility, Citizenship, and Criminal Law', in R Antony Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 125.

⁶¹ Criticisms against the soundness of this inclusion have been levelled by Chehtman (n 49) 432–3.

⁶² Acknowledging the personality principle (active and passive) has an analytical advantage over the territorial account. As Duff concedes, 'the point is that extra-territorial jurisdiction over crimes committed by or against the polity's members makes straightforward sense if we take citizenship to be the basis of criminal responsibility – whereas if we start with a territorial criterion of jurisdiction they will seem much more puzzling': R Antony Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart 2007) 54.

⁶³ *ibid.*

⁶⁴ Duff (n 60) 135. The pragmatic account provides a legitimization of territorial jurisdiction because 'it is sensible that those who are best placed to discharge' the task of bringing wrongdoers to account (134); as Boister (n 20) puts it in simple and clear terms, '[t]erritoriality is practical – that's where the harm is done, that's where the evidence is, and that's where the interest in suppression is'; following Duff, the pragmatic account is especially insufficient in explaining the plausibility of active and passive personality principle: 'neither of these can be readily rationalized in terms of the efficient satisfaction of the demands of an impersonal and universal justice' (Duff (n 60) 136–7).

a warranted conviction and sentence, can be at best an inadequate substitute.⁶⁵ The importance of this conceptual statement requires to set out in full what this ‘we,’ according to Duff, is composed of:

... all members of the political community within which the crimes were committed, who recognize the victims as fellow members whose wrongs they should share.... [I]f we are to understand the criminal law not simply as set of prohibitions, but as a practice through which wrongdoers are called to public account we must be able to ground it in some kind of community – a ‘we’ who call them to account. This ‘we’ requires not merely an aggregate of individual interests in such matters as security, but a collective interest that is ‘our’ interest. A collective interest, however, requires ... people who can see themselves as being engaged in a common enterprise of living not just alongside each other, but together. People who happen to be thrown together might form some such common enterprise ... and the criminal law can strengthen such an enterprise: but it must presuppose an already existing ‘we,’ an already existing ... community whose law it is.⁶⁶

Along this line of reasoning, Duff recognizes that ‘any polity must have a public sphere, structured by its self-defining values. Those values include how citizens should treat each other.’ Criminal law, correlatively, is a ‘formal way of identifying and responding to such wrongs.’⁶⁷ On this understanding, public wrongs are not that because of their being public, but wrongs that concern all citizens. Extraterritorial application is not legitimate because this recognition, in Duff’s opinion, operates only within a given political community. According to Duff, this does not imply that especially the so-called *mala in se* are not (or are less serious) wrongs when committed elsewhere or against someone who is not a citizen of the polity.⁶⁸ These wrongs concern us as human beings or as moral agents. However, what is in discussion here is what concerns us as citizens and what concerns the criminal law of this (our) bordered political community:

We cannot see a rape committed in Poland as a wrong committed within our civic enterprise as a polity or, therefore, as a wrong that concerns our criminal law.... As citizens, we have a special duty to attend to public wrongs committed within the polity: a duty to respond to such wrongs by calling the wrongdoer to public account, which we owe to both victim and wrongdoer.⁶⁹

3.2 Critical Assessment

Duff’s comprehensive theorization of the legitimacy of criminal law, and correlatively, of its territorial and personal scope is undoubtedly fascinating. It provides a reading of the philosophical underpinnings of punitive power and its scope as anchored in the fundamental social agreement of a political community. It is the political community that expresses and bolsters, through the stigmatizing effect of criminal law, the fundamental values that cement it as a common polity.

As happens to every great, apparently self-sustained, deductively construed, and intellectually influential system of thought, Duff’s broad account of the punitive power has

⁶⁵ Duff (n 60) 136.

⁶⁶ *ibid* 136–7.

⁶⁷ *ibid* 139.

⁶⁸ *ibid* 140.

⁶⁹ *ibid* 140.

been subjected to scrutiny by legal theorists and criminal law scholars. Going into detailed description of the diverse criticisms raised and of the alternative or complementary views suggested to counter alleged shortcomings of the theory, is beyond the scope of this article.⁷⁰ In what follows, I would address only two fundamental aspects directly relevant to the issue of the scope of criminal law: the first one pertains to the structure of the account (as to whether it is descriptive, normative, or both). The second one concerns the substance of the propositions about criminal law's legitimacy, where I maintain that some key argumentative knots are expressed as necessary truths while they are not logically compelling.

First, as for the structure of Duff's argument, it can be interpreted as either a descriptive argument, or a normative one (in the sense of one that accounts for how the spatial sphere of the punitive power should be legitimized in deontological terms), or as based both on factual findings and normative statements. For example, is the assertion that a rape committed abroad is not a wrong committed within the civic enterprise as a political community, and therefore is not a wrong that concerns 'our' criminal law, one that describes empirical facts? If the answer is in the positive, one could object that whether any polity whatsoever considers an act committed abroad as irrelevant to the polity itself should be ascertained on empirical basis. Accordingly, this issue cannot be dealt with in the abstract, irrespective of the concrete attitudes of that given polity.⁷¹ In light of this, it could be argued that Duff's account is implicitly but overwhelmingly influenced by the traditional standpoint of United Kingdom's legal orders,⁷² that is, self-restraint in the extraterritorial application of criminal statutes.⁷³ It thereby overlooks the reality of many of the world's legal orders, starting with continental ones.⁷⁴ Indeed, many criminal codes and statutes envisage extraterritorial rules based on the principles of active and passive personality: this means that they explicitly recognize facts committed abroad by (or against) citizens as a business of the political community. Admittedly, the reading of Duff's reasoning as descriptive of legal and empirical facts cannot be a meaningful interpretation of it. Therefore, Duff's argument must be taken as a normative stance towards the spatial scope of criminal law.

If so, one should ask whether the effort to philosophically legitimize the central point of this thesis, namely that the wrongs addressed by criminal law are only those committed *within* a political community, has been successful. This leads us to consider the substantive limb of Duff's contention.⁷⁵ Duff acknowledges that this conclusion is valid 'unless we accept

⁷⁰ See, for example, Chehtman (n 15); Gideon Yaffe, 'Punishing Non-citizens', (2020) 14 CLPH 347; Bill Wringer, 'Punishing Noncitizens' (2021) 38 Journal of Applied Philosophy 384; Ivó Coca-Vila and Cristián Irrarrázaval, 'A Criminal Law for Semicitizens' (2022) 39 Journal of Applied Philosophy 56 (with further references in fn 1) who point out to 'two major problems' of theories on 'citizen criminal law': 'Firstly, these conceptions operate with a binary understanding of the notion of citizenship', whilst 'the bond between an individual and the state is of an essentially gradient nature Secondly, based on a gradient notion of citizenship, it is problematic to assume a rigid association between punishment for full insiders as opposed to simple preventive measures of coercion for all those individuals who do not fit in this pattern' (57). See also Attilio Nisco, *Teorie espressive della pena: un'introduzione critica* (Giappichelli 2024) 74–83, 163–9.

⁷¹ In fact, one indicator of the actual choices made by that polity is the system of *Geltungsbereichsnormen* as positive law.

⁷² As for Canada: see Canadian Criminal Code, s 6(2).

⁷³ Arnell (n 30) 955; Michael Hirst, *Jurisdiction and Ambit of the Criminal Law* (OUP 2001). But see Markus D Dubber and Tatjana Hörnle, *Criminal Law. A Comparative Approach* (OUP 2014) 142: 'the treatment of jurisdiction in both systems turns out to bear a remarkable resemblance, even if each may have arrived at its current position from different starting points.' The situation in the United States, where an 'energetic boom of extraterritorial jurisdiction' is to be recorded, is different: see for example Antony Colangelo, 'Constitutional Limits on Extra-territorial Jurisdiction: Terrorism and the Intersection of National and International Law' (2007) 48 Harv Intl LJ 121.

⁷⁴ Italian criminal law, for instance, applies to all forms of sexual aggression (rape, assault by penetration, sexual offences against children, to cause or induce children to engage in prostitution, and the like) committed by a citizen or against a citizen abroad, as well as by foreigners when they act as accomplices of citizens (the latter application is provided for the most serious offences among the above-mentioned, and upon request by the Ministry of Justice). Compare with the SC New Zealand case, *LM v R*: Boister (n 20) 259 fn 93.

⁷⁵ Due to space constraints, we will not discuss here Duff's rejection of the 'pragmatic or instrumentalist explanation of jurisdiction': Duff (n 60) 134–7 (136, on the nationality and passive personality principles).

a principle of nationality or of passive personality ... and count it as our business if [crime] is committed by or against an English citizen.’ But Duff stresses that ‘while [his account] shows how we can make sense of those principles, does not commit us to adopting them.’⁷⁶ It seems that, in Duff’s view, *if* we accept the nationality principle *then* we count a crime as a business of the polity. To the contrary, I argue that *if* (and *because*) a political community can be affected by wrongs committed outside it (that is, its geographical boundaries), *then* it is precisely this fact that leads us to acknowledge the philosophical legitimacy of the said jurisdictional links.

Second, let us now move to the second level of analysis of Duff’s account. I argue that a given political community could agree upon the utmost importance of safeguarding some public ‘interests’ through criminal law, whose axiological significance is (perceived as being) not exhausted within the geographical limits of the territory. Therefore, it might declare the law applicable extraterritorially, through general rules, or specific extraterritorial statutes. On closer inspection, to maintain (as Duff does) that an offence committed by or against a citizen abroad is a purely moral wrong committed ‘outside’ the civic enterprise as a political community, is not a logically compelling statement, rather one that expresses a personal value choice. Instead, a plurality of legitimate value choices should be conceptually granted. With respect to (at least) certain types of crime, mainly amounting to *mala in se*, it can be quite legitimately said that the legal order might acknowledge a special connection with either the perpetrator or the victim.

Starting with the latter situation (connection through the nationality of the victim), envisaged by the principle of passive personality, one can quite consistently argue (using the same abstraction proposed by Duff about the ‘decent polity’) that any ‘decent polity’ shall protect its citizens abroad; indeed, Duff refers to the fact that calling the perpetrator to account is something the state owes not only to the perpetrator themselves but also to the victim. The case of the murder of the Italian researcher Giulio Regeni is telling in this respect. Regeni was travelling for empirical social research around Egypt, while working in England enrolled in a British university. After having been kidnapped and likely tortured, Regeni was murdered in Egypt. Regardless of the concrete circumstances in, and reasons for which the Egyptian authorities allegedly failed to make effective investigations on that case, what matters here is the demand for justice forcefully made not only by Giulio’s relatives, who lodged a request for opening investigations in Italy according to the passive personality principle, but by public opinion, domestic institutions, and national sections of international NGOs.⁷⁷

I do not find extraterritorial jurisdiction (applied in a principled way, that is, based on a reasonable genuine link, enforced with respect to international law and comity, and so on) objectionable.

The former case (where the jurisdictional link is the nationality or residence of the perpetrator) might appear more tangled. Markus D Dubber has convincingly argued that ‘as a matter of positive law, citizenship is largely, if not entirely, irrelevant in all aspects of penal law ... offenses are not defined in terms of the citizenship status of either the offender or the victim.’⁷⁸ That being true, a further qualification is in order. In a nutshell, my contention is as follows. The decisive element in theorizing extraterritorial legitimacy is the rank of the ‘protected interest’ (*Rechtsgut*, good-in-law or legally protected interest).⁷⁹ This rank is usually

⁷⁶ Duff (n 59) 140 fn 44.

⁷⁷ It is worth mentioning that, for a long time, sheets and banners with the words ‘Truth for Giulio Regeni’ were displayed in repeated demonstrations all over the country, hung on public buildings (such as municipalities and regional authorities, and so on). Furthermore, it is apposite to specify that, under the circumstances of the instant case (the alleged lack of sincere cooperation by the local authorities), it is not possible to gain the ‘truth’ – that is, to establish the facts – without opening criminal proceedings and the commencement of investigations.

⁷⁸ Dubber (n 29) 190 stresses that ‘the citizenship (or nationality) of either the offender or the victim may in some exceptional cases establish what is known, tellingly as “extraterritorial jurisdiction”’ (192).

⁷⁹ On this concept, from a comparative perspective (between the United States and Germany): Dubber and Hörnle (n 72) 113–41; Claus Roxin, ‘The Legislation Critical Concept of Goods-in-law under Scrutiny’ (2013) 3 European Criminal

signalled by the measure of the penalty threatened by the criminal statute: the higher the protected interest, the higher the penalty provided for in the abstract by the criminal statute. Correlatively, *the citizen's bond with the state is also graded* along a correspondent scale and cannot be understood according to the simple on-off, yes-no, zero-one alternative.

Hence, depending on the specific kind and rank of the 'protected interest,' and provided that this value is not incompatible with internationally recognized human rights standards, the philosophical soundness of the nationality principle can be accounted for. Accordingly, this head of jurisdiction expresses the acknowledgment that membership in the polity incorporates a *legal commitment to its highest legally binding values independently of the physical geography*. On the other hand, no such commitment can be affirmed with a similar breadth vis à vis less serious offences. I will come back to this rationale below (s 4).

This commitment is crucial not only with respect to the individual who acted abroad, but also for all other fellow citizens and any other individual living in the territory. In fact, they cannot be denied the interest in knowing (in being reassured) that those who live near them, so to speak, (must) share and respect those fundamental values and for their violation they can be held accountable even if committed abroad. This expectation of reassurance is legitimate precisely because of the nature of the value being protected, regardless of whether it is protected in different forms in the foreign state where the act was committed.

Consider, for example, Duff's instance of a rape committed by one (say, British) citizen in Poland. If the perpetrator returns to England, it seems to me at least problematic to deny that an English citizen, hypothetically the mother of a young girl, has an interest in being reassured that the perpetrator will not commit a similar act in England as well. This reassurance can only be given through the possible application of English law. Such an interest is not of an exclusively subjective kind, but one that is legally acknowledged; this can be seen as an outcome of the more general assertion that there is a collective interest of every individual in knowing that person is protected by a system of criminal law in force (see next paragraph). Based on what I argued just few lines above, this very interest is not absolute but gradable according to the seriousness of the offence.

Admittedly, my argument works as a broader justification for unilateral extraterritorial jurisdiction beyond the existence of special *aut dedere aut iudicare* treaty provisions, rather than for the nationality principle as such. This is not a problem at this stage: what matters is less a special justification of the active personality nexus than an act of contrasting Duff's foundational statement that a (serious) crime committed abroad does not concern the domestic polity.

3.3 Territoriality and Nothing Else, "at the Bar of Justice"?

The exclusive legitimacy of the principle of territoriality has been argued along a different line of reasoning. Alejandro Chehtman, perhaps the most coherent proponent of this view, contends that

... the right to punish ought to be understood mainly as the power to alter certain moral boundaries of an offender ... based on the claim that having a system of criminal law in force constitutes a public good that benefits in a certain way the individuals that happen to be under it.... The collective interest individuals have in this system being in force ... is sufficiently important to warrant conferring upon the state the normative power to punish those who violate these rules.⁸⁰

Law Rev 1; see also Matthew Dyson and Frank Meyer, 'Structures within Criminal Legal Reasoning', in Kai Ambos and others (eds), *Core Concepts in Criminal Law and Criminal Justice*, vol II (CUP 2022) especially 28 (protected interest as one building block of the conceptual 'architecture' to characterizing facts relevant to criminal law).

⁸⁰ Chehtman (n 15) 439.

At least for ordinary crimes, jurisdiction based on different links like the active personality principle (for what is most directly relevant here) is barred by such a notion of territory. I will not go through all the argumentative steps of this account altogether. Let it suffice here to summarize that Chehtman's argument is twofold, an analytical and a normative one.

Starting with the analytical line of argument, Chehtman notes that 'it seems odd' to say that the national has 'violated' the laws of the state beyond its borders.⁸¹ A reply to this claim could be made, that the conduct carried out abroad can certainly match the 'act type,' that is, the abstract description enshrined in the domestic offence definition,⁸² except for the 'foreignness' element (*Geltungsbereichsfaktor*, '*elemento di estraneità*'). The latter is not met, precisely because the specific 'act token' has been committed abroad. Failing the territorial requirement, the perpetrator is not liable because the state has no power to punish (*Strafgewalt, ius puniendi*). One might well be responsible for a criminal wrong without being liable to punishment. Indeed, Chehtman too acknowledges that 'being responsible for a particular act to a particular person or community is not (yet) paramount to being liable to that person or community inflicting legal punishment to the perpetrator.'⁸³ This acknowledgment would enable the conclusion that, while a given conduct satisfies the constituent elements of the offence definition under domestic law, the perpetrator is not punishable.⁸⁴ This is not a completely bizarre proposition.⁸⁵

Granting this analytical point 'for the sake of argument,' Chehtman contends moreover that:

... the collective interest of individuals in [a state S] in the sense of security and dignity that S's criminal laws being in force provides them does not seem to be affected by a robbery perpetrated in the territory of some other state. This same reasoning would apply if V, the victim of the robbery, were a national of S. Inhabitants of S may feel horrified by a particular crime committed outside S's territory, but the sense of dignity and security they enjoy as a result of S's system of criminal rules being in force is not undermined by these offenses.

The author has a point in arguing that the collective good of having a system of criminal law in force within the state cannot be undermined by a crime committed abroad. However, that this collective good is not shattered by any crimes committed abroad, even beyond situations covered by the protective principle, is not a proposition of logical necessity but one that can only be assessed as a matter of fact, that is, on a case-by-case basis. For instance, a robbery committed in Germany by an Italo-German affiliate of an 'ndrangheta cell based and active (only) in Germany but with (supposed) connections to an Italian criminal organization could possibly undermine the security of Italian citizens due to the objective risk of retaliations in Italy – which is often the case, indeed.

More to the point, if Chehtman's account is to be interpreted as a normative one (this is the second limb of Chehtman's argument), it fails at least to consider that, as previously noted, a decent state or a decent, empathetic polity cares at least in the abstract for its nationals that happen to become victims of crimes abroad. I do not see any philosophically compelling reason why such duty of care should be limited to the territory. This reply is the more

⁸¹ Similarly, Jeßberger (n 3) especially 122–8.

⁸² See (n 3).

⁸³ Chehtman (n 15) 433.

⁸⁴ One relevant consequence of this conceptual distinction would be, for instance, to legitimately subject the individual concerned to preventative 'security measures', whose legal nature and legitimacy are controversial but cannot be excluded as a matter of principle.

⁸⁵ See, for example, Kai Ambos, *Internationales Strafrecht* (3rd edn, CH Beck 2011) 4 marginal no 9.

convincing if one considers that a victim abroad is (or could be) more vulnerable as that person is a foreigner within the territorial state.

Moreover, specifically with regard to the nationality principle, Chehtman's reasoning draws from the alleged inconsistency of the analytical reasons underpinning the nationality principle, that this principle is 'altogether unjustified at the bar of the justice.'⁸⁶ It is worth recalling, as I noted above, that identifying certain analytical foundations of the active personality principle (avoiding avenues of impunity, reaffirming the high rank of certain values, and so on) does not entail that these foundations are mutually exclusive, nor does it mean that this principle is the only genuine link, that is, it excludes the legitimacy of other heads of jurisdiction. Chehtman's position is undoubtedly correct when it questions which state is legitimized under a general account of criminal law. What I count as flawed is the idea that, when it is claimed that a 'genuine link' does legitimize the state to act extraterritorially, this claim should entail dismissing the admissibility of different criteria legitimately chosen by other states. Yet, extraterritoriality is perfectly compatible, in fact it logically requires the acknowledgment that 'states may have valid concurrent claims to jurisdiction.'⁸⁷ Chehtman's critique would be justified only if there is such a claim to uniqueness; but this is not the case.

Finally, it is worth noticing that Chehtman's philosophical revision of the assumptions on extra-territorial jurisdiction is based in turn on the largely shared, conventional negative attitude towards conflicts of jurisdiction. One could doubt whether restricting legitimacy to territoriality would effectively reduce such conflicts. I rather suspect that the main issue of transnational criminal law is not so much that of the legitimate criterion of jurisdiction, but rather that of the criteria for dealing with conflicts of jurisdiction in a way that safeguards fair trial principles (including principles related to the rights to participation of the alleged victims) and fundamental human rights of the accused.

4. EXTRA-TERRITORIALITY AS A GRADABLE CONCEPT

In what follows I am trying to account for a legitimization of non-territorial jurisdiction that, alongside overcoming a strictly analytical attitude towards the heads of jurisdiction, takes stock of critical analysis of legal philosophers' and theorists' intellectual endeavour to reconnect this issue with the foundations of the spatial remit of the criminal law.

The first part of my argument is that extraterritoriality is a gradable concept. It can be uncontroversially acknowledged that, for the protection of goods-in-law, the legal order sets up duties to individuals (natural or legal persons) who fall under its sovereignty. Goods-in-law and the corresponding duties may be either limited to the territory or exceed its boundaries. This appears to be a first qualitative gradient dimension of the 'subject matter jurisdiction,' one that is related to the scope of the protected interest whose violation triggers criminal jurisdiction.

One must ask, then, whether the proper nature of the actual and concrete link between individuals' duties and their legal order reflects the gradient dimension highlighted above. In what terms can such a link between the legal subject and the polity underpin and (better) justify the extra-territorial exercise of punitive power? This question seems to relate exclusively, or at any rate more directly, to the active personality principle. However, it affects the broader debate on the foundations of the traditional territorial scope of punitive power.

I maintain that the very reference to a 'geographical link' that connects a person to a legal order requires further conceptual deepening. As I have underlined above,⁸⁸ the nationality principle is not a concept without colour hues. I now suggest *considering the intrinsic*

⁸⁶ Chehtman (n 43) 66; see, moreover, Alexander Chehtman, 'The Extraterritorial Scope of the Right to Punish' (2010) 29 Law & Phil 127, 136–41.

⁸⁷ *R v Hape* (n 28) 328, para 62.

⁸⁸ See s 3.2.

philosophical meaning of provisions of positive law which establish a divide between serious and less serious offences as to their extraterritorial application based on the nationality principle. This is tantamount to saying (more precisely, this implies theoretically) that the citizen's bond with the state, that which their punishability for acts committed abroad, is not as thick, white, and plain as a Carrara marble block. As a graded concept, it rather arranges itself along a scale of intensity connected with the gravity of the crime in the abstract.⁸⁹ It cannot be understood according to the simple on-off, yes-no, zero-one alternative: it is gradable.

This graduated structure of the active personality principle has nothing to do with the fragmentation of citizenship theorized by some scholars to highlight substantive differences in the factual enjoyment of rights, opportunities, inclusive social environments, and so on, therefore challenging the broader irenic citizen theory of criminal law. Of course, all these factual aspects – that an individual belongs to societal layers that are marginal(ized) for economic, social, and political reasons – are not irrelevant to criminal law in general, especially to its mechanisms of imputation,⁹⁰ although they have no bearing on the legal bound expressed by sovereignty. Yet, their relevance operates on a different plane: those aspects require the provision and implementation of mechanisms by which the *Zumutbarkeit* (the reasonableness to demand compliance with legal duties) is seriously taken into consideration by the legal system. For example, legal mechanisms shall be set up to consider lessened individual reproachability of an act, exclude culpability, enhance such defences as mistake of law, consider personal circumstances in mitigating sentencing up to forms of pardon in extreme cases,⁹¹ choose the type of punishment and modes of execution (such as community service), and the like.

But it is worth repeating that all these considerations have no bearing on the philosophical inquiry into the nature and legitimacy of the nationality principle as a head of jurisdiction. What matters in framing the concept and rationale of the personality principle is that membership in the polity incorporates a *legal commitment to its highest legally binding values, which might claim validity independently of any physical geography*. Such bond is tight in case of serious offences, whereas it softens (in different ways) *vis à vis* less serious offences.⁹²

5. JURISDICTION AS A FUNCTIONAL CONCEPT

At this point, one might be tempted to infer from the irrelevance of a pure geographical link of the individual to the legal order that the rationale for this head of jurisdiction is radically different from territoriality. That would be too hasty a conclusion, though. In fact, the very concept of territorial jurisdiction cannot be interpreted in a purely geographical sense, and it could not have since its inception. Lindsay Farmer has explained that:

Even in its origins territory is *not a natural category*, but was bound up with practices of administration and rule and ideas about the aims and authority of law. Territory does not begin as an already existing, empty space that requires mapping ... but is from the beginning a particular locality, that is to say a place with a history

⁸⁹ Coca-Vila and Irrarázaval (n 70) maintain that the concept of citizenship itself has a 'gradient nature.' I take their suggestion about 'gradient concepts' but argue that it is not so much the subjective *status* as the objective connection with the crime that has a gradient dimension which is key to the issue of legitimating extraterritoriality based on the active personality principle.

⁹⁰ Insightful considerations in: Douglas Husak, 'Criminal Law at the Margins' (2020) 14 *Criminal Law and Philosophy* 381.

⁹¹ On this concept see only: R Antony Duff, 'Mercy', in John Deigh and David Dolinko, *The Oxford Handbook of Criminal Law* (OUP 2011) 472, 481–5; John Tasioulas, 'Mercy' (2003) 103 *Proceedings of Aristotelian Society* 101, especially 110–4.

⁹² For example, through discretionary prosecution clauses, up to barring extraterritorial jurisdiction for petty offences.

that is already bound up with the institution and application of law.... If territory is thus the governing idea, the central ideas of territory have themselves been transformed in response to changes in social, political, and legal organization.⁹³

This accounts historically for the developments of jurisdiction through the progressive extensions of it. While originally:

... the criminal law was concerned primarily with crimes committed within the territory because of the threat they posed to internal legal order ... later extension of jurisdiction, based on particular crimes, followed a different logic, namely acts committed outside the territory could have harmful consequences for civil order or the legitimate interests of the state.⁹⁴

These developments are familiar to (transnational) criminal law scholarship. Take for instance the concepts of objective and subjective territoriality,⁹⁵ which might be controversial in their application but have a ‘long-standing pedigree,’⁹⁶ as well as the widely applied (under different labels) criterion of ubiquity, according to which jurisdiction can be claimed whenever either a substantial or material part of the conduct (more precisely, of the act type, its attempt or any act of complicity in it), or the harmful event or part of it, occurs in the territory. It is commonplace to recall that ‘individuals not only travel internationally with increased frequency, this conjoined with technology has given rise to the ability to commit crimes remotely;’⁹⁷ among other factors, this explains ‘the decline of the importance of territory for the purposes of jurisdiction,’⁹⁸ and explains ‘why the existing territorial jurisdictional scheme is inadequate.’⁹⁹

On the other hand, the statement that the decline of territory ‘has been accompanied by a lessened significance of borders’ seems flawed.¹⁰⁰ Rather, while the significance of borders has increased, their qualitative nature has changed. Indeed, their purely geographical dimension has been blurred in favour of a functional understanding that enables sovereign control over the changed – and changing – dynamics of transnational social and economic processes.¹⁰¹ Offences committed in the framework of illegal migration are just one example (and a good one at that) of functional modification of national borders.

First, smugglers disembarking migrants at high seas from mother-ships to makeshift, unseaworthy boats on high seas to cause NGO vessels to intervene and save human lives, then in turn disembarking migrants on European ports, are considered perpetrators of smuggling offences as they were committed on Italian territory (precisely because migrants had been disembarked there). This is clearly a fictitious notion of territoriality, one that leads to punish offences committed by foreigners overseas. I would classify this sample of blurred territoriality

⁹³ Farmer (n 13) 133 (emphasis added).

⁹⁴ Farmer (n 13) 134.

⁹⁵ See for example Boister (n 20) 253: ‘Subjective territoriality requires only that some of the conduct elements of the offence occur in the territory ... even if the offence terminates abroad ... Objective territoriality applies where a transnational crime is initiated abroad and only completed in the state wishing to establish jurisdiction.’

⁹⁶ Arnell (n 30) 956, with references.

⁹⁷ *ibid* 959.

⁹⁸ *ibid*.

⁹⁹ *ibid*.

¹⁰⁰ *ibid* 959.

¹⁰¹ Boister (n 20) 9, appropriately points out that ‘states are not always in an antagonistic relationship with these dark forces of globalization. Frequently they are in symbiosis: states have been compliant in sanctions busting, money laundering, transfer of nuclear technology, weapons trafficking, counterfeiting, drug trafficking, among other things.’ Among those things are systematic violations of human rights by states and international organizations, for instance in the context of mass migration, as evidenced by a staple of specialized literature that cannot even be cited here.

and extraterritoriality as (only seemingly territorial) *jurisdiction without geographical meaning, for criminalization purposes*.

Second, help and assistance provided by anyone to unauthorized migrants on Italian soil (territory as a clearly geographically determined space) out of ‘humanitarian motives’ otherwise dubbed as ‘altruistic reasons’ do not amount to the offence of smuggling. The territory is the basis of what many commentators consider as a ‘justification’ (*Rechtfertigungsgrund*), even though I deem preferable to acknowledge that help and assistance do not meet the offence requirements of illegal smuggling. I would classify this sample as one of actual *territorial jurisdiction without geographical meaning*, as the pivotal consideration in addressing the behaviour by the law is that of applying a criminal law defence: *a purely functional perspective*.

Third, conversely, help and assistance provided by anyone to illegal migrants on high seas beyond the strict boundaries of the state of necessity are criminalized as (complicity in) illegal smuggling.¹⁰² Extraterritorial jurisdiction disguises territoriality, as it is triggered by the fact that rescued migrants are usually disembarked on the territory, or at least rescuers attempt to do so, heading to a ‘safe haven.’ I would classify this sample where extra-territoriality is territoriality in disguise, as (only seemingly extra-territorial) *jurisdiction without geographical meaning, for the purpose of discarding defences*.

Furthermore, any instance of circumvention tourism (*fraude à la loi*, pt 2.6) seems to trigger a functional jurisdiction rather than a purely extra-territorial one.¹⁰³ Take the example of surrogacy carried out by Italian citizens abroad despite the domestic prohibition. As a rule, they travel abroad after availing themselves of the help of service-providing agencies that advertise and organize the trip (advertising and organizing surrogacy is a crime, too). After legally getting the child delivered with the relevant parenting documents according to the foreign law, these individuals (as a rule, couples) return to Italy and ask for formal recognition of the parental relationship. This *complex life situation* usually appears as a mixture of territoriality and extraterritoriality. The fact of surrogacy has transpired in its entirety abroad, yet it was enabled by organizers illegally acting in the territory. Moreover, the real effect of the evasion of law(s) really occurs when those who have resorted to surrogacy ask for recognition of their parental relationship, which is deemed contrary to the *ordre public* precisely because the state prohibits the practice of surrogacy. The complex life situation is composed of these different segments, although the last one is not per se relevant to criminal law, because the request for recognition is not in itself a crime. Admittedly, this can be considered an instance of extra-territorial jurisdiction in a strict sense, based on the nationality principle. Yet, what matters here is that the intended parent(s) aim(s) to be entitled to family rights through *domestic* legal instruments the availability of which in the *territory* is conditional upon the respect of binding values with *no territorial* dimension. Rather specific to this case is that extra-territorial criminal jurisdiction functionally encroaches on territoriality of private law regulations.

To the contrary, it could be observed that punishing (only) the citizen who commits the act abroad is tantamount to reimposing the infamous duty of allegiance now intolerable in modern democratic societies. This objection could be responded to if one considers the nature of the value protected through criminalization as an allegedly universalizable moral wrong:

¹⁰² This situation faces staunch criticisms indeed, as rescue activities at sea would not be covered by the ‘humanitarian defence,’ as described in the first example.

¹⁰³ Or even territorial, as Chehtman (n 43) 141, maintains; see furthermore Mariana Valverde, ‘Deepening the Conversation between Socio-legal Theory and Legal Scholarship about Jurisdiction’, in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 166 and further references at fns 18–21 (‘jurisdiction appears as a flexible and often multi-scalar game of power, rather than a zero-sum game of territorial sovereignty’).

According to the principle of the unavailability of the human body, buying, selling or renting it are fundamentally acts contrary to its dignity. The commodification of the child and the instrumentalization of the woman's body are also contrary to human dignity.... Particularly in countries where very detailed regulations on the subject have been adopted, a thriving reproductive market has developed, boasting annual turnover amounting to many billions of dollars. The practice of surrogacy is carried out through enterprises specialized in human reproduction within a broadly organized system that includes clinics, physicians, lawyers and brokerage agencies. In this system, women are equated with instruments of production, and pregnancy and childbirth represent production processes to be attributed a usage value as well as an exchange value, and to be included in the globalization of markets that have the human body as their object.¹⁰⁴

This is, according to the Italian legislator 'a modern form of slavery.' On this basis, as controversial as it may be on the merits, the punishment of the citizen alone seems to be a limit to the potentially broader protection of the legally and morally high-ranked public interest, dictated by criminal policy considerations. Yet, such considerations do not affect the dignity and importance of an interest which is understood to be substantially, even though highly contentiously, universal. Limiting the scope of authorship to Italian nationals, therefore, seems dictated rather out of respect paid to the principle of comity in international relations, than by a logic of punishing disloyalty.

6. NO TERRITORY IS A TERRITORY: OVERCOMING THE CONCEPTUAL DIVIDE BETWEEN TERRITORIALITY AND EXTRATERRITORIALITY

Admittedly, both territoriality and extra-territoriality reveal themselves as no more than convenience labels that conceal the intimate structure of jurisdiction as a functional concept. The purely geographical dimension of jurisdiction might not entirely disappear,¹⁰⁵ but fades into the background. Here, making puns with John Donne's famous verse serves to draw the attention to one philosophical import of the acknowledgment of the functional nature of jurisdiction.¹⁰⁶

Conventionally, in the framework of prescriptive and enforcement jurisdiction the concept of territory is interpreted as 'land;' on this understanding, lawyers have a tendency, as Ó Floinn and others have underlined, 'to think about territory and states in this way – as a *geographical, physical* fact.'¹⁰⁷ In a different vein, legal philosophers (whose accounts we have discussed above) confer legitimacy to only territorial criminal law, thereby negating philosophical import to the concrete entrenchment between territorial and extraterritorial dimensions of the complex situations of life relevant to criminal law. Consequently, they tend to structure the relations between territoriality and extraterritoriality according to a rule-exception scheme whose validity can be assessed in the abstract. The functional concept of jurisdiction, instead, goes a different pathway, which can be sketched as follows.

The fact that territoriality itself is functionally anchored to the features of the concrete case (which may of course include, but is not exhausted by, the coincidence between the facts and the geographical territory) suggests looking at the deepest significance of such an anchorage for the concept of jurisdiction.

¹⁰⁴ *Proposta di legge* n 2599, submitted on 20 July 2020, in *Atti Parlamentari: Camera dei deputati, XVIII Legislatura-Disegni di legge e relazioni-Documenti* AC 2599, 2 (left column), 3 (right column).

¹⁰⁵ I obviously acknowledge that there are purely domestic – territorial – crimes.

¹⁰⁶ John Donne, *Devotions Upon Emergent Occasion, and Several Steps in my Sicknes* (1624): 'no man is an island.'

¹⁰⁷ Ó Floinn and others (n 18) 4 (emphasis added).

What is crucial is that *certain material acts give rise to social relations* between the individual and the state or whatsoever entity on which criminal jurisdiction is conferred over the prohibited behaviour; between perpetrator and victim; between those complex relations and the state, which the criminal law claims to regulate. This is hardly surprising, if one thinks historically: if the relationship between territory and persons (the ‘civil order’) is key to the understanding of territory, it is not surprising indeed ‘that jurisdiction cannot be reduced to the question of “punishability” but is concerned with broader matters of governability.’¹⁰⁸

Social relations arising from acts of concern of criminal law are drawn within its remit irrespective of the simple geographical dimension of the state territory. To put it otherwise, territory itself has a functional dimension that cannot be grasped by a purely geographical understanding; rather crucial for jurisdiction is the complex real-world fact situation (*Lebenssachverhalt*) which expresses the closest connection to the values enshrined in the offence definitions, a connection that can be geographical or not, depending both on the features of the abstract provision and on the specificity of the concrete situation of life.

In essence, legitimacy must be linked neither to citizenship, nor to a generic moral agency of the sole perpetrator, but to the ‘situational specificity’ of human beings who, through their objectively ascertainable deeds,¹⁰⁹ build relationships with each other and with the legal interests of any legal order in which a given polity recognizes itself. This situational specificity gives rise to a transnational ‘case’ to be dealt with in the legally relevant space. Consistently, *there is no rule-exception, not to say a hierarchical relationship between territorial jurisdiction, on the one hand, and extraterritoriality, on the other hand.*

By closer consideration of this functionalized, protean concept of territory, it seems appropriate to maintain that it cannot be truly determined in the abstract with exclusive relation to its geographical dimension. As a legal concept within the remit of criminal law, it operates at the intersection between offence definition, underlying values/interests/goods-in-law,¹¹⁰ and concrete behaviour carried out by individuals (either nationals or foreigners). Hence, territory changes its physiognomy in respect of the specificities of the concrete case. Correlatively, so does extra-territoriality. Not only are they complementary angles in a legal space, but they also constitute and manipulate that legal space through the functionalization of physical borders.

7. NON-EUCLIDEAN CRIMINAL JURISDICTION

This account leads to the last part of my argument, which can only be sketched here. The functional reading of criminal jurisdiction fits into and can be significantly strengthened by referring to a recent elaboration on the concept of territory in international legal scholarship. Gail Lithgoe argues that territory refers to ‘a space created for and by the exercise of power, without prejudging which actor or institution exercises that power.’¹¹¹ On this understanding, territory is ‘neither container nor object but ... something that does not exist without the social relations which provide the conditions for its constitution.’¹¹² It is rather conceived of as ‘a particular category of space in relation to which control is exercised by states’ (as well as by ‘many non-state actors’).¹¹³

¹⁰⁸ Farmer (n 13) 132; see also this article, pt 1.

¹⁰⁹ I hereby underline the conventionally required act requirement of criminal law; see, for example, Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2009); G Hallevey, *A Modern Treatise on the Principle of Legality in Modern Criminal Law* (Springer 2010); but see, to the contrary, Douglas Husak, ‘Does Criminal Liability Require an Act?’, in Antony Duff (ed), *Philosophy and the Criminal Law. Principle and Critique* (CUP 1998) 60.

¹¹⁰ I refer to all these concepts without further distinction because each of them – according to different theories of criminalization – is deemed to underpin criminalization.

¹¹¹ Lithgoe (n 16) 9.

¹¹² *ibid* 10.

¹¹³ *ibid* 146.

Thus, territory is not the physical geography as such, but the space created as a result of particular practices (claiming or occupying) and their effect (inscribing meaning on that physical geography).¹¹⁴ Its central characteristic is that it is constituted ‘when a community exercises control in relation to that space and uses that space to order their activities.’¹¹⁵ Drawing on authoritative international law scholarship,¹¹⁶ control becomes a key concept in this theorization: ‘control is used to establish (individual criminal or state) responsibility ... and to define jurisdiction,’¹¹⁷ which in turn is the consequence of the fact of control, which is:

... the actor has the ability (often is legally empowered) to influence and discipline activity and people in some way ... territory, on this reading of things then, is a space produced by activities, processes, and relationships. Territory is not an object (natural or otherwise) but a space created by ‘the social processes and relationships that produce it.’¹¹⁸

One example of the exercise of jurisdiction through control can be found again in the framework of migration management. An Italian ship on police duty that is in the contiguous zone or in international waters encounters a ship that might be engaged in or otherwise involved in the illicit transportation of migrants may stop it, subject it to inspection, and, if necessary, take it to a state port. Those who were carrying out the transportation of foreigners or otherwise carried out acts directed at procuring legal entry into the territory may be punished as traffickers or smugglers.¹¹⁹

Within this broader conceptual framework, the very dimension and legitimization of extraterritorial jurisdiction are reconceptualized. While the conventional account ‘assumes that state territory forms the normal base for jurisdiction and every other mode of exercising jurisdiction is regarded as *extraordinary*,’¹²⁰ the concept of territory as ‘socially produced space’ leads to the acknowledgment that there is nothing exceptional with extraterritorial heads of jurisdiction, despite the name.¹²¹

‘Even now, nothing actually is extraterritorial;’ extraterritoriality is a narrative explaining where states are exercising powers. It acts as a justification for why and how a state exercises power in a physical geography beyond where it is ‘supposed’ to. Given that where powers are exercised is not, in reality, limited to a uniform and permanent unit of space, the reliance on an understanding of territory as an object and its equation with physical geography requires the creation of his ordinary and extraordinary distinction.... We could instead imagine territory as

¹¹⁴ *ibid* 154.

¹¹⁵ *ibid* 158.

¹¹⁶ Anne Orford, in James Crawford, Martti Koskenniemi, Surabhi Ranganathan (eds) *The Cambridge Companion to International Law* (CUP 2015) 275; see also Anne Orford, ‘Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect’ (2008) 30 *Mich J Intl L* 981.

¹¹⁷ Lythgoe (n 16) 158.

¹¹⁸ *ibid* 164, quoting Francisco R Klauser, ‘Rethinking the relationship between Society and Space: A review of Claude Raffestin’s Conceptualisation of Human Territoriality’ (2008) WP 37 Social Sciences Research Centre – National University of Galway <http://www.nuigalway.ie/research/ssrc/documents/territoriality_working_paper_francisco_klauser.pdf>; Francisco R Klauser, ‘Thinking through territoriality: introducing Claude Raffestin to Anglophone socio-spatial theory’ (2012) 30 *Environment and Planning D: Society and Space* 106.

¹¹⁹ The control criterion has been acknowledged by the ECtHR: see for instance *Medvedyev v France*, GC judgment 29 March 2010, App no 3394/03 (the Court held that France had exercised full and exclusive control over a Cambodian vessel at least *de facto* from the time of its interception, in a continuous and uninterrupted manner: para 67); similarly, *Hirsi Jamaa v Italy*, GC judgment 23 February 2012, App no 27765/09 (‘continuous *de iure* and *de facto* control’: para 81; the flag principle came/comes into consideration here).

¹²⁰ Lythgoe (n 16) 205 (emphasis in original).

¹²¹ I argued for this thesis in Alberto di Martino, *La frontiera e il diritto penale. Natura e contesto delle norme di “diritto penale transnazionale”* (Giappichelli 2006) 153 and following, 253 and following.

spatially extending to cover the space where any state (or any other actor) is exercising a particular function of power.... Territory as relational and produced through practices of control could instead drive a different narrative that does not adopt normative ordinary or extraordinary assumptions.¹²²

This long excerpt is necessary to highlight the theoretical framework that may bring new insights into the specific issue of jurisdiction in criminal matters.

The spatiality introduced by the modern technology of cartography, historically supported the ‘state’s monopolistic claims of territorial jurisdiction.’¹²³ cartography drew geographical lines that mapped a series of bounded empty spaces subjected to sovereignty.¹²⁴ This traditional geometry, that is, this conception of territorial jurisdiction (which we can dub as Euclidean) holds no longer true. Human relations in contemporary world, especially after the Internet revolution but not only because of it, deploys along ‘flexible and dynamic boundaries that institute a simultaneity of overlapping spaces,’¹²⁵ which I dub as non-Euclidean. As those spaces are not geographically defined, any endeavour to conceive of jurisdiction (criminal jurisdiction, for what matters here) within territorial boundaries seems flawed.

The functional conception of jurisdiction provides a philosophically sound explicative account of jurisdiction in modern times. Functionality operates extraterritorially on the same grounds that it operates within a state’s territory. Accordingly, the very concept of territorial jurisdiction shall be redefined in functional terms, to do justice to the complexity of social and human relations in present times.

In sum, we can depict jurisdiction in criminal matters like physicists describe a straight line: ‘A straight line is a special case of a curve. It’s a curve which is uncurved.’ Extraterritoriality is a special case of territoriality. It is a territory which is not territorial.

8. SOME CONCLUSIONS

In this article, the issue of extraterritorial criminal jurisdiction based on the active personality (or nationality) principle has been examined. The Italian bill criminalizing gestational surrogacy carried out by Italian citizens abroad is used as a case-study that triggers a reflection beyond the mere rehashing of the normative basis of the nationality principle as a recognized head of jurisdiction outside state’s borders. Alongside an in-depth consideration of the main criticisms levelled against the (active) nationality principle from an analytical standpoint, the article contains a suggestion of an updated, human rights-oriented reading of this principle which – it is argued – proves to be especially helpful when the value-laden judgment underpinning domestic criminalization is controversial in the international arena. The case-study is particularly insightful in this respect. It refers to a moral wrong that, despite not being universally recognized, is unilaterally criminalized. However, on the one hand, it is maintained that prescriptive jurisdiction per se does not infringe upon a foreign sovereignty, not even of states where the behaviour is entirely legal (pt 2.1). Moreover, it is precisely the contentious nature of the example which suggested the human-rights oriented reconceptualization of the nationality principle. This principle should be conceived as an instrument to the protection of rights, both of allegedly vulnerable persons (as in the instant case) and of the alleged perpetrator (beyond the instant case) (pt 2.3). On this basis, the legitimacy of the unrestricted resort to this head of jurisdiction by the Italian bill on surrogacy cannot be questioned.

¹²² Lythgoe (n 16) 208.

¹²³ Here I follow Mireille Hildebrandt, ‘Text-driven Jurisdiction in Cyberspace’, in Micheál Ó Floinn and others (eds), *Transformations in Criminal Jurisdiction: Extraterritoriality and Enforcement* (Hart 2023) 43.

¹²⁴ See on that Hildebrandt (n 123) 43 fn. 16, recalling Richard T Ford’s ‘Law’s Territory (A History of Jurisdiction)’ (1999) 97 *Mich L Rev* 843.

¹²⁵ Hildebrandt (n 123) 49.

Still, the question of opportunity of an unrestricted resort to the nationality principle remains; thus, it is placed on another level that does not affect legitimacy. Actually, respect due to different value choices by foreign states and especially by the territorial State cannot be its indirect result, as I have explained above (pt 2.1), *substantially* extraterritorial effects that paradoxically stem from non-criminal rules and regulations of the forum state that are also applicable to foreigners.

On a more general note, in the article it is argued that it is unavoidable to take issue with *philosophical* objections to extraterritorial criminal jurisdiction itself. The complexity of influential philosophical account seems to have received less attention from the ‘doctrine’ of criminal law. In this vein, a more robust understanding of the foundations and the allocation of jurisdictional authority is advocated. The gist of the argument is that the fundamental philosophical explanation that the punitive power’s legitimacy is to be found in the citizens’ membership in a political community living within a given territory, therefore is inherently territorial, is flawed. The citizen theory insufficiently considers the complexity of social and human relations in present times. Instead, a two-tiered element crucially accounts for the legitimacy of extraterritorial criminal jurisdiction, namely, the *kind* and *rank* of the legally protected interest (*Rechtsgut*). Certain public goods can claim protection independently of any physical geography and they can certainly be affected by wrongs committed outside state’s borders. In addition, the rank of the protected interest plays a substantial role in the justificatory endeavour: the citizens’ bond with the state, this article maintains, is a graded concept that arranges itself along a scale of intensity directly proportional to the crime gravity in the abstract. On this understanding, the provisions of positive law that establish a divide between serious and less serious offences as regards the extraterritorial applicability have a profound philosophical import. Moreover, this scalar conception of the citizens’ bond to the fundamental values protected through the criminal law qualifies the very conception of extraterritoriality, which is a gradable concept itself.

Finally, the paper argues that the philosophical rationale of the active personality principle should not be recognized in the simple citizenship as a formal category, nor in the duty of allegiance towards whatever domestic criminal law provision. Instead, it must be identified in the existence of a complex life situation, that is, in what we have called the situational specificity of the behaviour carried out by human beings who build relationships with each other and with fundamental legal interests of their political community. This qualification of the rationale behind this head of jurisdiction helps to highlight how and why extraterritorial jurisdiction is triggered in the case of surrogacy: on the one hand, this gestational option is unduly advertised extra-territorially and, on the other hand, the individuals concerned claim domestic entitlement within “their” state to parental rights (children recognition) conditional upon the commitment to binding values with no territorial dimension. Explaining this line of reasoning has led to delving into the concept of territorial jurisdiction itself, highlighting the widespread acknowledgment that it cannot be grasped in purely geographical terms. Criminal law and jurisdiction are triggered by complex situations of life revolving around material acts that give rise to social relations relevant (also) to criminal law, where both territorial and extraterritorial dimensions are deeply intertwined. It is this state of facts that leads to an acknowledgement of not only the legitimacy of extraterritorial jurisdiction, but the very homogeneity of territoriality and extraterritoriality from a functional perspective, that of grasping the complexity of social relations affecting human life in the contemporary world.