EXTRATERRITORIALITY AND CRIMINAL LAW: FROM UNILATERAL ACTION TO A MULTILATERAL PARADIGM

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ABSTRACT

Much of the thinking about the extraterritoriality of criminal law remains within the paradigm of unilateral actions by States. This paradigm starts with the principle of strict territoriality, that is to say, no State can take action to enforce its laws outside its own borders. So, within this paradigm, the conversation is always about whether a State has an appropriate jurisdictional basis to act, and the nature of the limits on that action supplied by International Law. Today, however, the prosecution of state criminal law in cases with cross-border elements frequently takes place not within a paradigm of unilateral action but rather within a multilateral paradigm. For instance, many States have entered into bilateral mutual legal assistance treaties. Under these treaties, States may enlist the assistance of their treaty partners in taking certain enforcement actions overseas, thus getting around the traditional territorial limitation on enforcement. Equally important, there are now multilateral treaties in many critical areas, such as anti-corruption and money laundering or human right violations such as female genital mutilation, that actively require member states to prosecute certain crimes with cross-border elements, thus legitimizing the jurisdiction of States to apply their criminal laws to foreign conduct. This chapter will investigate the shift from the traditional unilateral paradigm to this more multilateral approach and ask what it means for our understanding of extraterritoriality.

SECTION 1. INTRODUCTION

Even without a generally agreed definition, "extraterritoriality" (also named "extraterritorial jurisdiction")[1] may refer to the possibility to extend the application and/or enforcement of one State domestic regulation outside its territorial borders[2]. When dealing with extraterritoriality in criminal law we may refer to the extraterritorial scope of action of States' criminal system to allow national courts to conduct criminal proceedings for acts arising outside its borders[3]. This means expand applicability of

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[1] See M T Kamminga, "Extraterritoriality", *Max Planck Encyclopedia of Public International Law*, 2012, para. 1.

[2] See, among others, M. Gibney, "On Terminology: Extraterritorial Obligations", in M. Langford, W. Vandenhole, M. Scheinin, W. van Genugten (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge, Cambridge University Press, 2013, pp. 41-42; also, in Report of the International Law Commission, 58th Session, doc. A/61/10, Annex E: Extraterritorial Jurisdiction, p. 520, para. 7

[3] See on the notions and conceptual debate of extraterritorial jurisdiction A. J. Colangelo, "What is Extraterritorial…" *op. cit.*, pp. 1303-1352.

criminal substantive norms to crimes occurred outside the borders but also to confer jurisdiction on the Tribunal to try and to enforce rulings. This thoughtful remains in a unilateral paradigm[4]. Here, States unilaterally assert jurisdiction over offences abroad by its domestic laws no matter the encroachment in other State jurisdictions. Within this paradigm, the conversation is always about whether a State has an appropriate jurisdictional basis to act, and the nature of the limits on that action supplied by International Law.

At the same time, the problems at stake cover essential elements of international law because jurisdiction and *ius puniendi* are fundamental elements of States' sovereignty. The latter reflects the willing of a society to determine actions that deserve a criminal sanction. Also, jurisdiction is considered for a long time as "an aspect of sovereignty"[5]. However, the content of jurisdiction, as referred of what a State can do (or not) comprises a wide variety of actions [6] and its concept remains to be controversial [7]. Likewise, doctrine has discerned [8] three different categories of "jurisdiction" depending on whether it was the regulation of 1) social behavior or relations, named *jurisdiction to prescribe*, *legislative jurisdiction* or *substantive jurisdiction*; 2) judicial resolution of conflicts named *jurisdiction to adjudicate* or *judicial jurisdiction*; and 3) coercive enforcement called *jurisdiction to enforce* or *executive jurisdiction*[9]. The first would refer to the power of a State to apply its own law to cases with a foreign component (subjects, object, or rules). The second type would state to the power of the courts and tribunals of a State to judge cases with a foreign

[4] See on the notions of unilateral and multilateral actions: R. O. Keohane, "Multilateralism: An Agenda for Research", *International Journal*, Vol. 45 (1990), pp. 731-764; L. L. Martin, "Interests, Power, and Multilateralism", *International Organization*, Vol. 46, No. 4 (1992), pp. 765–792; D. García San José, "Unilateralismo y Multilateralismo como conceptos de Geometría Variable en la Sociedad Internacional Poscontemporánea", *Revista Electrónica de Estudios Internacionales*, No. 15 (2008), pp. 1 et seq.

[5] See F. A. Mann, "The Doctrine of Jurisdiction in International Law", *Recueil des cours*, Vol. 111 (1964), p. 30. In the same sense: C. Ryngaert, *Jurisdiction in International Law*, Oxford, Oxford University Press, 2008, p. 5; A. Orakhelashvili, "State jurisdiction in international law: complexities of a basic concept", A. Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law*, Cheltenham, Edward Elgar Publishing, 2015, p. 1; C. Tiburcio, "The Current Practice of International Co-Operation in Civil Matters", *Recueil des cours*, Vol. 393 (2018), p. 54.

[6] Like trying people, enforcement by officers (military or police…), extrajudicial executions (in cases of military forces), etc.

[7] R. O'Keefe, "Universal Jurisdiction: Clarifying the Basis Concept", *Journal of International Criminal Justice*, Vol. 2, Issue 3 (2004), p. 736. It may refer to "the power of States to subject persons or property to their laws, judicial institutions, or enforcement capacity" (I. Bantekas, "Criminal Jurisdiction of States under International Law", *Max Planck Encyclopedia of Public International Law*, 2011)

[8] See M. Akehurst, "Jurisdiction in International Law", *British Yearbook of International Law*, Vol. 46 (1972-1973), p. 145; K.C. Randall, "Universal Jurisdiction under International Law, *Texas Law Review*, Vol. 66 (1988) p. 786; I. Brownlie, *Principles of Public International Law*, Oxford, Oxford University Press, 5th ed., 1998, p. 313; Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, Chap. I Definitions, September, 2001, p. 1; I. Bantekas, "Criminal Jurisdiction…" *op. cit.*, 2011.

[9] See this classification, among others, in Amnesty International, *Universal Jurisdiction… op. cit.*, Chap. I Definitions, September, 2001, pp. 1-2; A. Sánchez Legido, *Jurisdicción... op. cit.*, pp. 22-24; A. Cassese, *International Law*, Oxford, Oxford University Press, 2nd ed., 2005, pp. 49-52; International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction*, 2009, pp. 8-11; G. Werge, *Tratado de Derecho Penal Internacional*, Valencia, Tirant lo Blanch, 2nd ed., 2011, p. 138; A. J. Colangelo, "What is Extraterritorial Jurisdiction?", *Cornell Law Review*, Vol. 99 (2014), pp. 1310; A. S. Galand, "Conceptions of Courts and Their Jurisdiction", in *UN Security Council Referrals to the International Criminal Court. Legal Nature, Effects and Limits*, Brill-Nijhoff, 2019, p. 14.

element. And the third to the power of a State "to enforce the rules it has prescribed and adjudicated"[10].

State practice in the last decades have allow controversial interpretation of classical principles on territoriality in international law stated by PCIJ case of the *SS "Lotus"*[11]. Divergent movements by legislative and executive branches for and against extraterritorial jurisdiction shown set forth in Pinochet, CIA secrets flights, El Salvador, Guantánamo, Teodoro Obiang or Kiobel cases before national courts of Spain, France or the United States. Also, the International Court of Justice proceedings[12] confirm conflicting approaches to extraterritoriality in international scene. This trend may reflect the lack of consensus around some of the links of jurisdiction (also named bases for jurisdiction) in criminal law.

However, scholars have devoted little to the study of the extraterritoriality of national criminal law[13], motivated by the classical conception that the courts of a State could not prosecute acts committed by foreigners abroad, along with the conception of the extraterritorial exercise of jurisdiction as a foreign policy tool of States[14]. With the arrival of international crimes and the development of international or internationalized tribunals, the question was limited to the possibility to prosecute crimes against international community (core-crimes). In this case, mechanisms were established so that, in the event of non-prosecution by the International Criminal Court or another international criminal tribunal, States could prosecute the said crimes through their national courts[15] based on the principles of primacy or complementary jurisdiction, universal jurisdiction, etc.

Nevertheless, there are other types of crimes (non-core crimes) whose international importance has been growing over the last decades in areas such as anti-corruption and money laundering or human right (e.g. female genital mutilation)[16]. The

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[10] A. S. Galand, "Conceptions…" *op. cit.*, p.14.

[11] PCIJ, *SS Lotus* (France v. Turkey), PCIJ Reports, Series A, No. 10 (1927). The bases for jurisdiction arising from the Lotus case were the objective territorial principle, the protective principle, and the ship riders [today known as the hot pursuit]"; see B. Pemberton, "Pirate Jurisdiction: Fact, Fiction and Fragmentation in International Law", Working Paper, One Earth Future Foundation, 2 February 2011, pp. 17-20. See about this case A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, OUP, 2009, p. 532; A. Sánchez Legido, *Jurisdicción Univeral Penal y Derecho Internacional*, Valencia, Tirant lo Blanch, 2003, pp. 28 et seq.; A. Pellet, "*Lotus* que de sottises on profère en ton nom! Remarques sur le concept de souveraineté dans la jurisprudence de la Cour mondiale", in J. P. Puissochet, *L'État souverain dans le monde d'aujourd'hui: mélanges en l'honneur de Jean-Pierre Puissochet*, Paris, Pedone, 2008, pp. 215-230.

[12] *Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*; *Certain Criminal Proceedings in France (Republic of the Congo v. France);* or *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*.

[13] See among others M. Farbiarz, "Extraterritorial Criminal Jurisdiction", *Michigan Law Review*, Issue 4, Vol. 114, (2016), p. 514; J. B. Corr, "Criminal Procedure and the Conflict of Laws", *The Georgetown Law Journal*, Vol. 73 (1985), p. 1217; D. L. Rotenberg, "Extraterritorial Legislative Jurisdiction and the State Criminal Law", *Texas Law Review*, Vol. 38 (1960), p. 767.

[14] See M. Farbiarz, "Extraterritorial…" *op. cit.*, p. 512.

[15] See among many others R. Wolfrum, "The Decentralized Prosecution of International Offences through a National Courts", *Israel Yearbook on Human Rights*, Vol. 24 (1994), pp. 183-199.

[16] See some recent examples of US foreign anti-bribery enforcement cases against non-US companies in B. Hock, *Extraterritoriality and International Bribery. A Collective Action Perspective*, Routledge, 2020, pp. 2-3.

prosecution of state criminal law in cases with cross-border elements frequently takes place not within a paradigm of unilateral action but rather within a multilateral one. For instance, many States have entered into mutual legal assistance treaties or criminal cooperation mechanisms. Under these instruments, States may enlist the assistance of their treaty partners in taking certain enforcement actions overseas, thus getting around the traditional territorial limitation on enforcement. Also, these multilateral treaties actively require member states to prosecute these non-core crimes, thus legitimizing the jurisdiction of States to apply their criminal laws to foreign conduct.

Therefore, extraterritorial criminal jurisdiction also involves an issue of whether it is legitimate to exercise jurisdiction over people abroad[17]. In this way, from a sociological or normative perspective, legitimacy of courts is understood as a possession of "a justifiable right to issue judgments, decisions, or opinions, which those normatively addressed must obey, or at least consider with due care"[18]. Hence, the illegitimate exercise of jurisdiction may trigger problematic situations that will be led inevitably to dissatisfactions on values of international law such as principle of sovereignty and non-intervention, the fight against impunity, the respect of human rights as to a fair trial, etc. Under a unilateral paradigm, the doctrine has asked whether it is legitimate to subject a person to a prosecution and to criminal legislation before another State other than where the events occurred[19]. The extraterritorial exercise of jurisdiction to enforce may be considered problematic as well, insofar as the exercise of public powers such as detention[20] or evidence collection by one State in the territory of another would violate the principle of sovereignty set down in International Law. For this reason, we must distinguish between the extraterritorial application of national criminal law and its extraterritorial execution. The first assumption is accepted through the extraterritorial links of jurisdiction in criminal law, although with an uneven evolution and application by States. On the contrary, the execution of criminal law beyond national borders poses more serious problems that affect the triad sovereignty-territory-jurisdiction.

This chapter will investigate the extraterritoriality in criminal law and how this system has evolved from a unilateral to a multilateral paradigm underpinning territoriality to more flexible regimes and the problematic situations that the latter involves. For that purpose, in section 2, we will conduct an analysis of development of bases for jurisdiction in criminal law as a reflex of unilateral model and the consequences that their use can lead. Section 3 addresses the trend towards the multilateral paradigm through the study of a series of crimes of international significance (non-core crimes). On the one hand, the different assumptions of prescriptive jurisdiction are analysed through relevant international agreements dealing with non-core crimes[21]. On the other hand, the legal framework of international cooperation in criminal matters that supports the extraterritorial execution of criminal law is addressed. We will pay particular attention to the European Union mechanism of criminal cooperation such as the European Arrest Warrant as a spearhead of

[17] See M. Farbiarz, "Extraterritorial…" *op. cit.*, p. 514.
[18] Grossman, N., Cohen, H., Follesdal, A., Ulfstein, G. (Eds.). *Legitimacy and International Courts*, Cambridge, Cambridge University Press, 2018, p. 4.
[19] M. Farbiarz, "Extraterritorial…" *op. cit.*, p. 514.
[20] See *infra* the case of Adolf Eichmann, note xxx.
[21] We are aware that our selection leaves out many other treaties. However, the limits of this paper impose the obligation to reduce to the most relevant or those with a greater participation in the extraterritorial application.

extraterritorial enforcement thanks to the multilateral approach. As a conclusion, section 4 exposes final remarks on what the evolved paradigm means for our understanding of extraterritoriality.

SECTION 2. MECHANISMS ON UNILATERAL EXTRATERRITORIALITY

The territoriality principle is considered the keystone in the exercise of criminal action by States. However, this principle has been giving way to others that will allow the exercise of criminal action (particularly jurisdiction to prescribe) outside the borders of the State: principle of personality, protection of interests, etc. This evolution has ultimately resulted in the principle of universal jurisdiction. This, in its unconditional interpretation, would allow the exercise of criminal action without connection points with the forum State. All of them would be framed in the paradigm of unilateral action by States, since they are the ones that legislate and apply their own criminal legislation extraterritorially without worrying about the consequences. Hence, the analysis focuses on the nature and scope of the different bases of jurisdiction on which States can act, within the framework of international law.

1. The Principle of territoriality as an uncontested base for Criminal Jurisdiction

A. Territory and Territoriality

The "Territory" is one of the constitutive elements of the State[22]. Despite recent developments supporting less territorial nature of States[23], it could be said that the most important competences that a sovereign State can exercise have territorial character[24]. As stated by Tiburcio, "due to its link with sovereignty, jurisdiction has traditionally been considered territorial"[25]. States can exercise jurisdiction over criminal offences occurred within their territories, according to the principles *lex locus delicti* and *iudex loci delicti commissi*. Therefore, the territory plays a fundamental role in the exercise of criminal jurisdiction. For that reason, there have been some attempts to define and specify its limits, such as the one by Basdevant or Cavaré[26]. But the most followed is that stated by Kelsen, defining territory as the territorial sphere of validity of the national legal order[27]. However, as pointed out by some scholars[28], this definition of

[22] As stated out by most authoritative scholars, among many others: A. A. Cançado Trindade, *International Law for the Humankind. Towards a New Ius Gentium*, Leiden-Boston, Martinus Nijhoff, 2nd ed., 2013, pp. 479; J. A. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, Tecnos, 16th ed., Madrid, 2012, pp. 327 et seq.; M. N. Shaw, *International Law*, 6th ed., Cambridge, Cambridge University Press, 2008, pp. 197 et seq.

[23] See, volume 47 of the *Netherlands Yearbook of International Law* dedicated to "The Changing Nature of Territoriality in International Law", and particularly V. Bílková, "A State Without Territory", *Netherlands Yearbook of International Law*, Vol. 47 (2016), pp. 24 et seq.

[24] J. A. Pastor Ridruejo, *Curso de Derecho Internacional… op. cit.,* p. 325.

[25] C. Tiburcio, "The Current Practice of International Co-Operation in Civil Matters", *Recueil des cours*, Vol. 393 (2018), p. 54.

[26] J. D. González Campos, L. I. Sánchez Rodríguez, and M. P. Andrés Sáenz de Santa María, *Curso de Derecho Internacional Público*, Servicio de Publicaciones de la Facultad de Derecho, Universidad Complutense de Madrid, 5th ed., Madrid, 1992, p. 447 (internal quotation omitted).

[27] H. Kelsen, *General Theory of Law and State*, Cambridge, Harvard University Press, 1949, pp. 207 et seq.

territory as a physical unit cannot be enough to determine the attributes that a State can exercise; besides ignoring the possibility of exercising competences beyond state borders[29]. We must also add that the physical notion of territory has been extended not only to the portion of land but also to the interior waters, the territorial sea and the air space overlying the territory and the territorial sea.

Also, lawmaking is an own and fundamental attribute of the sovereignty, and therefore, it is bound to the idea of territoriality. In this sense, sovereignty has an essentially territorial character since, together with the idea of independence, it is understood as the right to exercise in a territory, to the exclusion of any other State, the functions inherent to the State. This was established by arbitrator Max Huber in the *Island of Palmas case* when he ruled that:

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations"[30].

Furthermore, it should be noted that the laws are made to be applied within the State whose legislative power created them. Thus, referring to criminal matters, we find that, since the *ius puniendi* is a key element of sovereignty, it is in the territory of the State that legislated where it should and can be applied and executed[31]. However, this idea must be qualified through the possibility of introducing certain exceptions to criminal territoriality, the so-called extraterritorial titles of jurisdiction[32], also called *links or bases for jurisdiction*[33].

The principle of territoriality, referred to criminal matters, implies that International Law allows a State to exercise criminal jurisdiction over persons (nationals or not) for acts committed in the territory of that State[34]. It is, therefore, a criterion of attribution of criminal jurisdiction to the State where the crime was committed (*forum delicti commissi*). The doctrine agrees to consider this as a principle of customary

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[28] J. A. Pastor Ridruejo, *Curso de Derecho Internacional… op. cit.,* p. 326 (quoting Jiménez de Aréchaga); and J. D. González Campos, L. I. Sánchez Rodríguez, and M. P. Andrés Sáenz de Santa María, *Curso… op. cit.,* pp. 447-448.

[29] H. Kelsen, *General… op. cit.*, p. 208.

[30] Island of Palmas Case (Netherlands vs. USA), 4 April 1928 in *Recueil SANU*, Vol. II., pp. 829-871, p. 838, available at http://www.un.org/law/riaa/. Idea also maintained in the *case of the Corfu Channel*; see *CIJ Recueil,* 1949, p. 22. See C. McLachlan, *Foreign Relations Law*, Cambridge, Cambridge University Press, 2014, pp. 191 et seq.

[31] See J. L. Díez Ripollés, *Derecho Penal Español. Parte General en Esquemas*, Tirant lo Blanch, Valencia, 2007, p. 75; y A. Sánchez Legido, *Jurisdicción… op. cit.*, p. 27.

[32] A. Sánchez Legido, *Jurisdicción... op. cit.*, p. 32.

[33] See the terminology utilized in A. S. Galand, "Conceptions…" *op. cit.*, p. 14; A. J. Pérez-Cruz Martín *et al*, *Derecho Procesal Penal*, Civitas, 2nd ed., 2010, p. 78; G. Bottini, "Universal Jurisdiction after the Creation of the International Criminal Court", *International Law and Politics,* Vol. 36 (2004), p. 511; R. O'Keefe, "Universal…", *op. cit.*, p. 738; M. M. Martín Martínez, "Jurisdicción Universal y Crímenes Internacionales", in A. Salinas de Frías (ed.), *Nuevos Retos del Derecho: integración y desigualdades desde una perspectiva comparada Estados Unidos / Unión Europea*, Servicio de Publicaciones Universidad de Málaga, 2001, pp. 153 et seq.

[34] See A. Cassese (ed.), *The Oxford Companion… op. cit.*, p. 531.

international law[35] and that, moreover, it is a consequence of the sovereignty of States. This principle recognizes a "preferential right" in favour of the State of the *forum* (State of the place) with respect to jurisdictions that may be exercised by other States. This is the result of its conception as a basic principle on which the exercise of criminal jurisdiction is based on, and therefore with primacy over other bases for jurisdiction. The preference is justified by its practical advantages. The *forum* State is where most of the material evidence, the witnesses, and presumably the victims and the alleged perpetrators will be found, and it will be the one who has the greatest interest in bringing those responsible before Justice[36]. This principle has a general acceptance by the scientific doctrine as well as by State practice[37], and international instruments[38].

B. Extended territoriality

The principle of territoriality has been increased in its scope of action through the called *sui generis* bases of prescriptive criminal jurisdiction[39], namely the principle of the State of the flag or the State of registration, the principles of objective and subjective territoriality, as well as the doctrine of "effects". These operates as extensions of the principle of territoriality, and they have been used to respond to the evolution of crime with a foreign element.

(i) Fictional territories of the State

The "principle of the State of the flag of the ship" refers to the power of State jurisdiction over persons or property in relation to acts that occurred within the vessels whose flag hoist. It is a legal fiction in which it is believed that the ship is an extension of the territory of the forum State. The said jurisdiction shall be exercised, in principle, exclusively by the State whose flag the vessel owns. This principle has been confirmed in Article 6 of the *Convention on the High Seas*[40], Article 92 of *the United Nations Convention on the Law of the Sea* (UNCLOS)[41] and art. 6 of the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*[42]. Also, it has been adopted into the domestic laws of States.

Regarding the "principle of the State of registry of the aircraft" we will say that it is an update of the previous principle of the State of the flag, specifically referred to the aircraft. Like the previous one, it has been included in the Treaties on aviation as a jurisdictional nexus that enables the State of the registration of the aircraft to exercise its jurisdiction over the events that occurred there. Thus, it can be seen in article 3 of the *Convention on offenses committed on board aircraft* (Tokyo, 1963)[43], Article 4 of the

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[35] M. M. Martín Martínez, "Jurisdicción…" *op. cit.*, p. 154.
[36] Amnesty International, *Universal Jurisdiction... op. cit.*, chap. I Definitions, p. 4; M. M. Martín Martínez, "Jurisdicción…" *op. cit.*, p. 154.
[37] E.g. France, Belgium, Germany or Spain; see Amnesty International, *Universal Jurisdiction... op. cit.*, chap. I Definitions, p. 4.
[38] See e.g. Article VI of the *Convention for the Prevention and Punishment of the Crime of Genocide, UNTS*, Vol. 78, p. 277; or in Article 5.1.a) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNTS*, Vol. 1465, p. 85.
[39] R. O'Keefe, *International Criminal Law*, Oxford, Oxford University Press, 2015, pp. 14 et seq.
[40] Done in Genève 29 April 1958, *UNTS*, Vol. 450, p. 11.
[41] United Nations Convention on the Law of the Seas, done at Montego Bay (Jamaica) 10 December 1982, *UNTS*, Vol. 1833, p. 3.
[42] Done in Rome 10 March 1988, *UNTS*, Vol. 1678, p. 262.
[43] *UNTS*, Vol. 704, p. 219

Convention on the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970)[44], and Article 5 of the *Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Montreal, 1971)[45], among others.

(ii) Crimes involving multiple territories

It may be the case that not all acts of crime are carried out within the territory of the same State (transnational crimes). In fact, we can find events that partially occur within the territory of the State. Consider, a well-known example of the case of a person who, within the territory of one State, shoots another person who is in the territory of another State. To solve this problem, we resort to an *extension* or the territoriality principle. Therefore, this principle allows the exercise of jurisdiction over crimes that, even in part, have been developed in the territory of the State of the Court (State of the *forum*). In this line the PCIJ was pronounced in the *SS Lotus case* that

> "it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there"[46].

This idea has resulted in three different notions: the principle of objective territoriality, the principle of subjective territoriality, and the theory of effects. The first allows the exercise of jurisdiction over events that begin in the territory of the forum State but end in the territory of another State, the second, the "principle of objective territoriality", allows jurisdiction in cases where the event starts outside the territory of the State but is completed within it[47]. Conversely, the effects doctrine expands this idea even further to the entire offense committed abroad. So, following ILC notion, the effect doctrine allows

> "jurisdiction asserted with regard to the conduct of a foreign national occurring outside the territory a State which has a substantial effect within that territory. This basis, while closely related to the objective territoriality principle, does not require that an element of the conduct take place in the territory of the regulating State"[48].

This doctrine is considered a form of territoriality as it is based on the impact of the crime[49]. Thus, based on a broad conception of the territory, a response has been given to certain crimes that are related to several territories, such as the illicit trade (importing) of drugs[50].

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[44] *UNTS*, Vol. 1973, p. 123.
[45] *UNTS*, Vol. 1975, p. 198.
[46] PCIJ, *SS Lotus* (France v. Turkey), PCIJ Reports, Series A, No. 10 (1927), p. 23.
[47] A. Cassese (ed.), *The Oxford Companion… op. cit.*, p. 532.
[48] Report of the International Law Commission, 58th Session, doc. A/61/10, Annex E: Extraterritorial Jurisdiction, para. 12; also see A. Petrig, "The Expansion of Swiss Criminal Jurisdiction in Light of International Law", *Utrecht Law Review*, Vol. 9, No. 4 (2013) p. 38.
[49] R. Wedgwood, "The Present State of Research Carried Out by the English-speaking Section of The Centre for Studies and Research", in The Hague Academy of International Law, *La Justice Pénale Internationale. International Criminal Justice*, The Netherlands, Brill-Nijhoff, 2002, p. 72.
[50] R. O'Keefe, "Universal…", *op. cit.*, p. 739.

2. Evolution against criminality: extraterritorial links of jurisdiction

The principle of territoriality is widely accepted by the doctrine and by most countries, as it has been described as "a well-established tradition that makes the territoriality of penal law the fundamental principle of contemporary criminal law"[51]. However, this vision has been complemented by the extraterritorial links of jurisdiction to deal with transnational crime. These links are, among others[52], the principle of personality or nationality (comprising active and passive personality) the principle of protection of national interests, the principle of Universal Jurisdiction and the principle of supplementary justice[53].

These principles will be exercised in a complementary and subsidiary manner as a corollary of the principle of territoriality. In fact, an evolution can be seen from the jurisdiction based on the territory that little by little is reducing the links with the *forum* state until reaching universal jurisdiction. However, the acceptance of these principles is by no means general, neither in each of them nor in their degree of intensity. Which can be deduced from the acceptance or not by the States, and to what extent.

A. Active personality principle

The principle of personality or nationality is inferred from the second substantial element of statehood: the population[54]. Thanks to the active personality principle, a State is allowed to exercise its jurisdiction over criminal offences that have occurred abroad, provided that the author is a national of this State. Here the emphasis is placed primarily on the national character of the active subject of the crime. This principle is based on the idea of subjection of the minions of a State to its laws, and therefore these laws follow them wherever they are[55].

Despite its accommodation in national legislations, it is not peacefully accepted by scientific doctrine the unitary exercise of it. It seems difficult to sustain jurisdiction based exclusively on this principle, according to which the legal interest protected or the nationality of the victim or even the national legislation of the State where the crime is committed is indifferent. That is why to avoid an abusive exercise it is required that the act also be an offense according to the Law of the place of commission (*lex commissi delicti*), which also take into account other principles, such as territoriality. A reasonable exception of this argument is found in cases of crimes against the sexual liberty of the individual such as the female genital mutilation as explained *infra*.

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[51] First report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, YILC, Vol. II, Part 1, 1983, para. 32.

[52] The principle of belligerency is an archaic principle that consists of the possibility for a State to prosecute acts committed by enemy-country nationals, against their nationals, interests or against co-belligerent States, always within a war situation. Some authors consider it an application of other principles such as the protective or the passive nationality or the universal jurisdiction. Thus, it is rarely used principle with limited incorporation in criminal legislation. See A. Cassese (editor in Chief), *The Oxford... op. cit.*, p. 474; A. Sánchez Legido, *Jurisdicción… op.cit.*, p. 37, Amnesty International, *Universal Jurisdiction... op. cit.*, chap. I Definitions, pp. 9-10.

[53] A. S. Galand, "Conceptions…" *op. cit.*, p. 14 et seq.; C. Ryngaert, *Jurisdiction in International… op. cit.*, p. 21; R. O'Keefe, "Universal…", *op. cit.*, pp. 739-740; J. J. Diez Sánchez, *El Derecho Penal Internacional (Ámbito Espacial de la Ley Penal)*, Editorial Colex, Madrid, 1990.

[54] J. J. Diez Sánchez, *El Derecho… op. cit.*, p. 99.

[55] This legal status that follows the individual is commonly accepted for example, in family law; H. Donnedieu de Vabres, *Les principes modernes du droit pénal international*, Paris, Sirey, 1928, p. 80.

B. Passive personality principle

The principle of passive personality is the other aspect of the subjection of the individual to the State, based on the nationality not of the offender but of the victim or injured. Here, the victim's national status allows the State to exercise its jurisdiction over the facts committed abroad. Historically it did not enjoy much support, because it was considered as illegitimate interference as it cast doubt on other national legal systems[56]. Indeed, it seems like a foreign legal system is not appropriate because it does not consider certain action as a crime, therefore, an extraterritorial application of another state's law is required to improve the situation.

According to some authors, this principle would appear linked or would be a manifestation of the principle of protection of national interests. The victim, as a subject of the State appears as an interest of the latter and therefore its protection would be included within the obligatory protection of the State interests[57]. In one way or another, today it is widely accepted by state practice[58] and by jurisprudence[59]. This base for jurisdiction is used in prosecuting core crimes, as could be seen in the Eichmann case[60] or in the extradition order issued against Pinochet to the United Kingdom based on the killing of Spanish nationals[61]. But also, to prosecute non-core crimes such as terrorism[62] or corruption[63].

The incorporation of this principle was motivated by the need to pursue certain behaviours that occurred outside the borders to avoid the action of justice. Thus, its use can be seen to pursue female genital mutilation in Spain. This practice typical of some African countries is considered a violation of human rights. In order to combat it from a State in which it is prohibited but that the acts take place abroad and by foreigners, it was decided to use this principle of active or passive personality. Thus, it provides for jurisdiction of Spanish courts when "the procedure is directed against a foreign citizen who habitually resides in Spain" or "the crime was committed against a victim who, at the time of the commission of the acts, had Spanish nationality or habitual residence in Spain"[64]. In this case, criticism of the principle of passive personality revolve around the fact that the perpetrator of the crime does not know what criminal legislation will be applied to him, since it depends on the nationality of the victim. Which is not the case with the active personality. Or he/she does not know that this concrete action, that is

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[56] In this sense J. J. Diez Sánchez, *El Derecho…op. cit.*, p. 113 y M. M. Martín Martínez, "Jurisdicción…" *op. cit.*, p. 155.
[57] See A. Cassese (editor in Chief), *The Oxford... op. cit.*, p. 451; M. M. Martín Martínez, "Jurisdicción…" *op. cit.*, p. 155; J. J. Diez Sánchez, *El Derecho…op. cit.*, p. 115.
[58] Y. Dinstein, "Universality Principle and War Crimes", *International Legal Studies*, Vol. 71 (1998), p. 18. For instance, the acceptance of this principle in the laws of the United States: paras. 2331 and 2332 of US Federal Criminal Code (18 USC Part I).
[59] See separate opinions of Judges Higgins, Kooijmans and Buergenthal, Rezek, and Guillaume in Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002; referred in C. Ryngaert, *Jurisdiction in International… op. cit.*, p. 94, note 59.
[60] Amnesty International, *Universal Jurisdiction... op. cit.*, chap. I Definitions, p. 9.
[61] A. Cassese, M. Delmas-Marty, *Jurisdictions Nationales et Crimes Internationaux*, Presses Universitaires de France, 1ère édition, 2002, p. 578; A. Sánchez Legido, *Jurisdicción… op.cit.*, p. 36.
[62] A. Sánchez Legido, *Jurisdicción… op.cit.*, p. 35.
[63] See, e.g. its inclusion in article 42.2.a) of the 2003 UN Convention against Corruption.
[64] Art. 23.4.k) 2 and 4 respectively, of Spanish Law on the Judiciary (Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, BOE No. 157, of 2.7.1985), hereinafter LOPJ.

part of his/her culture is banned in another country[65]. This problem would not occur with double criminality if the conduct is punishable both in the place of commission and in *forum* state that intends to prosecute. But out of this premise, this principle is justified on preventive ground, for its deterrent effect[66] and to avoid impunity[67]. The legislator wants to prevent the conduct considered criminal within its society, even if the author tries to evade the action of justice by committing it in a territory where it is not punished.

C. Principle of protection of national interests

The protective principle[68] derives from political organization as a constituent element of statehood[69]. We can establish a general concept of this principle as intended to "protect the State from acts perpetrated abroad which jeopardize its sovereignty or its right to political independence"[70]. Thus, by means of this principle, the State is allowed to exercise jurisdiction over crimes committed abroad, regardless of the nationality of the author, whenever these violate their interests or affect the prerogatives of public authority[71]. However, there are problematic situations when including notions of "security" (hence the use by some authors of the title *security principle*), which would increase the scope of exercise of the jurisdiction[72]. In any case, there is wide margin of appreciation for States to determine which are those circumstances that affect their national interests of greater importance. For example, in the case of United States of America and its foreign performance abroad based on national security concerns[73].

This principle is not applicable as long as any interest of the State is affected. These interests must be of great importance for the normal development of their political-social organization and must therefore be fundamental interests of the State[74]. Traditionally, this principle was used when committing treason against the State. Nowadays, the catalog of crimes that are pursued based on this principle reflects a wide array of twentieth century interests, such as, currency counterfeiting, espionage, attack against the Head of State, plotting the overthrow of the government, etc[75]. Hence, the

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[65] This ignorance can be considered as an attenuating circumstance; see Audiencia Nacional (Sala Penal, Sección 4), Judgment 9/2013, of 4 April.
[66] As argue by C. Ryngaert, *Jurisdiction in International… op. cit.*, p. 93.
[67] Ibid., p. 95.
[68] Also called *security principle*, *protective principle*, *compétence réelle* or by the German doctrine *Realiprinzip*, *Realsystem*, *Schutzprincip* or *Staatsschutzprinzip*; see A. Cassese (editor in Chief), *The Oxford... op. cit.*, p. 304; M. M. Martín Martínez, "Jurisdicción…" *op. cit.*, p. 155; J. J. Diez Sánchez, *El Derecho…op. cit.*, p. 133; I. Cameron, "International Criminal Jurisdiction, Protective Principle", *Max Planck Encyclopedia of Public International Law*, 2007, para. 1.
[69] A. Sánchez Legido, *Jurisdicción… op.cit.*, p. 36.
[70] C. Ryngaert, *Jurisdiction in International… op. cit.*, p. 96.
[71] See M. M. Martín Martínez, "Jurisdicción…" *op. cit.*, p. 155; A. A. Cançado Trindade, *International Law… op. cit.*, p. 383.
[72] See C. Ryngaert, *Jurisdiction in International… op. cit.*, p. 97.
[73] For example in the case of Huawei considered as a national security threat, see China's Huawei Tech retrenches in U.S. after years of criticism, 17 April 2018, Reuters, https://www.reuters.com/article/us-usa-huawei-lobbying/chinas-huawei-tech-retrenches-in-u-s-after-years-of-criticism-idUSKBN1HO2FG (accessed 9 January 2021).
[74] R. O'Keefe, *Universal… op.cit.*, p. 739.
[75] See C. Ryngaert, *Jurisdiction in International… op. cit.*, pp. 98-99 (e.g. in US was considered under this principle "making false statements to consular officials abroad in order to obtain a visa"; A. Cassese (editor in Chief), *The Oxford... op. cit.*, p. 474; Y. Dinstein, "The Extra-Territorial Jurisdiction of States: The Protective Principle", *Annuaire d'Institut de Droit International*, Vol. 65 No. 2 (1993), pp. 305-315.

authors have sought to establish the basis of the principle in the self-protection exercised by the State to protect their own legal interests[76], as if the State were the victim.

The principle has a general acceptance by International Law[77] and by States' national legislation. Indeed, it is clear its use regarding terrorist attack affecting States[78]. An example of the application of this principle by the United States could be seen in the execution of Osama Bin Laden. Without going into the debate about the legality or not of the facts, the truth is that Bin Laden was considered an enemy of the State after participating in the terrorist attacks on the WTC and as such was located and executed. Also, in this case, as in situations of armed conflict, this principle can be confused with that of passive personality[79], while the victims were, to a large extent, US nationals.

D. Principle of supplementary justice

Another step in the recognition of extraterritorial bases that rely on non-territorial links to the regulating state is the supplementary justice or principle of representation[80]. This principle is based on the possibility of a State to judge acts committed abroad by foreigners (and against foreigners) for ordinary crimes if it is not possible to punish them by the competent jurisdiction[81]. This institution is similar to the idea of the *forum necessitatis* in private law. Here, the State of the forum replaces the lack of jurisdiction and punishes instead of the other, though, applying the *lex fori*. The rationale is to fill the punitive gaps due to factual, legal or political impossibilities. It is mainly associated with cases of denial of extradition due to political asylum in the forum State, or simply because it has not been requested. Scholars accept this principle due to its ultimate foundation, to avoid impunity. It appears collected in a few national legislations such as the German or the Austrian, among others. In the same way it has been included in some Conventions, such as the 1964 European Convention on the Punishment of Road Traffic Offences[82] or the European Convention on the Transfer of Proceedings in Criminal Matters of 1972[83].

This principle has great similarities with the principle of protection of national interests[84], but above all, with the principle of universal Jurisdiction[85], as far as it does

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[76] J. J Diez Sánchez, *El Derecho…op. cit.*, pp. 135-137.
[77] A. Cassese (editor in Chief), *The Oxford... op. cit.*, p. 474. A contrary opinion in C. Ryngaert, *Jurisdiction in International… op. cit.*, pp. 98-99.
[78] Art. 6.2.b) and d) International Convention for the Suppression of Terrorist Bombing, done in New York, 15 December 1997; and art. 7.2.b) International Convention for the Suppression of the Financing of Terrorism, done in New York, 9 December 1999; see C. Walter, *Terrorism and the Law*, Oxford University Press, Oxford, 2011.
[79] A. Cassese (editor in Chief), *The Oxford... op. cit.*, p. 474; Amnesty International, *Universal Jurisdiction... op. cit.*, chap. I Definitions, p. 10.
[80] Along with other names, mainly in the German doctrine, such as the *alternate criminal administration of justice*, *subsidiary criminal justice*, *substitute justice*, vicarious jurisdiction, delegation of jurisdiction, etc; see J. J Diez Sánchez, *El Derecho… op. cit.*, pp. 203; A. S. Galand, "Conceptions…" *op. cit.*, pp. 16-17; C. Ryngaert, *Jurisdiction in International… op. cit.*, pp. 102-104.
[81] B. Swart, "La place des critères traditionnels de compétence dans la poursuite des crimes internationaux", in A. Cassese, M. Delmas-Marty, *Jurisdictions Nationales et crimes internationaux*, PUF, Paris, 2002, p. 578.
[82] Dated 30 November 1964, ETS No. 52.
[83] Done in Strasbourg, 15 May 1972, ETS No. 73.
[84] See A. Sánchez Legido, *Jurisdicción… op. cit.*, p. 40.
[85] Amnesty International, *Universal Jurisdiction... op. cit.*, chap. I Definitions, p. 3.

not use any connection between the fact and the *forum* State. It is not based on territoriality -because it has been committed abroad-, nor on nationality -neither the author nor the victim is a national, and although the victim is, the passive personality is not usually admitted-, nor in the protection of state interests, as ordinary crimes are punished. The difference is found in this last element: while the universal jurisdiction is exercised with respect to core crimes, this principle is exercised with respect to non-core crimes. Another difference is the requirement that the acting State have the consent to judge of the State where the crime was committed. Thus, it is the State of the place of commission that decides whether the prosecuting State should extend its *ius puniendi* to the specific act[86]. However, if it is reasonable the opinion that understands that this principle is in some way the principle of universal jurisdiction but for non-core crimes, the problem is that the UJ enjoys important criticisms for understanding that it allows interference in the internal affairs of States by allowing jurisdiction over acts committed abroad. So, if it would be accepted for ordinary crimes criticisms will increase.

E. Waiver of links: Universal Jurisdiction

As described, there are many links to ground jurisdiction by the State's court and they are all alternative[87]. The court may set its jurisdiction on one of them or various. In the Arrest Warrant case, judges indicated that there is a clear evolution from the notion of territoriality to the links of jurisdiction[88]. This evolution is still on-going to even a less strict necessity of jurisdictional links to the absolute absence of link with the court's State as with universal jurisdiction. At the same time, "States increasingly perceive the need to protect both their own interests and the interests of the international community in respect of conduct occurring beyond their borders"[89].This may be seen as a tendency in order to waive links of jurisdiction, or to expand domestic criminal law extraterritorially[90], to grant justice and struggle against impunity for the most significant crimes. Hence, the ultimate expression of extraterritoriality in criminal law is the principle of universal jurisdiction or universality principle (UJ). It entails domestics courts "to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim"[91]. It involves "the non-applicability of statutory limitations in relation to crimes which affect humanity itself" [92] and for that reason transcending not only the territoriality principle but the grounds for links of jurisdiction. In this way, the principle of universal jurisdiction is entrusted as the outermost base for jurisdiction in criminal

[86] K. Ambos, *Derecho y proceso penal internacional. Ensayos críticos*, Fontamara, México, 2008.
[87] Spanish Supreme Court, Criminal chamber, Judgment 5261/2007, of 5 July 2007, FJ 3 (stated that the principle of territoriality is the preferred nexus of criminal jurisdiction , but it coexists with other principles).
[88] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), ICJ, Judgment of 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 47.
[89] M. T. Kamminga, "Territoriality", *Max Planck Encyclopedia of Public International Law*, 2012, para. 4.
[90] This tendency may be seen in many countries since years, e.g. in Switzerland; see A. Petrig, "The Expansion of Swiss Criminal Jurisdiction in Light of International Law", *Utrecht Law Review*, Vol. 9, No. 4 (2013), p. 55.
[91] M. T. Kamminga, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, Committee on International Human Rights Law and Practice, International Law Association, Final ILA Report, London Conference 2000, p. 3; similar to other definitions like in Amnesty International, *Universal Jurisdiction... op. cit.*, chap. I Definitions, p. 11.
[92] A. A. Cançado Trindade, *International Law for the Humankind. Towards a New Ius Gentium*, Leiden-Boston, Martinus Nijhoff, 2nd ed., 2013, p. 388.

procedure, in fact, it entails the waiver of links. That is why it could be considered an exception of the territoriality principle[93].

Therefore, extraterritoriality in criminal law may be established in domestic laws based on a unilateral exercise (optional or voluntary[94]). Also, in certain subjects, international instruments set up compulsory rules for extraterritorial jurisdiction based on extraterritoriality principles or even, universal jurisdiction[95]. See for example, the insightful art. 4 of the Convention for the Suppression of Unlawful Seizure of Aircraft[96]. In these cases, international rules impose on States the obligation to prosecute certain crimes. This establishment of extraterritorial jurisdiction through conventional standards is widely accepted[97]. In fact, some multilateral instruments impose on States parties the duty to endow its tribunals to judge the actions depicted by them[98].

However, the principle of universal jurisdiction has been limited in its application to the so call *international crimes*. Although there is no agreement in the complete catalog of such crimes[99], nor in their elements to be included in it, there is a certain consensus regarding a minimum number of them, which are considered of special gravity and importance for the international community in its set. As stated by Bennouna, such crimes "sont commis en violation de normes universelles *(erga omnes)* et de caractère impératif *(jus cogens)*"[100]. It is precisely this violation of peremptory norms of international law that allows the exercise of the principle of universality for its repression[101]. Several instruments deal with these crimes of special significance for the international community, such as UNGA resolutions[102], ILC works[103] and international

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[93] D. Vandermeersch, "La Compétence universelle", in A. Cassese, M. Delmas-Marty, *Jurisdictions Nationales et crimes internationaux*, PUF, Paris, 2002, p. 589.

[94] In case domestic Law establishes a competence greater than that allowed by the conventional norm; see D. Vandermeersch, "La Compétence… *op. cit.*, p. 590.

[95] A. Sánchez Legido, *Jurisdicción Univeral Penal y Derecho Internacional*, Valencia, Tirant lo Blanch, 2003, pp. 69 et seq.

[96] Signed at The Hague on 16 December 1970, *UNTS,* Vol. 860, No. 12325.

[97] D. Vandermeersch, "La Compétence… *op. cit.*, p. 590.

[98] Ibid., p. 591. See for instance, the survey within the Arrest Warrant case of some international instruments allocating universal jurisdiction or "an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere"; Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), ICJ, Judgment of 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 41.

[99] For example, Bassiouni argues that there are 27 international crimes: aggression, genocide, crimes against humanity, war crimes, crimes against the UN and associated personnel, illegitimate possession and / or use of weapons, theft of nuclear materials, mercenarism, apartheid, slavery and related practices , torture, illegitimate human experimentation, piracy, aircraft hijacking, illegal acts against civil maritime navigation, illegal acts against internationally protected persons, taking of civilian hostages, illegal use of the mail, nuclear terrorism, financing of international terrorism, illegal drug trafficking and dangerous substances, destruction and / or theft of national treasures and cultural heritage, illegal acts against the environment, international trafficking in obscene materials, counterfeiting, illegal interference with submarine cables, and bribes by foreign public officials; M. C. Bassiouni cited by M. Ollé Sesé, *Justicia Universal para Crímenes Internacionales*, La Ley, 2008, p. 200, note 292.

[100] M. Bennouna, « Le droit international entre la lettre et l'esprit », *Recueil des cours*, Vol. 383 (2016), p. 140.

[101] Ibid., p. 140; G. Bottini, "Universal Jurisdiction after the Creation of the International Criminal Court", *International Law and Politics,* Vol. 36 (2004), p. 511. However, other scholars do not require to be included in international conventions in order to be able to apply the universality principle; J. J. Diez Sánchez, *El Derecho… op. cit.*, pp. 180-182.

[102] E.g. the Resolution of the UN General Assembly 96(I), of 11 December 1946, *which confirms the principles of international law recognized by the Statute of the Nuremberg Tribunal*.

treaties[104]. But surely a significant one is the Rome Statute of the International Criminal Court[105] (hereinafter the Rome Statute), allocating jurisdiction to the ICC over the crime of genocide, crimes against humanity, war crimes and the crime of aggression[106]. Nevertheless, the concretion of the number of this category of crimes remains a debate in the doctrine descended decades ago[107] and States are reluctant to expand it.

3. Consequences of extraterritorial jurisdiction within a unilateral paradigm

As described, in recent decades, the extraterritoriality of criminal law has occurred unilaterally through the principle of universality. However, the use of this principle has never been peacefully accepted. The legal basis of the universal jurisdiction can be found in conventional international law[108], customary or in the so-called Nuremberg Law. The reason why this principle should be applicable, lies in these aspects: avoid impunity, allow access to justice and the importance of the crimes committed, that is, *jus cogens* crimes. It has also been justified by its capacity to "motivate" courts where the acts took place which had shown their lack of desire to judge them[109]. The JU also finds its legitimacy in the right of access to justice[110].

Nevertheless, the extraterritoriality action based on the UJ has focused on the same international crimes under jurisdiction of the ICC. To this end, it has used less and less links of jurisdiction till the use, or abuse, of the principle of universality.

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[103] See the *Nuremberg Principles* formulated by the ILC in 1950, *Part IV: The Principles of International Law Recognized in the Charter and the Judgment of the Nurnberg Tribunal; Texts and Comments*, YILC, Vol. II, 1950, pp. 191 y ss.; the Draft Code of Crimes against the Peace and Security of Mankind adopted by the ILC in 1996 (Articles 16, 17, 18 and 20. Report of the International Law Commission, 48th Session, doc. A/51/10)

[104] See Article 101.a.ii of the UNCLOS.

[105] Done at Rome on 17 July 1998, in force on 1 July 2002 (*UNTS*, Vol. 2187, No. 38544) as adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, doc. A/CONF.183/9; and amended by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.

[106] Art. 5 of the Rome Statute.

[107] See for instance M. Chadwick, *Piracy and the Origins of Universal Jurisdiction. On Stranger Tides?*, Brill, Leiden, 2019, p. 204; L. Arenal Lora, *Las graves formas de victimización. Los crímenes económicos contra la humanidad*, Fundación para la Cooperación APY-Solidaridad en Acción, 2017; M. Cherif Bassiouni, "International Crimes: The Ratione Materiae of International Criminal Law" in M. Cherif Bassiouni (ed.), *International Criminal Law: Sources, Subjects, and Content* (Vol I), Leiden, Martinus Nijhoff, 2008, p. 132; A. Reisinger Coracini, "'Amended Most Serious Crimes': A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court?", *Leiden Journal of International Law*, Vol. 21, Issue 3, 2008, pp. 699-718; M. Ollé Sesé, *Justicia… op. cit.*, particularly pp. 184 et seq.

[108] See the 1949 Geneva conventions (arts. 19-50, 129-130, and 85.1 of Protocol I); see T.M.C. Asser Instituut, *Humanitarian Law of Armed Conflict. Challenges Ahead. Essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1991, pp. 203-204.

[109] REDRESS, International Federation for Human Rights, *Letter to the EU Council, Africa Working Group on the Principle of Universal Jurisdiction*, 10 February 2009, p. 3, available at https://redress.org/wp-content/uploads/2018/01/February-comments-to-the-council-of-Africa-working-group.pdf (accessed 20 January 2021).

[110] It is common for victims of international crimes to be denied access to justice in their respective countries, among other reasons, due to the absence of an adequate judicial system, either because they work poorly because of an armed conflict, or, by the lack of will from the state's tribunals to prosecute the alleged perpetrators; see International Federation for Human Rights, *Un Enfoque paso a paso sobre el Ejercicio de la Jurisdicción (Penal) Universal en los Países de Europa Occidental*; disponible en *http://www.fidh.org/-Jurisdiccion-universal-*.

Consequently, States have acted largely through unilateral measures. To do this, they have modified their domestic legislation to allow their courts to hear crimes that only to some extent did not have requirements to prosecute them (e.g. presence in the territory of the alleged perpetrator). Therefore, these situations were generally dominated by the legal regime of these international crimes. In this way, Bassiouni introduced the key elements of such legal status as follows:

> "International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are inderogable. Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of 'obedience to superior orders' (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under 'states of emergency', and universal jurisdiction over perpetrators of such crimes"[111].

Hence, the extraterritorial links allows domestic courts of the States to judge for international crimes. These courts will apply the national law of the State of the forum, without prejudice to the possible application of International Law when their system (monistic or dualistic) allows it. In this sense, the extraterritoriality incorporated by the States into their legislation for its exercise by its courts, will be subject to the own limits of domestic laws[112]. This establishes for example, the obligation of the alleged perpetrator to be under the control of the forum State, even before the investigation against him begins[113]. Another limitation is the requirement of obtaining the nationality or residence of the forum State, to be able to act against the person (case of Australia, Kyrgyzstan and the United Kingdom). In addition, *jus cogens* crimes poses a challenge in terms of their effectiveness because "crimes under international law are typically State crimes"[114]. Thus, we face immunities under international law of heads of state. These are not applicable when it comes to judging international crimes by international courts like ICC. However, they operate when the judge is a domestic court[115]. Other limitations are double criminality, the establishment of geographical limits, status of limitation of such crimes according to domestic criminal procedure, etc.[116]

Furthermore, in this unilateral paradigm, States thend to justify their extraterritorial action by legitimating it (called by others "juicio de razonabilidad", "reasonableness", "jurisdictional rule of reason"[117] or "criterio de razonabilidad interestatal"[118])[119]. Here, the legal basis to be able to act extraterritorially by a national

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[111] M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", *Law and Contemporary Problems*, Vol. 59, No. 4 (1996), p. 63.
[112] See A. J. Colangelo, "Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law", *Harvard international law journal*, Vol. 48, No. 1 (2007), pp. 121-201.
[113] Called the "custodial universal jurisdiction"; Amnesty International, *Universal… op. cit.*, chap. I Definitions, September, 2001, p. 15.
[114] G. Werle, *Tratado de Derecho Penal Internacional*, Tirant lo Blanch, 2011, p. 144; M. Ollé Sesé, *Crimen Internacional y Jurisdicción Penal Nacional: de la Justicia Universal a la Jurisdicción Penal Interestatal*, Thomson Reuters Aranzadi, 2019, pp. 211-212.
[115] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, para. 59.
[116] Amnesty International, *Universal… op. cit.*, chap. I Definitions, September, 2001, pp. 16-17.
[117] C. Ryngaert, *Jurisdiction in International… op. cit.*, p. 136 et seq.
[118] M. Ollé Sesé, *Crimen Internacional… op. cit.*, p. 224.
[119] See E. Rehbinder, "Extra-Territoriality…" *op. cit.*, pp. 129 and bibliography cited in note 5.

court must be combined with the postulates of the International law. This is because the International law principles[120] that regulate relations between States are also applicable to the exercise of jurisdiction by them. As said by Rehbinder:

> "As the exercise of extra-territorial jurisdiction to prescribe is associated with interventions into the territorial sovereignty of foreign states, it requires, at the substantive level, consideration of the interests of third states affected and, procedurally, consultations with a view to reaching an agreement whenever there is a true conflict between the states concerned. […] Apart from this requirement of a sufficient link, in cases of true conflict between the source and the victim state, proportionality between the (expected) harm and the intervention into the territorial sovereignty of the source state and a balancing of interests may be necessary, either as a matter of law or of comity"[121].

Therefore, the legitimacy of the state that intends to act is related to that of other states. As a matter of law, this is achieved through international treaties that establish rules to see who is more entitled to act. Legitimacy in the extraterritorial application also has to do, as Farbiarz points out, in when it is legitimate for a person to have a different legislation applied to their actions than that of their State[122]. In this way, a legitimate exercise of jurisdiction has to be balanced with the jurisdiction of other State/s. In a unilateral framework, this does not occur, which gives rise to diplomatic problems or obstruction of judicial action. Mainly, the non-recognition of judicial decisions that seek to be applied extraterritorially, which translates into non-cooperation to investigate the crime or to hand over the alleged perpetrator. However, in the multilateral paradigm, this is done through the establishment of distribution rules in international treaties in which States cope with their different interest[123]. The States parties have accepted these distribution rules, so their institutions (legislative and judicial power) are obliged to apply them.

Also, this unilateralism in adjudication causes serious diplomatic and applicability concerns. States aim at ensuring the application of international criminal law and fight against impunity, but when doing it unilaterally, it causes misfunctioning in application and execution, along with unintended consequences such as diplomatic disputes. The state practice of the last decades in those States more prone to extraterritorial application (Spain, Belgium…) has caused significant legal and diplomatic problems, as the main defendants were members of foreign governments or the jurisdiction exercised was reported illegitimate[124]. Therefore, as Kamminga indicates[125], not any extraterritorial exercise was accepted despite the absence of a prohibitive norm in international law.

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[120] E.g. the principles of non-intervention, sovereign equality, equity, proportionality, and the prohibition of abuse of law cited by C. Ryngaert, *Jurisdiction in International… op. cit.*, p. 237.

[121] E. Rehbinder, "Extra-Territoriality…" *op. cit.*, pp. 129 et seq.

[122] M. Farbiarz, "Extraterritorial…" *op. cit.*, p. 514.

[123] As it occurs with bilateral agreements; see N. Witkin, "A State of the People: The Shift of Sovereignty from Territory to Citizens", *Transnational Law and Contemporary Problems*, Vol. 27, No. 1 (2017), pp. 54-55.

[124] States may signal their objections by protesting or by other means; see C. Ryngaert, *Jurisdiction in International… op. cit.*, pp. 36-37.

[125] He states that "While it is perfectly understandable that the PCIJ wished to point out that the exercise of extraterritorial jurisdiction by way of prescription and adjudication is less objectionable than by way of enforcement, State practice does not support the view that the exercise of any form of prescriptive and

In conclusion, unilateral action implies that regardless of the jurisdictional nexus employed[126], the correct application of the principles will fall exclusively on the jurisdictional bodies that apply them, and we should trust in their logical and sensible exercise to avoid collisions of a legal or political-diplomatic nature. The real shift in the paradigm does not currently occur under the principle of universal jurisdiction. This has been anchored for years in the restrictive interpretation that States make so as not to become world courts and to avoid diplomatic problems[127]. On the contrary, it is in the field of transnational crimes (cases of corruption, money laundering...) where we find an upward trend to prosecute actions extraterritorially. Hence, legal problems that arise around jurisdiction must be resolved and are setting up a framework for multilateral action.

SECTION 3. MULTILATERAL PARADIGM

As described in previous section, States unilaterally, through the different jurisdictional links, have sought the extraterritorial application and / or execution of their criminal law. In this paradigm, the attribution of jurisdiction will be established to that State with a closer connection with the fact[128], and through the jurisdictional links. The problem is how this proximity is determined, since there are usually no rules for the attribution of powers in domestic law between the State of the forum and other possible ones. This leads to the complaint of exorbitant exercise of jurisdiction in many cases. Furthermore, *jus cogens* crimes enjoy a "particular" legal status, which entails challenges in their domestic application. Hence, the scope and limits of domestic courts' extraterritorial jurisdiction persist challenged due to the scarcity of state practice[129]. In contrast, in a multilateral paradigm, the jurisdiction is considered legitimate regarding that of other States through international rules commonly agreed. In our opinion, partly following Professor Ryngaert, I believe that the best system to resolve this approach is the extraterritoriality exercised by means of international criminal cooperation. In this way, through international treaties the States will determine "on what ground, for what purpose, and under what conditions they could exercise jurisdiction"[130]. At the same time, approaching it from a multilateral perspective would allow solving problems such as fragmentation in the application of international norms and, mainly, allow extraterritorial enforcement.

In this section, when addressing the paradigm shift of extraterritorial prosecution, I differentiate two areas: on the one hand, referring to the jurisdiction to prescribe, and on the other hand, to the jurisdiction to enforce. Referring to the first, the

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adjudicative jurisdiction beyond a State's borders is permitted as long as there is no specific rule of international law prohibiting it"; M. T. Kamminga, "Extraterritoriality", *op. cit.*, para. 9.

[126] Normally jurisdiction is based on several of them; R. O'Keefe, *Universal… op.cit.*, p. 738.

[127] As occurred in Spain and which led to the restriction of this principle in their domestic law; see A. Bautista-Hernáez, "¿Crisis de la Jurisdicción Universal? Avances y retrocesos en la aplicación de la Jurisdicción Universal por los Tribunales Españoles tras la reforma de 2009", A. Valencia Sáiz (ed.), *Investigaciones en ciencias jurídicas: desafíos actuales del derecho*, eumed.net, 2014.

[128] J. R. Crawford, *Brownlie's Principles of Public International Law*, Oxford, OUP, 9th Ed., 2019, p. 461; C. Ryngaert, *Jurisdiction in International… op. cit.*, p. 237.

[129] See the assertion related to universal jurisdiction for *jus cogens* international crimes in J.E. Álvarez, "Alternatives to International Criminal Justice", in A. Cassese (ed.), *The Oxford Companion… op. cit.*, p. 27.

[130] C. Ryngaert, *Jurisdiction in International… op. cit.*, p. 134.

trend towards multilateralism can be observed in two levels: at the substantive one, referring to the obligation to criminalize conducts and their definition, and at the implementation level, dealing with the set of jurisdictions to national courts.

1. Extraterritorial Jurisdiction to Prescribe

A. Substantive multilateralism

One of the main elements that determine the multilateral approach to the question of extraterritoriality is the existence of shared values that define common approaches in criminal law. In this respect, we can observe how there are certain common values to criminalize a certain behaviour. And these values take the form of widely accepted international treaties. Thus, a series of multilateral -universal and regional- treaties that exemplify the development in the multilateral paradigm. These instruments reflect more State practice in their application and reveal a more institutionalized cooperation in criminal matters. This could be seen with the setting up of various Commission within UN system[131]. Also, they constitute universal consensus in criminalize different actions thus these instruments are of universal application and came from generally accepted United Nations General Assembly resolutions[132], or have been adopted within the frame of regional organizations for cooperating in criminal matters.

These treaties, unlike those used for unilateral extraterritoriality, demonstrate a greater consensus in their application given its dimension. This is because jus cogens crimes represent a small part of current international criminality, even if they are the sharpest. On the contrary, there are many other situations with less reluctance among scholars and of States' international practice. We refer to criminal offences that may be considered as *threats of transnational dimension*[133] (and that we henceforth call transnational crimes[134]). They show greater acceptance by States when applying international cooperation mechanisms such as extradition or cooperation between police

[131] E.g. the Commission on Narcotic Drugs, the Commission on Crime Prevention and Criminal Justice, the United Nations Congresses on Crime Prevention and Criminal Justice, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime and the Conference of the States Parties to the United Nations Convention against Corruption; see https://www.unodc.org/unodc/.

[132] See e.g. UNGA Resolution 2106 (XX) [A], International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, A/RES/2106 (XX), Yes: 106, No: 0, Abstentions: 1, Non-Voting: 10, Total voting membership: 117; or UNGA Resolution International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, A/RES/61/177, adopted without vote.

[133] As named by MI González Cano (Dir.), *Cooperación Judicial Penal en la Unión Europea. Reflexiones sobre algunos aspectos de la investigación y el enjuiciamiento en el espacio europeo de justicia penal*, Tirant lo Blanch, 2015, p. 16. Also, this transnational sphere is important, for example, in the case of terrorism. Here, the 1999 Convention for the Suppression of the Financing of Terrorism is relevant because the assets related with the crime may be in different countries and they may be considered a link for exercising jurisdiction.

[134] Transnational crime are defined in article 3.2 of the Palermo Convention (United Nations Convention against Transnational Organized Crime, adopted by UNGA Resolution 55/25 of 15 November 2000, *UNTS*, Vol. 2225), as follows: "an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State".

or judicial authorities. In addition, transnational crimes do not pose so many difficulties in terms of their application as they are ordinary crimes with an international element. Therefore, government officials or individuals -but not States as a government policy- may commit these actions (bribery, money laundry…).

Within this category we found a series of agreements dealing with a variety of crimes, such as: counterfeiting[135], terrorism[136], human rights crimes[137], drugs[138], mercenarism[139], organized crime[140] and corruption[141]. In parallel, we may also find regional instruments that criminalize certain conducts that have been used as a base for extraterritorial application of criminal law. This study will take into consideration the instruments from the Council of Europe[142] and the European Union[143] as more developed models. However, we will also refer to examples within other regional organizations like the Organization of American States (OAS), the Association of Southeast Asian Nations (ASEAN)[144], the South Asian Association for Regional Cooperation (SAARC)[145], or the Organization of African Unity (currently the African Union)[146], serving as a counterpoint. The latter lead to the international prosecution in cases such as Joaquin "el Chapo" Guzmán (drug traffic); Edward Snowden (espionage of data) in the United States; Abu Hamza al-Masri (terrorism) in United Kingdom; or the Japan trial of Carlos Ghosn for financial misconduct, the Spanish prosecution against the construction company FCC for corruption in Panama, etc.

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[135] International Convention for the Suppression of Counterfeiting Currency, done at Geneva on 20 April 1929, *LNTS*, Vol. 112, No. 2623.

[136] Among many other, the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Signed at Tokyo on 14 September 1963, *UNTS*, Vol. 220, No. 10106; the Convention for the Suppression of Unlawful Seizure of Aircraft, Signed at The Hague on 16 December 1970, *UNTS*, Vol. 860, No. 12325; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971, *UNTS*, Vol. 974, No. 14118 (amended by the Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, signed at Montreal on 24 February 1988, *UNTS*, Vol. 974).

[137] See e.g., the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by UNGA Resolution 2106 (XX) [A] of 21 December 1965, *UNTS* Vol. 660.

[138] UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done in Vienna on 20 December 1988, *UNTS,* Vol. 1582.

[139] International Convention against the Recruitment, Use, Financing and Training of Mercenaries, New York, 4 December 1989, resolution 44/34 of 4 December 1989, *UNTS* Vol. 2163, entry into force 20 October 2001.

[140] United Nations Convention against Transnational Organized Crime, adopted by UNGA Resolution 55/25 of 15 November 2000, *UNTS*, Vol. 2225 (known as the Palermo Convention).

[141] UN Convention against Corruption, New York, 31 October 2003, *UNTS*, Vol. 2349, No. I-42146.

[142] European Convention on the Suppression of Terrorism, done in Strasbourg on 27 January 1977, *European Treaty Series*, No. 90.

[143] Referring to substantive criminal law there is no great progress in the EU since criminal law is not an exclusive competence of the Union. Therefore, the maximum that could be achieved is a harmonization of certain measures through Directives after the entry into force of the Treaty of Lisbon (see i.e. in the case of EU Council Framework Decision 2002/475/JHA on Combating Terrorism replaced by Directive (EU) 2017/541). However, as will be seen, there are extensive advances in cooperation in criminal police and judicial matters as a result of an area of freedom, security and justice and the communitarisation of certain measures, such as mutual recognition; see M. I. González Cano (Dir.), *Cooperación Judicial Penal en la Unión Europea. Reflexiones sobre algunos aspectos de la investigación y el enjuiciamiento en el espacio europeo de justicia penal*, Tirant lo Blanch, 2015, p. 15.

[144] ASEAN Convention on Counter Terrorism, Cebu, 13 January 2007, *UNTS*, No I-54629.

[145] SAARC Regional Convention on Suppression of Terrorism, done at Kathmandu on 4 November 1987.

[146] OAU Convention for the Elimination of Mercenarism in Africa, done at Libreville, 3 July 1977, Organization of African Unity, CM/817 (XXIX), Annex II Rev. 1, entry into force 22.4.1985.

In this way, we find a set of international instruments that imposes the obligation to criminalize conducts of international or transnational relevance. To do so, treaties contain provisions as follows: "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences…"; and in some cases, they include a minimum or a range of penalties[147]. Thus, for example, the Spanish Penal Code[148] has been modified to introduce criminal penalties for serious market abuse offences within the EU[149], fraud to the EU's financial interests[150] and counterfeiting of Euro currency[151]. This inclusion demonstrates there is a broad consensus in the definition of certain transnational crimes. For these, the States have agreed to define the crime and this definition is applicable to all States parties. This result in a *harmonization* of domestic penal codes solving therefore overlapping jurisdictions[152]. At the same time, we can see this shift that does not occur in the case of international crimes, for whose definition practitioners tends to resort to the ICC statute. Nor with other crimes that move between international and transnational crimes, such as terrorism, which does not reach a consensus in its definition[153].

However, this duality between defining the action and the requirement to incorporate it in national legislation implies doubts about the relationship between the obligations imposed by international treaties and internal regulations. The treaties set forth that regulate transnational crimes will be applied by the States in their internal sphere, but it will be the domestic legislation that establishes the penalties and the procedure to judge[154]. Hence, art. 18 of the 1929 International Convention for the Suppression of Counterfeiting Currency provides that

> "the Convention does not affect the principle that the offences referred to in Article 3 should in each country, without ever being allowed impunity, be defined, prosecuted and punished in conformity with the general rules of its domestic law".

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[147] See for instance: "1. Each Member State shall take the necessary measures to ensure that *the conduct referred to in Articles 1 and 2 is punishable by effective, proportionate and dissuasive criminal penalties*. 2. Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1 is punishable by criminal penalties *of a maximum of at least between 1 and 3 years of imprisonment*". Emphasis added. Art. 3 of Council Framework Decision 2008/913/JHA of 28 November 2008, on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJEU L 328, 6.12.2008.

[148] Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, BOE No. 281, of 24.11.1995

[149] By transposing Directive 2014/57/EU, of the European Parliament and of the Council, of 16 April 2014, on criminal sanctions for market abuse (market abuse directive), OJ L 173, 12.6.2014, Preamble, para. 8.

[150] By transposing Directive (EU) 2017/1371 of the European Parliament and of the Council, of 5 July 2017, on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017.

[151] By transposing Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, OJ L 151, 21.5.2014.

[152] International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction*, 2009, p. 28.

[153] In this sense, for example, the statement after the adoption of the EU Council Framework Decision 2002/475/JHA on Combating Terrorism, of 13 June 2002, states that "The Council states that the offence of threat specified in Article 1, paragraph 1 (i) *should be viewed as defined by the national law* of the Member State concerned" (emphasis added); see Doc. 9958/02 ADD 1 REV 1, para. 16.

[154] M. Ollé Sesé, *Crimen Internacional… op. cit.*, p. 213.

This clause, far from representing a conflict between international and national regulation, aims to prioritize the application of the former. Similarly, it guarantees that collateral issues regarding the crime (aggravating or attenuating circumstances, the enforcement of the sentence, the right to amnesty, etc.) are regulated by national criminal law. This interpretation is laid down in other conventions[155]. Which is logical considering that it must be the legislation of the place of the trial and the conviction that should regulate the collateral issues to the sentence or the execution of the sentence. In this way, if there is a discrepancy between the definition of the treaty and that of the national criminal code, the treaty prevails because of the principle of primacy of International Law over domestic law. This does not prevent domestic definitions from being used as an interpretive criterion. In some cases, domestic law would even allow the direct application of the definitions contained in the treaties[156].

Thus, States are free to determine which conduct deserves criminal sanction and which does not. However, its establishment through multilateral international treaties endows the State with legitimacy to prosecute the conduct, to the extent that its action, far from being unilateral, is carried out in line with that of other States. By doing so, it is intended that the collective action of the states is more effective "in addressing global societal problems" [157]. And, at the same time, a multilateral approach to transnational criminality has advantages such as "avoid[ing] fragmentation and piece-meal approaches to solving a common problem and are more consistent with other international law principles and mechanisms" [158]. It is precisely the global or transnational nature of these problems that avoids national legislation applied nationally from being a solution to them[159]. Therefore, with the goal of achieving international justice, the "transnational offender" has become a sort of "enemy of all mankind"[160].

B. Multilateral application of extraterritoriality

Here we can see common approaches to extraterritorially apply national criminal laws. On the one hand, regarding the obligation imposed by the international treaties mentioned in section 3.1.A. *supra* not only to criminalize but also to establish jurisdiction for their extraterritorial prosecution. On the other hand, a whole series of multilateral mechanisms that allow common solutions regarding competition troubles, thus avoiding exorbitant jurisdiction.

(i) Obligation to prosecute extraterritorially

To prosecute offences beyond States borders, international agreements must include two different commitments. First, they impose States Parties the obligation to

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[155] E.g., when specifying that "the Convention does not affect the right of the High Contracting Parties freely to regulate, according to their domestic law, the principles on which a lighter sentence may be imposed, the prerogative of pardon or mercy and the right to amnesty"; Protocol to the International Convention for the Suppression of Counterfeiting Currency, Geneva, 20 April 1929, *LNTS*, Vol. 112, No. 2623, Annex, sect. I, para. (2), p. 389.

[156] E.g., in Spain in accordance with art. 23.4.p) of LOPJ.

[157] B. Hock, *Extraterritoriality… op. cit.*, p. 8.

[158] A. L. Parrish, "Kiobel, Unilateralism, and the Retreat from Extraterritoriality", *Maryland Journal of International Law*, vol. 28, 2013, pp. 235 et seq.

[159] B. Hock, *Extraterritoriality… op. cit.*, p. 4.

[160] A formulation similar to that indicated by the Second Circuit in the Filartiga v. Pena-Irala; 630 F.2d 876 (2d Cir. 1980) ("the torturer has become -like the pirate and slave trader before him- *hostis humani generis*, an enemy of all mankind" at 890).

adopt national legislative measures to criminalize and punish certain crimes. Second, the treaties establish jurisdiction of States courts over the crimes regulated by them. In some cases, they may establish some type of requirement or link between national courts and the acts committed abroad in order to apply such jurisdiction like the presence of the defendant in the territory of the forum State[161] or its non-extradition[162] (generally both appears together), the double basis for jurisdiction [163], double jeopardy[164], etc. Consequently, he establishment of both obligations (*to punish* and *to establish jurisdiction*) reinforces the possibility of acting extraterritorially. If only criminalization is imposed, the State is obliged to punish the conduct, for example by including the crime in its penal code. But unless the possibility of exercising extraterritorial jurisdiction is established in its internal legislation, action can only be taken when the alleged perpetrator is in the territory. Therefore, it is necessary that the instruments include rules on jurisdiction. Although it is true that the fact that some treaties leave the States parties free to establish rules on extraterritorial prosecution. This hinders the purpose of the treaty itself[165].

Regarding the establishment of jurisdiction, the formulation of the rule has evolved over time, from general and vague expressions to specific and completed ones. The former is the case in art. 17 of the 1929 *International Convention for the Suppression of Counterfeiting Currency*[166]. Hence, with the passage of time we find more comprehensive formulas, which specifically affect the obligation to establish jurisdiction over the crimes typified (or remitted) in the treaty. This can be seen in the extensive art. 31 (jurisdiction) of the 2005 Council of Europe Convention[167], or in art. 19 (jurisdiction and prosecution) of Directive (EU) 2017/541 on combating terrorism[168]. Under the treaties scrutinised, extraterritorial jurisdiction is granted based on the classical links: territoriality (extended to vessels and aircrafts registered in the territory), the effects doctrine[169], and nationality of victim[170] or offender[171], or the protective

[161] See, for instance, 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 4.2.

[162] For instance, in 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 4.2; 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, art. 9.2.

[163] Art. 6 of 1977 European Convention on the Suppression of Terrorism sets out compulsory jurisdiction over offences occurred abroad with two conditions: 1. the suspected offender is in the territory; and 2. the forum State does not extradite him if both States are acting under the same base for jurisdiction, that is to say "after receiving a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State".

[164] See 2003 UN Convention against Corruption, art. 23.2.c) or the 2001 Convention on Cybercrime, art. 22.1.d).

[165] M. Ollé Sesé, *Crimen Internacional… op. cit.*, p. 222.

[166] It establishes that "The participation of a High Contracting Party in the present Convention shall not be interpreted as affecting that Party's attitude on the general question of criminal jurisdiction as a question of international law". In this case, it seems more the codification of a general principle that the reaffirmation of the freedom of each State party regarding the establishment of its jurisdiction over counterfeiting. Thus, the treaty would follow in the judgment in the SS Lotus case. The latter, as already seen, sets out the well-known principle that "restrictions upon the independence of States cannot […] be presumed"; PCIJ, *SS Lotus* (France v. Turkey), PCIJ Reports, Series A, No. 10 (1927), p. 18.

[167] Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16 May 2005, *ETS* No. 197.

[168] Directive (EU) 2017/541 of the European Parliament and of the Council, of 15 March 2017, on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017.

[169] 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; 2003 UN Convention against Corruption, art. 42.2.c).

principle[172]. However, and as a result of the evolution in the use of the jurisdictional links indicated above[173], these classic links are not considered *numerus clausus*. Each treaty, depending on the wording, leaves States free to establish one or another, or even more than those imposed by the treaty[174]. As stated by O'Keefe, "the links of jurisdiction are alternatives and not necessarily exclusive"[175]. Thus, we can find that States establish more jurisdictional links to prosecute extraterritorially the crime of those settled in a treaty. This would be in line with the "principle of interstate criminal jurisdictional" developed by Ollé Sesé[176]. Nevertheless, the described freedom to establish jurisdictional links would be limited in the multilateral paradigm by the principles of International law such as sovereignty. This can be seen in the Declarations made by some States when ratifying or acceding to the treaties. Some indicate that the exercise of jurisdiction "will have to be implemented in strict compliance with the principles of the sovereignty and territorial integrity of States"[177].

Furthermore, the treaties can establish two possibilities concerning extraterritorial jurisdiction for States parties: it may be optional or mandatory[178]. However, one or the other will require a series of requirements such as the presence of

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[170] 1997 International Convention for the Suppression of Terrorist Bombings, art. 6.2; 1999 Criminal Law Convention on Corruption, art. 17.1.c); 2000 United Nations Convention against Transnational Organized Crime (Palermo Convention), art. 15.2.a); 2003 UN Convention against Corruption, art. 42.2.a); Directive (EU) 2017/541 of the European Parliament and of the Council, of 15 March 2017, on combating terrorism, art. 19.1.e).

[171] See, among others, 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 4.1.b); 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, art. 9.1; International Convention for the Suppression of Terrorist Bombings, adopted at New York on 15 December 1997, UNGA Resolution 52/164, 15.12.1997, art. 6.1.c; Convention on the Protection of the Environment through Criminal Law, Strasbourg, 4 November 1998, *ETS*, No. 172, art. 5.1.c); Criminal Law Convention on Corruption, Strasbourg, 27 January 1999 (ETS No. 173), art. 17.1.b); International Convention for the Suppression of the Financing of Terrorism, adopted at New York on 9 December 1999, (UNGA Resolution 54/109), *UNTS*, Vol. 2178, art. 7.1.c); 2000 United Nations Convention against Transnational Organized Crime, art. 15.2.b); Convention on Cybercrime, done at Budapest on 23 November 2001, *ETS*, No. 185, art. 42.1; 2003 UN Convention against Corruption, art. 42.2.b); Directive (EU) 2017/541 of the European Parliament and of the Council, of 15 March 2017, on combating terrorism, art. 19.1.c).

[172] 1997 International Convention for the Suppression of Terrorist Bombings, art. 6.2; 2003 UN Convention against Corruption, art. 42.2.d);

[173] See Section 2.

[174] E.g., the expression "The present Convention does not exclude any criminal jurisdiction exercised in accordance with national law" in art. 9.3 of *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, New York, 4 December 1989, *UNTS* Vol. 2163, entry into force 20 October 2001. Clause repeated in many other instruments such as the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 4.3; the 1997 International Convention for the Suppression of Terrorist Bombings, art. 6.5. Another wording of this clause refers to general rules of international law as such: "Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law"1999 International Convention for the Suppression of the Financing of Terrorism, art. 7.6. Identical clause may be fund in 2000 United Nations Convention against Transnational Organized Crime (Palermo Convention), art. 15.6; and in the 2003 UN Convention against Corruption, art. 42.6.

[175] R. O'Keefe, "Universal…", *op. cit.*, p. 738, note 11.

[176] As developed in M. Ollé Sesé, *Crimen Internacional… op. cit.*, pp. 207-227.

[177] Declaration made by Indonesia to the 1999 International Convention for the Suppression of the Financing of Terrorism. Even Yemen reserved the application of provisions of art. 2.1.b. See reservations and declarations at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&clang=_en#9 (accessed 15 January 2021).

[178] E.g., the 1999 International Convention for the Suppression of the Financing of Terrorism.

the alleged offender in the territory and his non-extradition to another State[179]. In this way, the system established by the Palermo Convention is followed. It states the possibility of establishing jurisdiction when the defendant is not extradited "solely on the ground that he or she is one of its nationals", but in the next paragraph, following the *aut dedere aut iudicare* principle, the elimination of this nationality requirement is allowed[180]. Another model is found in the wide-accepted Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, done at Paris on 17 December 1997[181]. Its art. 4 does not establish extraterritorial jurisdiction, but requires, for those States that already have it, to extend it to the crimes that are set forth by the agreement when they are committed by their nationals (active personality). Even in many cases the set down of extraterritorial jurisdiction is facultative, according to the declarations made by States parties most of them have included national legislation in order to establish jurisdiction in these cases[182].

Therefore, the common system established is that national courts shall judge such conduct based on certain connections and conditions. At first, this system may appear similar to the unilateral exercise. However, the difference lies in the fact that, from the multilateral perspective, it is the common international norms that, together with the ground of jurisdiction, will also establish common norms on the distribution of jurisdiction and solution of jurisdictional conflicts as shown below.

(ii) Multilateral based solutions facing concurrent jurisdictions

In a multilateral paradigm the question is about how to solve applicability and competency issues from a common perspective, thus reducing the risk of exorbitant jurisdiction and rendering "surrender resolutions"[183].

Among the possible ways to resolve conflicts of jurisdiction[184], from a unilateral perspective we find the *international comity*, and the principles of *lis pendes* and *res iudicata*[185]. The latter have not been widely applied by the States. This is demonstrated

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[179] See 1977 European Convention on the Suppression of Terrorism, art. 6; 1977 OAU Convention for the Elimination of Mercenarism in Africa, art. 8; 1997 International Convention for the Suppression of Terrorist Bombings, art. 6.4; 1998 Convention on the Protection of the Environment through Criminal Law, art. 5.2; 1999 Criminal Law Convention on Corruption, art. 17.3; 1999 International Convention for the Suppression of the Financing of Terrorism; 2001 Convention on Cybercrime, art. 22.3. In the case of the 2003 UN Convention against Corruption, establish mandatory extraterritorial jurisdiction for laundering of proceeds of crimes (art. 23). However, it requires double criminality both in the State where the crime has been committed and in the State that prosecutes the offender (art. 23.2.c). Apart from such cases jurisdiction over the offences described in the Convention follows the system in the Palermo Convention; See art. 44 paragraph 3 and 4.

[180] See art. 15.3 and 4, respectively, of the Palermo Convention.

[181] As the 37 OECD countries and 7 non-OECD countries (Argentina, Brazil, Bulgaria, Costa Rica, Peru, Russia and South Africa) have accepted/ratified/accessed the Convention and have adopted implementing legislation; see https://www.oecd.org/corruption/oecdantibriberyconvention.htm (accessed 20 January 2021).

[182] See e.g. Declarations made under art. 7.3 of the 1999 International Convention for the Suppression of the Financing of Terrorism at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&clang=_en#9 (accessed 20 January 2021).

[183] Known as "décisions boiteuses" or "resoluciones claudicantes" in French and in Spanish, respectively.

[184] International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction*, 2009, pp. 21 et seq.

[185] J. Crawford, *Chance, Order, Change: The Course of International Law*, The Hague Academy of International Law, Ail-Pocket, 2014, p. 302.

by the existence of parallel investigations by 2 national courts against the same person for the same facts[186]. Regarding the application of the international commity, it is a discretionary doctrine [187]. This operates "as a principle for resolving issues of overlapping jurisdiction […] to permit a tribunal to limit its own jurisdiction where exercise of that jurisdiction would be unreasonable or inappropriate"[188]. In fact, it has been understood by America's Courts as the possibility to refrain jurisdiction when it "[…] interferes with […] foreign relations" [189]. Due to the discretionary nature of this principle, this interpretation has not always been given. For example, when Spanish courts applied universal jurisdiction, they did so without taking into account the foreign policy consequences for the Spanish Government. This motivated the legislative change tending to condition the exercise of this principle[190]. Hence, despite claims from foreign governments, judges do not usually reject cases[191]. Therefore, this system would not be valid since courtesy without rules is still voluntarism and, as said by Judge Crawford: "it is a discretionary power, not a legal requirement"[192].

The quintessential multilateral mechanism would be a permanent international court with universal jurisdiction. In this way, questions about application and enforcement would be centralized, thus eliminating conflicts -declining or validating jurisdiction- and providing coherence to the system[193]. However, this has only been achieved with the ICC and some international or internationalized criminal tribunals (Rwanda, Former Yugoslavia…)[194]. Currently, there is no court with international jurisdiction over transnational crimes, and it is not expected soon[195]. Thus, this would be *de lege ferenda* proposal. In this sense, States have preferred to prosecute these crimes from their national courts. With this they have become part in international criminal law adjudication, together with international tribunals. Thus, it operates as a mechanism of the international criminal justice system[196].

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[186] E.g., the case involving the Spanish King Emeritus Juan Carlos I between Spain and Switzerland.
[187] International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction*, 2009, p. 25.
[188] C. Henckels, "Overcoming Jurisdictional Isolation at the WTO-FTA Nexus: A Potential Approach for the WTO", *European Journal of International Law*, vol. 19, 2008, p. 584.
[189] See Note on "Clarifying Kiobel's "Touch and Concern" Test", *Harvad Law Review*, Vol. 130, p. 1916 (internal quotation omitted).
[190] M. Ch. Marullo, "La jurisdicción universal en España en la STC 140/2018, de 20 de diciembre", Revista Española de Derecho Internacional, Vol. 71, No. 2 (2019), p. 311.
[191] See Note on "Clarifying Kiobel's "Touch and Concern" Test", *Harvad Law Review*, Vol. 130, pp. 1918-1919 (notes 177 and 178), and 1922.
[192] J. Crawford, *Chance, Order, Change: The Course of International Law*, The Hague Academy of International Law, Ail-Pocket, 2014, p. 299.
[193] Ph. Webb, *International Judicial Integration and Fragmentation*, OUP, 2013, p. 202.
[194] However, it is worth highlighting the proposal of a multilateral court on investment disputes in 2018 by the European Commission. Nevertheless, the said court does not refer to criminal matters. See about this project: M. Bungenberg and A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court. Options Regarding the Institutionalization of Investor-State Dispute Settlement*, Springer, 2018, p. 1; its latest developments at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 (accessed 19 January 2021).
[195] E. K. Spahn, "Multijurisdictional Bribery Law Enforcement: The OECD anti-Bribery Convention", *Virginia Journal of International Law*, vol. 53 (2012), p. 51 ("Establishment of a single court or super-prosecutor for multijurisdictional cases does not appear politically feasible at this point in history").
[196] See Tomuschat, Ch., "El sistema de la justicia penal internacional", *Los Derechos Humanos frente a la impunidad. Cursos de Derechos Humanos de Donostia-San Sebastián*, Vol. X, pp. 12-19. In this sense, R. Wedgwood, "The Present State of Research Carried Out by the English-speaking Section of The Centre for Studies and Research", in The Hague Academy of International Law, *La Justice Pénale Internationale. International Criminal Justice*, The Netherlands, Brill-Nijhoff, 2002, pp. 54 and 72 et seq.

In this way, the rules on competences will be established by the various international multilateral conventions. So, it is the common rule that regulate competition between the different States parties. This avoids the conflict between opposing national provisions on international jurisdiction. In the same way, it is through international norms that must configure the extraterritorial action of States, since it is the best way to modulate their sovereignty in conjunction with that of other States. Therefore, the treaty is the one that must resolve the issues without having to resort to national laws or other less global instruments[197]. Hence, national courts decisions may serve as a base for determining existing international criminal law norms [198], particularly, definitions of offence or *actus reus*[199]. However, the risk of conflicting jurisprudence laying down the state of the law cannot be ruled out[200]. That is because "even where the substantive law is harmonised, remedies may differ between countries" [201]. This may challenge the proper application of international criminal system[202].

Furthermore, the horizontal applicability system set up by States works on a close cooperation among States based on a level playing field. This cooperation takes the form of more or less formal mechanisms of common application. This can be seen, for example, in the monitoring system of the OECD Anti-Bribery Convention[203]. It created the OECD Working Group on Bribery in International Business Transactions that works on a peer review basis, analysing data from member states on investigations, proceedings and sanctions[204]. This Working Group represents an "informal network of prosecutors"[205] among whose functions is to resolve conflicts of jurisdiction through consultations raised by the States based on art. 4.3 of the OECD Anti-Bribery Convention. Another role is to address recommendations to member States on implementation. And even if they are in nature merely suggestions, States tends to change their domestic legislation in order to accomplish with it[206]. At the same time, the Council, OECD main body, works on the implementation of the treaty under the form of suggestions[207]. States in fact tend to modify their national law and justify why they have

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[197] See e.g. the OECD Anti-Bribery Convention may be used as legal base for extradition instead of a bilateral treaty (according to its art. 10.2).
[198] G. Werle, *Principles of International Criminal Law*, TMC Asser Press, 2005, p. 53.
[199] See Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, paras. 190 and 194.
[200] The same risk is present with the growing of international jurisdictions applying international responsibility; see A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, OUP, 2009, p. 23.
[201] International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction*, 2009, p. 29 et seq.
[202] This became clear after the ICJ's self-assertion (with reproval to the ICC) of its primacy in ruling aspects of general international law; see ICJ, *Application of the Convention of the Prevention and Punishment of the Crime of Genocide*, 26 February 2007, para. 406.
[203] Established by art. 12 of the Convention.
[204] See Working Group on Bribery Data on Enforcement of the AntiBribery Convention, June 2010, available at www.oecd.org/investment/anti-bribery/anti-briberyconvention/45450341.pdf (accessed 17 January 2021).
[205] E. K. Spahn, "Multijurisdictional Bribery Law Enforcement: The OECD anti-Bribery Convention", *Virginia Journal of International Law*, vol. 53 (2012), p. 19.
[206] See Follow-up reports submitted by States at www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (accessed 10 January 2021).
[207] Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Council on 26 November 2009, available at

no taken action to implement recommendations[208]. Therefore, the key aspect is to establish not only binding commitments but also "central institution able to provide collective implementation […] and technical assistance"[209].

Furthermore, these centralized mechanisms would make it possible to solve jurisdiction problems that international treaties do not solve by themselves. The latter, at the time of establishing jurisdiction to prosecute the crimes they regulate, they usually establish the criteria of the "most appropriate jurisdiction"[210] or the "jurisdiction with a relevant link"[211] to solve claims of jurisdiction among States parties. However, some treaties leave States free to resolve these conflicts through *consultation* among them[212]. These consultations will take place on a State-by-State basis, generally through communication by diplomatic channels (Ministry of Foreign Affairs, Embassies…). This system is outdated and typical of a model where the control of the executive over the judiciary is too high. For this reason, it is not an adequate formula if the intention is to effectively centralize the action in independent courts. A solution to these problems is found in the "direct consultations" in the European model established in the Decision 2009/948/JHA[213]).

Thus, this system determines the obligation of direct consultations between the courts to decide how to solve this concurrent jurisdiction. The States have transposed in their legislation different criteria regarding the decision of the courts in case of conflict of jurisdiction. Thus, the preference of nationality is included[214], among other criteria such as the place of the events, the place where evidence must be obtained or the interest of the victim[215]. These differentiated systems could undermine the effectiveness of the system. Thus, what the trend towards multilateralism shows is the solution when

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http://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Recommendation-ENG.pdf (accessed 17 January 2021).

[208] See in the case of Spain OECD, *Spain: Follow-Up to The Phase 3 Report & Recommendations, March 2015*, pp. 8 et seq. See data on enforcement of 2019 in OECD, *2018 Enforcement of the Anti-Bribery Convention: Investigations, proceedings, and sanctions*, OECD Working Group on Bribery, 2019, available at https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Convention-Enforcement-Data-2019.pdf (accessed 17 January 2021).

[209] Which was the key to the success of the OPCW chemical weapons system; see R. A. Miller and R. M. Bratspies, *Progress in International Law*, Martinus-Nijhoff, Leiden-Boston, 2008, p. 4.

[210] See e.g., the OECD Anti-Bribery Convention, art. 4.3; or the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, art. 31.5.

[211] Thus, the paradigmatic sentence in the case Kiobel v. Royal Dutch Petroleum Co. (133 S. Ct. 1659 (2013)) required that "all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application". However, the interpretation of the "touch and concern" and the "sufficient force" clauses is still under debate by doctrine.

[212] See for instance, the clause "When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution" in Art. 22.5 of 2001 Convention on Cybercrime, done at Budapest on 23 November 2001). Same idea is embodied in art. 4.3 of the OECD Anti-Bribery Convention; or in art. 31.4 of 2005 Council of Europe Convention on Action against Trafficking in Human Beings, among others.

[213] See Council Framework Decision 2009/948/JHA of 30 November 2009, on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L 328 of 15.12.2009.

[214] France (LOI n° 2015-993 du 17 août 2015 portant adaptation de la procédure pénale au droit de l'Union européenne, JO No. 0189, of 18.8.2015, art. 1).

[215] Spain (Ley 16/2015, de 7 de julio, por la que se regula el estatuto del miembro nacional de España en Eurojust, los conflictos de jurisdicción, las redes judiciales de cooperación internacional y el personal dependiente del Ministerio de Justicia en el Exterior, BOE No. 162, of 8.7.2015, art. 32).

the courts do not agree. In this case, there is the possibility of resorting to a supranational (and common) mechanism such as the European Union Agency for Criminal Justice Cooperation (Eurojust) [216]. This is not a higher court, but a permanent and technical body whose function is to coordinate national authorities in investigating and prosecuting transnational crime[217]. Thus, one of the functions of the College of Eurojust is to help to determine who is the competent court[218] facilitating a direct dialogue meeting or mediating among courts concerned[219]. Likewise, referring to the European Arrest Warrant (EAW)[220], in the event of various requests, the executing judicial authority will render the decision by taking into account "all the circumstances"[221], and in order to do so, the executing judicial authority may seek the advice of Eurojust as well[222]. A more complete system is set forth in art. 19 of Directive 2017/541 on combating terrorism[223], which comprises the recourse to Eurojust and also include a series of principles applicable for concurrent jurisdictions (art. 19.3).

Therefore, the European model seems to embrace the principle of subsidiarity preferably with the jurisdiction of the *forum delicti commissi*. Thus, in case of competing jurisdictional assertions, territoriality is called to enjoy a prior jurisdiction[224]. Then, precedence among extraterritoriality principles seems to be as such: 1) the territory where the offense was committed; 2) that of nationality (or residence) of the offender; 2) the nationality of the victims; 3) or the territory in which the offender was found. This is logical for the sake of effectiveness and it is also guaranteed by the existing police and judicial cooperation systems within the EU. This is the model followed, among others, by Spain[225]. Here, the priority is established, first, to the state where the offence took place, and second, to the state of nationality. In addition, it is established that the State that pretends to hear the case (applying territoriality or nationality principles) must do so effectively[226]. In conjunction with these principles, there is the criterion of the place of investigation whose importance is increasing among courts. And this for the sake of effectiveness and efficiency because the said link will

[216] Art. 12.2 of Decision 2009/948/JHA of 30 November 2009, on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.
[217] See https://www.eurojust.europa.eu/about-us/who-we-are (accessed 19 January 2021).
[218] Art. 4.2.b of Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018, on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, OJ L 295, 21.11.2018.
[219] See *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction*, updated 2018, available at https://www.eurojust.europa.eu/sites/default/files/2020-09/2018_Eurojust-casework-on-conflicts-of-Jurisdiction_EN.pdf (accessed 19 January 2021).
[220] Council Framework Decision 2002/584/JHA, of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002.
[221] Art. 16.1 of Council Framework Decision 2002/584/JHA, of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002.
[222] Ibid., Art. 16.2.
[223] Directive (EU) 2017/541 of the European Parliament and of the Council, of 15 March 2017, on combating terrorism.
[224] This position is defended by scientific doctrine, and is the criterion established by the Spanish Audiencia Nacional and the Supreme Court; see Spanish Audiencia Nacional, Auto of 4 and 5 November 1998, Legal reasoning No. 2; of 13 December 2000, legal reasoning No. 2; Supreme Court, Criminal Chamber, Judgment of 25 February 2003, legal reasoning No 6; A. Sánchez Legido, *Jurisdicción... op. cit.*, pp. 324-325; C. Ryngaert, *Jurisdiction in International… op. cit.*, pp. 217.
[225] See art. 23.5 LOPJ.
[226] It will be effective if a national decision is adopted with the purpose of removing the defendant from her criminal responsibility, due to an unjustified delay, or if there are doubts about independence or impartiality; see art. 23.5, para. 2 LOPJ.

allow greater knowledge of the facts and/or prevent impunity. It has been applied by the Spanish Supreme Court, when determining competent jurisdiction between Spain and France (in cases of terrorism[227]), or between Spain and Portugal (drug trafficking[228]).

Therefore, without an international court, the multilateral paradigm would provide not a solution to determine the best placed jurisdiction to hear the case, but the tools to grant this decision. Therefore, instead of the attribution of jurisdiction that each State may unilaterally establish in its national law, the recourse to a centralised permanent and common body that applying law may give instructions on how cooperate. The use of this common system, accepted by all members, is what will determine the recognition of the action as legitimate, allowing the execution of decisions by third states. This is because they have previously accepted the rules on which the action of the requesting court is based, as explained below.

2. Extraterritorial Enforcement through Cross-Border Cooperation

Once it is legitimate to prescribe rules extraterritorially, the main bone of contention, however, is their extraterritorial execution. Here, we face problems caused by the extraterritorial execution of investigative or prosecution measures. One of the principles that have remained in force since the *Lotus* case is that of the impossibility, *a priori*, of executing jurisdiction outside state borders[229]. This is because extraterritorial application of national criminal law does not entitle a State to enforce jurisdiction (perform of sovereign functions by its authorities) within the territory of another State unless the later had agreed. The opposite will be contrary to the principle of sovereignty and territorial integrity of a State[230]. Hence, the problem is the lack of recognition and,

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[227] Spanish Supreme Court, Criminal Chamber, Judgment 95/2020, of 4 March 2020. Here, a Spanish national is accused of the crime of depositing weapons and explosives that took place in France. The Supreme Court indicated in its judgment that together with the nationality link of the accused, the source of the crime notice was Spanish (a computer device located in the accused's law office in Bilbao). Therefore, it allows an extensive application of the principle of territoriality, allocating jurisdiction to Spanish courts (Legal Reasoning No. 2 *in fine*).

[228] Spanish Supreme Court, Criminal Chamber, Judgment 4587/2015, of 11 November 2015, Legal reasoning No. 3 para. 1. This is a case of drug trafficking on the high seas, where the State of nationality (Spain) hang over its jurisdiction in favour of Portugal. This attribution derives from the Spain-Portugal bilateral treaty on drug trafficking (*Tratado entre el Reino de España y la República de Portugal para la represión del tráfico ilícito de drogas en el mar*, 2 March 1998 (BOE No.18, of 20.1.2001) that allows the principle of supplementary justice or principle of representation. Thus, the Portuguese jurisdiction was understood to be preferred "because it was the first to learn of the facts subject to verification, which required the help of the Spanish authorities, who acted under the agreed principle of representation, the investigation carried out in Portugal being broader, where there are a greater number of sources of evidence, made up of police surveillance" (Legal reasoning No. 3 para. 3). In the same way Spanish Supreme Court, Criminal chamber, Judgment 5245/2015, of 14 December 2015.

[229] M. T. Kamminga, "Extraterritoriality", *op. cit.*, para. 8 (noting that "as a general rule, international law prohibits the exercise of extraterritorial enforcement jurisdiction unless this is specifically permitted"); J. R. Crawford, *Brownlie's Principles… op. cit.*, p. 462.

[230] See specific clauses in art. 4 of United Nations Convention against Transnational Organized Crime; in art. 18 para. 2 of Additional Protocol to the 1987 SAARC Regional Convention on Suppression of Terrorism, Islamabad, 6 January 2004; in art. 18 of International Convention for the Suppression of Terrorist Bombings, adopted at New York on 15 December 1997; in article IV of ASEAN Convention on Counter Terrorism, Cebu, 13 January 2007; or in article 4 para. 2 of the Convention on Extradition and Mutual Legal Assistance in Counterterrorism, adopted by the Fifth Conference of Ministers of Justice of the French-speaking African Countries at Rabat on 16 May 2008, reproduced in UN doc. A/62/939-S/2008/567, 22.08.2008, Annex.

therefore, enforcement of judicial decisions issued in criminal proceedings. Thus, the perception of the jurisdiction of a court by another State as illegitimate would entail that the *surrender resolutions*[231] that it dictates for the investigation or prosecution will not be executed[232]. However, despite the alleged prohibition *prima facie* of extraterritorial action, there are numerous cases in which a State arrest or "abducts" a citizen in the territory of another State to try him. A practice founded, for example, by the United States [233] or Israel [234]. Probably due to the lack of clear limits to enforcement jurisdictions [235]. This, again, causes controversies among States and breaches of international norms. In this study we argue that, within the multilateral paradigm, extraterritorial enforcement is adopted through mutual assistance and institutional instruments in matters of international criminal cooperation.

The growing concern of States to prevent and suppress domestic crimes[236] has led to the adoption of different instruments on international criminal cooperation. This cooperation is essential because, "without co-operation amongst States, authorities from one State could not reach beyond its territorial boundaries and justice would thus be impaired" [237]. This cooperation is based on bilateral or multilateral international treaties[238]. Through these, the premise is that the State can expand its jurisdiction[239]. These instruments will allow mutual assistance between the States parties, imposing the obligation to cooperate in the prevention and prosecution of crimes. In this way, a state may request the assistance of another for the execution of measures adopted in extraterritorial application.

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[231] This notion traditionally comes from Private International Law but it is perfectly applicable to the problem of criminal extraterritoriality as it concerns the same problem: the lack of legitimacy to establish jurisdiction that is claimed by other States and therefore the latter do not enforce or cooperate to the former. See about the risk of surrender resolutions when applying lex fori: A. L. Calvo Caravaca, J. Carrascosa Gonzalez, *Derecho Internacional Privado*, Comares, 2018, p. 33, para. 49.

[232] See the "blocking statute" described in J. R. Crawford, *Brownlie's Principles… op. cit.*, p. 461, note 170.

[233] A. J. Colangelo, "What is Extraterritorial…" *op. cit.*, p. 1330. even in his extreme position which is the execution of the alleged perpetrator, not bringing him before the courts, like the assassination of Osama Bin Laden in Afghanistan in May 2011 or Abu Bakr al-Baghdadi in Syria in October 2019; See M. Ryan and D. Lamothe, "Trump says Islamic State leader Abu Bakr al-Baghdadi blew himself up as U.S. troops closed in", The Washington Post, online version, 27.10.2019, available at https://www.washingtonpost.com/world/national-security/us-forces-launch-operation-in-syria-targeting-isis-leader-baghdadi-officials-say/2019/10/27/081bc257-adf1-4db6-9a6a-9b820dd9e32d_story.html (accessed 20 January 2021).

[234] Case of the nazi official Adolf Eichmann abducted in 1060 in Argentina to stand trial in Israel. See further W. Schabas, "The Contribution of the Eichmann Trial to International Law", *Leiden Journal of International Law*, Vol. 26, Issue 3 (2013), pp. 667-700.

[235] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment (Second Phase), 5 February 1970, I.C.J. Reports 1970, Separate Opinion of Judge Fitzmaurice, para. 70; J. R. Crawford, *Brownlie's Principles… op. cit.*, p. 463.

[236] M. Cherif Bassiouni, *Introduction to International Criminal Law*, Martinus-Nijhoff, Leiden-Boston, Second Revised Edition, 2013, p. 500.

[237] See C. Tiburcio, "The Current Practice of International Co-Operation in Civil Matters", *Recueil des cours*, Vol. 393 (2018), p. 54; J. Basedow, "The Law of Open Societies – Private Ordering and Public Regulation of International Relations", *Recueil des cours*, Vol. 360 (2012), p. 98.

[238] And not in the international *comity*; M. Cherif Bassiouni, *Introduction… op. cit.*, pp. 504.

[239] N. Witkin, "A State…" *op. cit.*, pp. 58 (noting that "extradition treaties […] are an exchange of jurisdiction […] of control over certain persons").

This cooperation for the prosecution of non-core crimes[240] would be included in Bassiouni's "indirect enforcement model"[241]. Here, the extraterritorial action of the State occurs indirectly, since it acts through the State that executes the order. The State that purports execute a decision outside its borders (for example, an arrest warrant) has two options: or sends its police to the territory of the other State, which requires its prior authorization otherwise it would violate its sovereignty[242]; or ask the other State to arrest the alleged perpetrator on his behalf. This second State (the executing State) may do so if said action is not only considered legal but also legitimate. The rules of legitimacy cannot be based on a legality according to the law of the requesting State, as they are the result of its unilateral will. It should be based on common rules. Therefore, it must be based on rules previously agreed between the States. This is where treaties on international criminal cooperation come into play. In this way, the executing State accepts because it recognizes as legitimate (and legal) the action of the requesting State. This recognition takes place through the rules of a conventional nature that they have agreed either bilaterally or multilaterally. It is in these standards where the "balancing of interest" occurs by establishing common procedural rules, etc. Thus, the legitimacy of the extraterritorial action that is required in the multilateral paradigm is much more evident when we talk about enforcement. In this way, these treaties "create a consensual, legal mechanism […] to avoid the problems of unilateral application of extraterritorial authority[243].

Treaty-based international cooperation includes the cooperation in the stage of investigation and prosecuting crime and in enforcing penal sanctions[244]. The analysed treaties establish, together with the general obligation of assistance[245], the possibility of

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[240] Although Bassiouni's model is applied mainly in universal jurisdiction; see M. M. Martín Martínez, "Jurisdicción …" *op. cit.*, pp. 160-161.

[241] M. Cherif Bassiouni, *Introduction… op. cit.*, pp. 487 et seq. See also about this model G. Werle, *Principles of International Criminal Law*, TMC Asser Press, 2005, pp. 194 et seq.

[242] J. R. Crawford, *Brownlie's Principles… op. cit.*, p. 466. However, there are some exceptions like situations in "hot pursuit" within the EU ruled in art. 40.2 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (*OJ* L 239, of 22.9.2000) or the inspection powers of member States regulated in art. V.4 of the Maritime Labour Convention, Adopted by the International Labour Conference at its 94th (Maritime) Session in 2006, as amended in 2014 and 2016.

[243] N. Witkin, "A State…" *op. cit.*, pp. 55.

[244] J. R. Crawford, *Brownlie's Principles… op. cit.*, p. 464 ("enforcement jurisdiction will ordinarily entail the pursuit and arrest of the accused, detention and trial, and the carrying out of any sentence"); B. Zagaris, "U.S. International Cooperation against Transnational Organized Crime", *Wayne Law Review*, Vol. 44 (1998-1999), pp. 1401-1464.

[245] E.g. for the crime of mercenarism:

> "1. States Parties shall afford one another the *greatest measure of assistance* in connection with criminal proceedings brought in respect of the offences set forth in the present Convention, including the supply of all evidence at their disposal necessary for the proceedings. The law of the State whose assistance is requested shall apply in all cases. 2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty", emphasis added (Art. 13 of *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, New York, 4 December 1989, *UNTS* Vol. 2163, entry into force 20 October 2001);

or for the Crime of mercenary:

> "The contracting States shall afford one another *the greatest measures of assistance* in connection with the investigation and criminal proceedings brought in respect of the offence and other acts connected with the activities of the offender", emphasis added (Art. 10 of *OAU Convention for the Elimination of Mercenarism in Africa*, Libreville, 3 July 1977).

collaboration at the request of the requesting State or that the requested State acts through its own institution[246]. Another issue when executing prescriptive extraterritorial jurisdiction is the arrest and surrender of the alleged perpetrators. With this objective in mind, two instruments of great importance were established: the Rome Statute, at the universal level for *jus cogens* crimes, and the EAW, at the European level[247]. In both cases, a complete judicialization of the procedure is intended, eliminating political issues[248]. Apart from these cases we may find mechanisms more "rudimentary"[249] to fight against international crimes such as extradition and international arrest warrant. But the effectiveness is practically impossible if there is no extradition treaty between the two countries. Thus, with the international arrest warrant (issued by Interpol red notice), the authorities of the requested State have no legal obligation to act. Furthermore, if they decided to act and execute the arrest warrant, the extradition to the requesting State will be constrained if there is no extradition treaty. Such has been the recent case of Alex Saab's arrest in Cape Verde pursuant to an Interpol Red Notice[250]. Saab faces an US indictment for conspiracy to commit money laundering and laundering of monetary instruments followed territoriality principle as part of the facts occurred within the US soil (in Florida)[251]. This situation would demonstrate the practice in criminal extraterritoriality and the problems that its execution within the unilateral paradigm entails[252]. In this case, there is no bilateral extradition treaty between US and the Republic of Cape Verde. So, the possibility of brought Mr Saab before US authorities will depend on Cape Verde political will, as it has been[253]. The lack of international criminal cooperation instruments may lead the requesting State to adopt unfriendly measures in the diplomatic or commercial sphere against the requested State if it does not agree to his request, especially in symbolic cases.

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[246] Thus, for example, in the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, done at Strasbourg on 8 November 1990, its art. 13, imposes an obligation to: "(a) enforce a confiscation order made by a court of a requesting Party in relation to such instrumentalities or proceeds; or (b) submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it".

[247] A comparative analysis between the systems in the Rome Statute and the EAW with the extradition can be found in I. Lirola Delgado and M. Martín Martínez, "La cooperación penal internacional en la detención y entrega de personas: el Estatuto de Roma y la Orden Europea", *Anuario Español de Derecho Internacional*, nº 20 (2004), pp. 173-240.

[248] I. Lirola Delgado and M. M. Martín Martínez, "La cooperación penal internacional en la detención y entrega de personas: el Estatuto de Roma y la Orden Europea", *Anuario Español de Derecho Internacional*, nº 20, 2004, p. 183.

[249] J.L. Fernández-Flores de Fúnes, "De la Jurisdicción Territorial a la Jurisdicción Universal", in A.J. Rodríguez Carrión *et al.*, *Soberanía del Estado y Derecho Internacional. Homenaje al Profesor Juan Antonio Carrillo Salcedo*, Srevicio de Publicaciones Universidad de Córdoba, Sevilla y Málaga, 2005, p. 569.

[250] Reuters, 13 June 2020, https://www.reuters.com/article/us-venezuela-corruption-idUSKBN23K0OT (accessed 20 January 2021).

[251] See United States v. Alex Nain Saab Moran, Indictment, filed on 25 July 2019 in the Southern District of Florida.

[252] Conversely, the extradition of former government official Hugo Carvajal from Spain to US. Carvajal faces charges of drug trafficking according to Indictment 11 Cr. 205 in the Southern District of New York; see http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Audiencia-Nacional/Noticias-Judiciales/La-Audiencia-Nacional-acuerda-extraditar-a-EEUU-al-general-venezolano-Hugo-Carvajal (accessed 20 January 2021); https://www.justice.gov/usao-sdny/pr/former-venezuelan-official-hugo-armando-carvajal-barrios-arrested-spain-connection-drug (accessed 20 January 2021).

[253] https://news.bloomberglaw.com/white-collar-and-criminal-law/extradition-of-maduros-alleged-dealmaker-to-u-s-is-approved (accessed 20 January 2021).

Despite the universal proposals[254], it is in the context of regional integration organizations (European Union) or that of strong coordination (such as the Council of Europe), where mechanisms that allow an effective application of criminal extraterritoriality can be seen. This is mainly thanks to the more sophisticated systems of cooperation in criminal matters, such as the EAW, the Joint Investigation Team (JIT)[255] or the mutual assistance in criminal matters treaties of the Council of Europe[256].

Taking the European system as a model, we find the *Convention on Mutual Assistance in Criminal Matters between the member states of the European Union*[257], and the *Council Framework Decision 2002/584/JHA, of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States* (European Arrest Warrant Decision), that replaced among EU member states the 1957 European Convention on Extradition[258]. We will focus on the issues that this Decision raises for extraterritorial enforcement. And this because it reflects a turning point with respect to the previous system governed by extradition. Before, the cooperation "rest[ed] on a procedure of request and consent, regulated by certain general principles" [259]. Extradition is, therefore, an act of state sovereignty[260], characteristic of the unilateral paradigm. On the contrary, in the EAW system, the surrender is imposed on the States as an obligation derived from the community rules based on mutual recognition considered "the *cornerstone* of judicial cooperation" [261]. This makes possible to eliminate the political component of extradition, and to put aside inequalities in the different national penal systems in favour of the achievement of justice. The improvement of the EAW mechanism over the extradition system is so evident that there have been cases of transformation of the extradition process to a EAW given the facilities that it entailed[262].

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[254] See UN treaty models on criminal matters: UN Model Treaty on Extradition (A/RES/45/116, amended A/RES/52/88); UN Model Treaty on Mutual Assistance in Criminal Matters (A/RES/45/117, amended by A/RES/53/112); Model Treaty on the Transfer of Proceedings in Criminal Matters (A/RES/45/118), even its Model Law on Mutual Assistance In Criminal Matters (2007).

[255] The creation of this multinational team is set forth in various instruments, such as 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 9.1.c; the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000, art. 13; the Palermo Convention, art. 19; the Council Framework Decision of 13 June 2002 on joint investigation teams (OJ L No. 162, of 20.6.2002); or the 2003 UN Convention against Corruption, art. 19.

[256] European Convention on Mutual Assistance in Criminal Matters, opened for signature, in Strasbourg, on 20 April 1959 (ETS No. 30); the European Convention on the International Validity of Criminal Judgments, 28 May 1970 (ETS No 70); Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg on 17 March 1978 (ETS No. 99); Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, opened for signature in Strasbourg on 8 November 2001 (ETS No. 182).

[257] Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union done in Brussels 29 May 2000, OJ C 197, of 12.7.2000.

[258] J. R. Crawford, *Brownlie's Principles… op. cit.*, p. 465.

[259] Ibid., p. 465.

[260] See among others, N. Witkin, "A State…" *op. cit.*, p. 56 et seq.

[261] According to recital 6 of European arrest warrant Decision. Also see I. Lirola Delgado and M. Martín Martínez, "La cooperación penal…" *op. cit.*, p. 180; F. Fonseca Morillo, "La orden de detención y entrega europea", Revista de Derecho Comunitario Europeo, nº 14, 2003, p. 70.

[262] Case heart before a Spanish Court in 2004; see Order of Audiencia Nacional of 10 February 2004 cited in I. Lirola Delgado and M. Martín Martínez, "La cooperación penal…" *op. cit.*, p. 179.

However, EAW is not a perfect system. On the contrary, it has some aspects that limit a much wider and more effective application. On the one hand, we find the paradox lies in the elimination of the requirement of double criminality, as can be seen from the analysis carried out by Lirola Delgado and Martín Martínez[263]. The double jeopardy reveals differences in values and principles of domestic criminal process. Hence it is a classic requirement of extradition. It is the existing formula when two criminal laws with different principles and elements are connected[264]. The logical reasoning would be that in a more integrated systems such as the European, where there are a series of common values recognised in the founding text[265], this requirement will not exist. However, it has not completely disappeared in the European EAW system[266]; rather, it is only excluded for 32 categories of offences[267]. Also, this has not prevented problems when interpreting it, as the recent Puigdemont case has shown in the application of the EAW by the courts of Belgium and Schleswig-Holstein (Germany)[268]. On the contrary, in the application of an arrest warrant issue by the ICC under the Rome Statute, double jeopardy is not required[269]. There are only two options to overcome this pitfall, or an equity of criminal definitions (through harmonization or regulation by reference to definitions contained in another instrument of EU law), or a true application of mutual recognition based on real trust between States and their judicial systems[270]. On the other hand, as was pointed out long ago[271], the EAW's execution can take up to 60 days, compared to extradition, which is not consistent with an instrument that aims to be agile and fast[272].

One of the main indicators that demonstrate the change in the trend in favour of criminal extraterritoriality is the little use of the optional denial clause of the EAW. This clause allows the executing judicial authority to refuse to execute the EAW "when the offence have been committed outside the territory of the issuing Member State and the

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[263] Ibid., pp. 193-198.
[264] Among which are different types of offences.
[265] Common values of the Union's member States enshrined in Art. 2 of the Treaty on European Union.
[266] B. Gilmore, "The EU framework decision on the European arrest warrant: An overview from the perspective of international criminal law", *ERA Forum Scripta Iuris Europaei*, Vol. 3, Issue 3, 2002, pp. 144–147, particularly p. 146.
[267] Even if the list is extraordinary wide; Art. 2.2 of Council Framework Decision 2002/584/JHA, of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002. As a beginning of the elimination of double criminality among EU member States related with terrorism, drug trafficking or organized crime, could be seen art. 3 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union, OJ C 313, 23.10.1996
[268] *El Pais,* 15.10.2019, online version, accessible at https://elpais.com/politica/2019/10/14/actualidad/1571037561_121845.html (accessed 20 January 2021).
[269] I. Lirola Delgado and M. Martín Martínez, "La cooperación penal…" *op. cit.*, p. 198.
[270] See about mutual recognition of judicial decisions within the EU: S. Peers, "Mutual recognition and criminal law in the European Union: Has the Council got it wrong?", *Common Market Law Review*, Volume 41, Issue 1, 2004, pp. 5-36; L. Klimek, "European Arrest Warrant: Procedural Instrument for Public Order Enforcement in the EU's Area of Freedom, Security and Justice", *Czech Yearbook of International Law*, 2012, pp. 3-18; A. Suominen, "Limits of Mutual Recognition in Cooperation in Criminal Matters Within the Eu: Especially in the Light of Recent Judgments of Both European Courts", *European Criminal Law Review*, Vol. 4, No. 3 (2014), pp. 210-235; J. Öberg, "Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure", *European Constitutional Law Review*, 2020, pp. 1-30.
[271] I. Lirola Delgado and M. Martín Martínez, "La cooperación penal…" *op. cit.*, pp. 190-191.
[272] See Art. 54 of Spanish Ley 23/2014, of 20 November, de reconocimiento mutuo de resoluciones penales en la Unión Europea, BOE No 282, of 21.11.2014 (amended by Ley Orgánica 1/2015, of 30 March and Ley 3/2018, of 11 June).

law of the executing Member State does not allow prosecution for the same offences when committed outside its territory"[273], in other words, when the issuing State is exercising extraterritorial jurisdiction. According to the latest records (period 2017-18), EAW was applied in more than 1800 cases[274], and the execution of an EAW was refused in 796 cases[275]. With respect of the clause contained in art. 4.7, data does not break down for cases in sections a) and b). Accumulative data shows that the execution of the EAW was denied based on art. 4.7 38 times out of 796 total denials[276]. Which means that this ground for denial is extremely little used. At the same time, the use of JIT has increased in last years[277]. Therefore, this tool has become a useful piece in the prosecution of transnational crimes.

The evolution shown indicates that extradition is no longer widely used, giving way to more practical and efficient models[278] based on mutual recognition and regional assistance. In this way, the legitimacy required through mutual assistance agreements would allow an improvement in the application of international justice. Thus, instead of a unilateral action by State's courts when the action produces effects in its territory, the agreement with the executing State on substantive and procedural measures will motivate a pooling of interests and "have their voice heard"[279]. Thus, the latter will be more receptive to following common positions on prohibiting such actions, and therefore, collaborate with judicial assistance required.

SECTION 4. CONCLUTIONS

As argued in previous pages, current evolution and practices in international criminal law allow us to draw some initial changes in our understanding of extraterritoriality in criminal law. In the next lines I will proceed with the explanation of the substance of such shift, the causes and possible consequences that this multilateral paradigm brings.

In this research, an alternative and updated application of the postulates related to extraterritoriality in criminal law has been sought. For that, two conceptual frameworks have been established that explain the state of affairs: the unilateral and the multilateral. The problems that the exercise produced at the unilateral level have been

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[273] Art. 4.7.b) of Council Framework Decision 2002/584/JHA, of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002.
[274] See EJN, *Report on activities and management 2017-2018*, p. 13, at https://www.ejn-crimjust.europa.eu/ejnupload/reportsEJN/ReportSecretariat%20.pdf (accessed 20 January 2021).
[275] European Commission, *Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017*, doc. SWD(2019) 318 final of 28.8.2019, at https://e-justice.europa.eu/content_european_arrest_warrant-90-es.do (accessed 20 January 2021).
[276] From the available statistics sent by EU Member States; European Commission, *Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017*, doc. SWD (2019) 318 final of 28.8.2019, p. 31.
[277] Eurojust supported the establishment of 103 JITs in 2019, an increase of 214% compared with 2015; see https://www.eurojust.europa.eu/judicial-cooperation/eurojust-role-facilitating-judicial-cooperation-instruments/joint-investigation-teams (accessed 20 January 2021).
[278] Identified as extradition, legal assistance, execution of foreign penal sentences, recognition of foreign penal judgments, transfer of criminal proceedings, freezing and seizing of assets deriving from criminal conduct, intelligence and law enforcement information-sharing; and regional and sub-regional "judicial spaces"; see an in-deep review of each one in M. Cherif Bassiouni, *Introduction… op. cit.*, pp. 500 et seq.
[279] C. Ryngaert, *Jurisdiction in International… op. cit.*, pp. 199.

exposed and it has been argued how the new positions tend to the multilateral paradigm in order to overcome them. In the latter, the extraterritorial exercise of jurisdiction to prescribed requires to be legitimate. Regarding the jurisdiction to enforce, the action also needs to be recognized as legitimate for its indirect execution by another State. This is achieved through a multilateral system based in a horizontal-State enforcement model.

This system is based on 3 fundamental aspects: 1. The establishment of common standards among States (bilateral or multilateral). These allow the adoption of common notions of the crimes to be prosecuted and establish the legal basis for such prosecution. Therefore, conventional obligation to punish and to stablish jurisdiction become the premises for extraterritorial jurisdiction to prescribe and at the same time it constitutes a legitimate action at international law level. 2. At the same time, the rules to resolve conflicts in the application and / or execution of the said criminal extraterritoriality also have their origin in these common rules accepted by the States. This collective system through treaties allows its performance in accordance with international standards. Furthermore, it is in these multilateral mechanisms where the legitimacy of the action by a national court is guaranteed. Thus, the French national authority has had a formal opportunity to participate through this mechanism in the development and implementation of the said action by other State. This participation would not have taken place on a strictly unilateral plane, so it would not be considered legitimate[280]. 3. The key to the system is the establishment of a central-permanent-technical mechanism of implementation. These mechanisms are not recognized as binding, but their action has moral force based on shared values of member states. This means that in practice, States are inclined to use this mechanism and to follow its recommendations.

The reasons for this paradigm shift are diverse. Among others, it is motivated by a real and effective achievement of justice. As pointed out, sometimes there may be tensions between States when pursuing international criminal adjudication[281]. For this reason, pragmatism is sought in the criminal sphere. States wish to criminalise some actions and bring the offender to justice without polemics or international disputes. This has been possible, partly thanks to the fact that they are not *jus cogens* crimes whose legal regulation is different from that of transnational crimes.

Furthermore, the change has been favoured by the evolution of regulatory sectors in a globalized world. Today, thanks to scholars works, there is a greater interconnection between the elements of Public international law and notions of the "conflict of laws" from Private international law[282]. Some concepts and principles of the latter are being applied to the extraterritoriality of criminal law, regulated in the field of public law. As seen in this enquiry, issues such as "surrender resolutions" coming from private sphere are applicable, with nuances, to the public law. At the same time, the change in the structures of international society, that is more favourable to close cooperation (even integration), allows States to give up unilateral stance of prosecuting

[280] See A. L. Parrish, "Reclaiming International Law from Extraterritoriality", *Minnesota Law Review*, vol. 93, 2009, p. 820.
[281] See M. Cherif Bassiouni, "International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice", A. Cassese (ed.), *The Oxford Companion… op. cit.*, pp. 131-142.
[282] As well as the techniques of Private International Law; see J. Crawford, *Chance, Order, Change: The Course of International Law*, The Hague Academy of International Law, Ail-Pocket, 2014, p. 298.

"their crimes" to encourage the prosecution of acts considered crimes by all. The result of this regional or universal concern are the different international instruments that use criminal law to prosecute conduct in these areas[283].

Concerning the consequences that this shift to a multilateral paradigm causes in the idea of criminal extraterritoriality, we must state that, observance of the principles of extraterritoriality is still in force. However, the principle of universality remains controversial due to the lack of extensive application by States[284]. Therefore, given the consequences caused by its legal regime, absolute universal jurisdiction should be limited to *jus cogens* crimes[285]. On the contrary, for transnational crimes, it is necessary to develop a legal framework that allows their effective extraterritorial prosecution. State practice has shown that States are more likely to prosecute transnational crimes, leaving *jus cogens* crimes to international tribunals or domestic courts where the crime was committed.

Dealing with implementation of jurisdiction to enforce is where the innovation of the multilateral paradigm is most reflected. As stated, the great limit that International law imposes on the extraterritorial exercise refers to the capacity to enforce provisions in the territory of another sovereign State. However, the adoption of criminal cooperation instruments based on mutual recognition of the multilateral paradigm allows indirect enforcement (by representation) of such measures (seizure of evidences, arrest, joint investigation team, concurrent prosecution, etc.). Currently, the most developed cooperation mechanisms are found in regional integration processes such as that of the European Union. Furthermore, these integration processes show that they can be a solution to the undesirable effects of substantivism on international cooperation (non-neutrality[286], unfairness[287], elevated costs…). The reason would lie in EU decision making process. In a bilateral or multilateral treaty, the positions of strong States are usually those who finally are adopted. On the contrary, at the European level, the updating of the founding treaties has been favouring the adoption of commitments by a majority rather than by unanimity. This implies that at least the predominant theses favour a multitude of States, so that the thesis of one does not predominate over that of all. Furthermore, this extraterritorial application at a multilateral level reduces the fragmentation of ID, one of the undesirable consequences of unilateral application[288]. In the multilateral paradigm, this risk is reduced thanks to the different supranational mechanisms that seek a uniform application and execution among its members.

To conclude, we must reaffirm the role of national courts at the forefront of the international criminal justice system, even though the creation of comprehensive

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[283] This area that has evolved considerably in recent decades in the field of international criminal law. See B-S. Cho, "¿El surgimiento de un Derecho Penal Internacional del Medioambiente?", *Revista penal*, No 8, 2001, pp. 3-23. Also, at EU level: Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Text with EEA relevance), OJ L 328, 6.12.2008.

[284] See H. Olasolo, C. Proner (Dirs), *Alcance y Limitaciones de la Justicia Internacional*, Tirant lo Blanch, 2018, p. 618.

[285] M. Ollé Sesé, *Crimen Internacional… op. cit.*, p. 209.

[286] H. L. Buxbaum, "Conflict of Economic Laws: From Sovereignty to Substance", *Virginia Journal of International Law*, Vol. 42 (2002), p. 957.

[287] C. Ryngaert, *Jurisdiction in International… op. cit.*, pp. 204.

[288] A. L. Parrish, "Kiobel, Unilateralism, and the Retreat from Extraterritoriality", *Maryland Journal of International Law*, vol. 28 (2013), p. 234.

international tribunals like the ICC[289]. The debate on international criminal law and its execution by an international criminal court was debated decades ago within the ILC. There, a pros and cons[290] assessment was made in which became clear that beyond the application of international criminal law by an international tribunal or an *ad hoc* tribunal, the relevant action was the moral rejection of certain conducts by the world opinion. Today these morally reprehensible behaviours have increased in number. However, its complete global persecution, requires a wide conjunction of legal instruments and political will. It seems that this will operates today through the horizontal system of extraterritoriality but there is much work still to be done.

In the end, the argumentation adopted in this study makes explicit practical postulates that States must follow to prosecute extraterritorially crimes of transnational concern. However, this pragmatic approach does not banish the hope of international justice for all kind of crimes. Therefore, practitioners and scholars must continue to work to achieve an exercise of State's jurisdictional powers that pursues justice for international community and, consequently, the well-being of the world.

ANNEX

SELECTED INSTRUMENTS ON INTERNATIONAL CRIMINAL LAW RELEVANT FOR EXTRATERRITORIALITY (IN CHRONOLOGICAL ORDER)

Treaty	*Topic*	*Definition of the offence (crime of)*	*Establish jurisdiction for national tribunals*
1929 International Convention for the Suppression of Counterfeiting Currency	Counterfeiting	Yes (art. 3)	Yes (art. 9)
1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft	Terrorism (aircraft)	Yes (Art. 1)	Yes (art. 4)
1965 International Convention on the Elimination of All Forms of Racial Discrimination	Human Rights (Racial discri-mination)	Yes	Yes (art. 6)
1970 Convention for the Suppression of Unlawful Seizure of Aircraft	Terrorism (aircraft)	Yes (art. 1)	Yes (art. 4)
1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (as amended by 1988 Protocol)	Terrorism (aircraft)	Yes (Art. 1)	Yes (art. 5)
1977 European Convention on the Suppression of Terrorism	Terrorism	Remission* (art. 1)	Yes (art. 6)
1977 OAU Convention for the Elimination of Mercenarism in Africa	Mercenarism	Yes	Yes (art. 8)
1987 SAARC Regional Convention on Suppression of Terrorism	Terrorism	Remission* (art. I)	Yes (art. V)
1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances	Drugs	Yes (art. 3)	Yes (art. 4)

[289] In this regard, as stated by Olivi "the whole ICC structure is based on the concept of the primacy of national courts […] formulated in the principle of complementarity"; G. Olivi, "The Role of National Courts in Prosecuting International Crimes: New Perspectives", *Sri Lanka Journal of International Law*, Vol. 18, 2006, p. 85.

[290] See Report on the Question of International Criminal Jurisdiction by Emil Sandström, Special Rapporteur, doc. A/CN.4/20, reproduced in YILC, Vol. II, 1950, para. 35.

Treaty	*Topic*	*Definition of the offence (crime of)*	*Establish jurisdiction for national tribunals*
1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries	Mercenarism	Yes	Yes (art. 9)
1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, done at Strasbourg on 8 November 1990, *ETS*, No. 141.	Money Laundering	Yes (art. 6)	No (recognition of foreign decisions, art. 13, 22)
1994 Inter-American Convention on International Traffic in Minors, done at Mexico, 18 March 1994	Trafficking human beings	Yes (art. 3)	Yes (art. 9)
1996 Inter-American Convention against Corruption, done at Caracas on 29 March 1996	Corruption	Yes (art. 6)	Yes (art. 5)
1997 International Convention for the Suppression of Terrorist Bombings, adopted at New York on 15 December 1997, UNGA Resolution 52/164, 15.12.1997	Terrorism	Yes (art. 2)	Yes (art. 6)
1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	Corruption	Yes (art. 1)	Yes (art. 4)
1998 Convention on the Protection of the Environment through Criminal Law	Environment	Yes (arts. 2-3)	Yes (art. 5)
1999 Criminal Law Convention on Corruption, Strasbourg, 27 January 1999 (ETS No. 173)	Corruption	Yes (arts. 2-14)	Yes (art. 17)
1999 International Convention for the Suppression of the Financing of Terrorism, adopted at New York on 9 December 1999, (UNGA Resolution 54/109), *UNTS*, vol. 2178	Terrorism	Yes (art. 2)	Yes (art. 7)
2000 United Nations Convention against Transnational Organized Crime (Palermo Convention)	Organized Crime	Yes (art. 3)	Yes (art. 6.2.*c* and 15)
2001 Convention on Cybercrime	Cybercrime	Yes (arts. 2-11)	Yes (arts. 14, 22)
2003 UN Convention against Corruption	Corruption	Yes (arts. 15-25)	Yes (art. 23.2, 42)
2004 Additional Protocol to the 1987 SAARC Regional Convention on Suppression of Terrorism, Islamabad, 6 January 2004	Terrorism	Remission* (art. 1)	Yes (art. 8.5, 9.2)
2005 Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16 May 2005	Terrorism	Art. 1 (Terrorist offence: remission to treaties in Appendix), art. 5 (Public provocation), art. 6 (Recruitment), art. 7 (Training)	Yes (art. 14)
2005 Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16 May 2005, *ETS* No. 197	Trafficking human beings	Yes (art. 4)	Yes (art. 31)
2007 ASEAN Convention on Counter Terrorism, Cebu, 13 January 2007	Terrorism	Remission* (art. II)	Yes (art. VII)
Directive 2014/57/EU, of the European Parliament and of the Council, of 16 April 2014, on criminal sanctions	Market abuse	Yes (art. 3-5)	Yes (art. 10)

Treaty	*Topic*	*Definition of the offence (crime of)*	*Establish jurisdiction for national tribunals*
for market abuse (market abuse directive)			
Directive 2014/62/EU of the European Parliament and of the Council, of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law	Counterfeiting	Yes (art. 3-4)	Yes (art. 8)
Directive (EU) 2017/541 of the European Parliament and of the Council, of 15 March 2017, on combating terrorism	Terrorism	Yes (art. 3-12 and 14)	Yes (art. 19)
Directive (EU) 2017/1371 of the European Parliament and of the Council, of 5 July 2017, on the fight against fraud to the Union's financial interests by means of criminal law	Fraud	Yes (arts. 3-5)	Yes (art.

Source: Elaborated by the author.
* Remission to other treaties for defining the crime.