TRANSNATIONAL CRIMES AND ITS PROSECUTION

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Abstract

There are numerous crimes that, due to their nature and the extent of their consequences, affect many states with equal intensity, and for this reason, they have been the focus of international conventions for cooperation in their suppression. Due, these offenses are considered *delicta iuris gentium*. The concept of a universally applicable Criminal Law can be pronounced from a cosmopolitan perspective of applying domestic law to attempts at unification in an internationally recognized Penal Code. This historical process, therefore, requires a unique chronology.

Keywords

Transnational crime. Universally principle. International criminal law.

Summary

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1. Introduction

It seems evident that there are numerous crimes that, due to their nature and the extent of their consequences, affect many states with equal intensity, and for this reason, they have been the focus of international conventions for cooperation in their suppression. According to FIERRO, these offenses are considered *delicta iuris gentium*, which over time have been gathered as human trafficking, submarine cable disruption, piracy, drug trafficking, aircraft hijacking, torture, child trafficking, international terrorism, Apartheid, archaeological treasure looting, Genocide, crimes against humanity, war crimes, among others[2]. In a new point of view, it can be perceived that some of these offenses lose significance with scientific advancement. Traditional piracy, certainly a concern of past centuries, now has its practice reduced in the face of air transportation and modern cargo vessels, steel superstructures sailing the oceans. Also, with the development of satellite communications, submarine cables are being replaced and overlooked in favor of new space technologies.

As a solution, MÁRQUEZ PIÑERO suggests that, in order to address these priorities, Criminal Law would have two possibilities: one, the strengthening of national legislation, which means that a country with a well-structured penal code can withstand the pressures of the unscrupulous to change its laws as well as demonstrate that its authorities are not exposed to corruption; the other, the strengthening of international criminal institutions, such as the criminal courts for the former Yugoslavia, for Rwanda, and the International Criminal Court[3].

The concept of a universally applicable Criminal Law can be pronounced from a cosmopolitan perspective of applying domestic law to

[2] Guillermo Fierro, *La ley penal y el derecho Internacional*, p.195.
[3] *Ibidem*, p. 146.

attempts at unification in an internationally recognized Penal Code. This historical process, therefore, requires a unique chronology.

2. Universal Justice

In an unrestrained regression, one could find the concept of Universal Justice already among the Greeks, in their democratic politics, and particularly in the writings of PLATO and ARISTOTLE. However, it is in Roman Law that the first provisions giving rise to a universal principle would be found. Justinian's Code (C.III.15) established jurisdiction in criminal matters for the governors of the Roman Empire in the place where the offender was arrested.

Drawing on more recent data, as early as the year 1122, councils proclaimed by the Catholic Church appeared, and in the Lateran Councils, alongside the prohibition of enslaving prisoners of war, there emerged a condemnation of piracy. FRANCISCO DE VITORIA and FRANCISCO SUÁREZ, considered precursors of International Law, held a universal concept within a religious perspective. VITORIA wrote that the global political community, the community of states, possessed real political power, meaning it was endowed with effective power, grounded in duty, to create laws that would be obligatory and respected worldwide, both by states and individuals[4]. FRANCISCO SUÁREZ, inspiring figures like HUGO GROTIUS and ALBERICO GENTILI, wrote about the "law of nations" as the law used by human peoples, which natural reason established among all humans and was equally respected by all of them[5]. He emphasized that while each city, state, or kingdom was a perfect community composed of its members, all were in some way members of a universe encompassing all of humanity, as these communities would never be so independent that they

[4] Marc Henzelin, *Le principe de l'universalité en Droit Penal International*, p.88.
[5] Francisco Suárez, *Tratado de las leyes y de Dios Legislador*, p. 181.

wouldn't require some mutual assistance[6]. When addressing piracy, he called for the taking up of arms and declared war against it due to its general violation of human rights and the harm it posed to human nature. In 1625, it was GROTIUS who referred to events that directly affected sovereigns and, by extension, indirectly affected all their subjects, as they violated the law of nature or the law of nations. Greater importance is often attributed to the studies conducted by the "*practitioners*." However, at the outset of their work, they tendentiously replaced the term "*iudex deprehensionis*" (right of seizure) with "iudex domicilii" (domiciliary right). The original sense was only revived by DONEAU in the early 17th century. Subsequently, PAUL VOËT and HENRICUS COCCEJI in the 18th century faithfully transmitted the Latin maxim "*iudex deprehensionis*"[7]. BÁRTOLO expounded on the subject while developing his theory of Continuous Theft[8], and BALDO, CLARO, and FARINÁCIO, prominent figures in Italian doctrine, advocated for the universal principle, so that wrongdoers could not find refuge anywhere. COVARRUBIAS staunchly upheld "*iudex deprehensionis*" and as such has been identified as the earliest proponent of the theory of absolute extraterritoriality.

During the period between 1648 and 1815, international provisions were much more concerned with the rules of non-interference by one state in another. It was only at the Congress of Vienna, held after the defeat of Napoleon Bonaparte, that a consideration of international regulation based on mutual cooperation emerged in order to ensure a balance of power. The participating states collectively repudiated the slave trade and maritime

[6] *Ibidem*, p. 191.
[7] Donnedieu de Vabres, *Droit Pénal International*, p. 135. No mesmo sentido Marc Henzelin, *Le principe de l'universalité en Droit Penal International*, p. 77.
[8] Manuel Vieira, *Derecho Penal Internacional y Derecho Internacional Penal*, p. 147.

piracy and agreed to pursue those responsible for these acts through their respective national legislations[9].

In 1820, the United States Supreme Court accepted the proposal of the Attorney General, who, citing GROTIUS, PUFFENDORF, and EMMERICH DE VATTEL, argued that these authors unanimously regarded pirates as hostile to humanity and punishable by all courts of all nations. The same court, in 1822, concluded that slavery was a crime against the law of nations. In 1832, GREGORY proposed the creation of an International Penal Code. VATTEL, in 1834, stated that while, on the one hand, the justice of each state should generally be limited to punishing crimes committed within its territory, on the other hand, exceptions must be made for those authors who, due to the quality and habitual frequency of their crimes, violate public safety and declare themselves enemies of humanity[10]. AUGUSTE WILHELM HEFFTER asserted the existence of violations that would offend all states and were therefore considered international, as they contradicted moral law. BLUNTSCHLI, as early as 1895, attempted to define an international codification by suggesting certain offenses that would lead to a breach of peace and therefore justify armed repression[11].

The Principle of Cosmopolitan Justice could already be perceived in the Italian codes of 1889, the Norwegian code of 1902, and the Prussian code of 1903. France, in 1924, through a law passed on May 31, also accepted its application[12]. However, it is from the end of the 19th century that these works gained prominence. For their significant contribution to the supranational development of the Science of Criminal Law, the works carried out since 1889, with the emergence of the International Association

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[9] Kriangsak Kittichaisaree, *International Criminal Law*, p. 05.
[10] *Apud* Guillermo Fierro, *La ley penal y el derecho Internacional*, p. 379.
[11] Waldo Villalpando, *De los Derechos Humanos al Derecho Internacional Penal*, p. 315.
[12] Manuel Vieira, *Derecho Penal Internacional y Derecho Internacional Penal*, p. 150.

of Penal Law (IAPL), must be highlighted. The IAPL focused, particularly during the second part of its existence, on the possibility of developing and promoting the adoption of measures that would favor the fight against international crime, especially in combating human trafficking, interstate cooperation, and unified regulation on extradition[13].

Following the work of the IAPL, numerous works emerged, now guided by epistemological considerations. The pioneers in the specific treatment of the subject, particularly regarding universal jurisdiction, were VON ROHLAND, MARTITZ, and MEILI[14]. One of the early enthusiasts of the subject was QUINTILIANO SALDAÑA, who in 1925 addressed the topic in a course he taught at The Hague Academy of International Law, titled "International Criminal Justice." Driven by his interest in the subject, he presented an internationally resonant study, distinguishing four categories of offenses: interstate crimes – with a state as the active subject, such as aggression war; antinational crimes – like diplomatic violations and attacks against a foreign state; international crimes – slavery, human trafficking, and drug trafficking; and extranational crimes – piracy, submarine cable disruption, etc. The distinction between the latter two lies in the fact that international crimes are carried out separately in various territories and jurisdictions, while extranational crimes take place in areas outside of any jurisdiction, such as on the high seas.

Following this, VESPASIANO PELLA addressed the subject in his work "The Collective Criminality of States and the Penal Law of the Future" (*La criminalité collective des Etats et le Droit Penal de l'avenir*) in 1926[15].

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[13] Ignacio Berdugo Gómez de la Torre, *La evolución del Derecho Penal contemporáneo y la Unión Internacional de Derecho Penal*, p. 91.
[14] Luis Jiménez de Asúa, *La ley y el delito*, p. 160; Eugenio Cuello Calón, *Derecho Penal*, p. 242; Manuel Vieira, *Derecho Penal Internacional y Derecho Internacional Penal*, p. 17 e 18.
[15] Stefan Glaser, *Droit International Pénal Conventionnel*, p. 39.

In 1925, during the International Penitentiary Congress in London, a debate arose about a way to enhance the fight against criminals considered international in scope. In the same year, with the establishment of the International Association of Penal Law (IAPL), at its first International Congress of Penal Law held in Brussels in 1926, participants expressed support for an International Criminal Court. To achieve this, the formulation of a single International Penal Code seemed plausible, which was conceived by VESPASIANO PELLA and, after refinements, was delivered in 1935. During this period, other international conferences for the unification of Criminal Law took place. The first International Conference on penal unification occurred in Warsaw between November 1 and 5, 1927, focusing on the development of "model provisions" for specific criminal matters to be adopted by states. Subsequent meetings with the same goal were held in Brussels (1930), Paris (1931), and Madrid (1933).

In 1931, the Institute of International Law discussed jurisdiction in a meeting held in Cambridge. After the debates, the conclusions reaffirmed those reached in the session that took place in Munich in 1883, during which Article 5 of the excerpts stated that every state has the right to prosecute acts committed abroad by a foreigner found within its territory, when these acts constitute an offense against the general interests protected by International Law, if extradition has not been requested. In 1932, a session of the International Academy of Comparative Law took place in The Hague, where, when discussing extraterritorial jurisdiction, it was concluded that every state has the right to punish acts committed outside its territory by a foreigner, including acts against another foreigner, when the acts committed constitute a crime under its criminal law, and if the offender is within its territory and cannot be extradited[16].

[16] Luis Jiménez de Asúa, *Tratado de Derecho Penal*, p. 1110.

In a private initiative, the Department of Research in International Law at Harvard – USA presented a draft Treaty on Criminal Jurisdiction in the same year of 1935, in which Article 10 stipulated that the principle of Universality could be invoked in cases where the perpetrator of the crime was present within the territory of the State assuming jurisdiction[17]. The Principle of Universality was secured for the crimes outlined in Articles 9 and 10, including Piracy[18].

Among all attempts at the universalization of Criminal Law, undoubtedly, the International Criminal Code by CHERIF BASSIOUNI gained the most prestige. Of Egyptian nationality, the professor at DePaul University in Chicago worked on this project since the year 1976. Between December 1977 and May 1979, the project was discussed by the International Institute of Higher Studies in Criminal Sciences in Siracusa, and at the conclusion of these efforts, it was submitted to the United Nations. The purpose of an International Criminal Code would, on one hand, serve as substantive law for an imaginary International Criminal Court and, at the same time, provide states with the necessary means for application within their domestic legal systems.

Over the years, other attempts were undertaken with the aim of unifying the law or achieving international codification. The spotlight remained on the Model Penal Code for Latin America and the legislation of the European continent.

3. International crimes

Social concepts are subject to constant and tumultuous changes, necessary renewals that are entirely normal, stemming from new situations

[17] Antonio Remiro Brotóns, *Los Crímenes de Derecho Internacional y su persecución judicial*, in: El Derecho Penal Internacional, p. 82.
[18] Gerhard Muller e Edward Wise, *International Criminal Law*, p. 1 e ss.

and ideas. And the law, as an enduring tool for human interaction, must keep pace and adapt to these new demands of modern life. In the euphemistic words of DORADO MONTERO, it would be an anachronism to maintain, within a new machinery, old and worn-out components that would hinder the normal functioning of the whole[19].

Previously, DE VABRES spoke of its necessity due to the evolution of communications and automobilism[20]. Today, faced with the increasing international circulation and mass migrations, MANTOVANI laments that Italian criminal law jurisprudence does not give proper attention to the issue, which on the international stage is gaining greater significance, in parallel with the development of various forms of interstate collaboration[21].

Several factors are pointed out by FIERRO as justifications for this penal reform. Among them are "the current configuration of the international community, which substantially transformed at the end of the 20th century; the universal condemnation against the crime of aggression; the tragic commission of crimes against humanity during World War II, especially Genocide; the circumstance of exceptional development in communications and transportation that enables individuals to move with unique ease and speed across all corners of the world; the increasing emergence of criminal organizations operating on a global scale and employing the most modern means to achieve their objectives; and the advent of technological means enabling worldwide criminal activities, as seen with offenses committed through the Internet"[22].

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19 *Bases para un nuevo Derecho Penal*, p. 4.

20 Donnedieu de Vabres, *Droit Pénal International*, p. 1: *"les facilites croissants des communications, les progrés de l'automobilisme, de l'aviation même ont mis à la disposition des malfeiteurs bien de moyens de franchin le frontiéres et de soustraire aux recherches des polices nationales"*. A mesma idéia é passada em sua outra obra *A Justiça Penal de hoje*, p. 23.

21 *Diritto Penale*, p. 872.

22 Guillermo Fierro, *La ley penal y el derecho Internacional*, p. 52-53.

These phenomena were also observed by PEDRO DAVID, as there is a constant threat to all states when the focus remains on offenses such as terrorism, drug trafficking, smuggling, environmental crimes, human and child trafficking, corruption, all planned and executed through a vast and intricate international network. In these offenses, as DAVID acknowledges, even though there is international cooperation aimed at combating them and despite significant achievements, it proves insufficient due to the deficiencies in certain countries, whether due to normative, technical, economic, or political shortcomings[23].

In response to this phenomenon, Criminal Science must undergo a reevaluation of its system, fostering a legal culture of research and accomplishments aimed at a cooperative effort to raise awareness during a transitional moment, advancing from a globally authoritarian education to a culture of participation[24].

According to FIERRO, this is the most outdated topic among legal scholars in Criminal Law, who are absent from technological innovations and the problems arising from this process of evolution, not mentioning it in their penal treatises. The subject would remain confined within known limits, oblivious to elements of unquestionable impact on the application of criminal law, such as activities conducted in outer space or celestial space, the ethereal realm where satellite radio and television transmissions occur, the extension of territorial waters currently undergoing profound review, the serious issues stemming from illicit drug trafficking, international terrorism, aircraft hijacking, among others[25].

These offenses, which in one way or another affect all of humanity, along with the process of internationalizing crime, converge thoughts and

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[23] Pedro R. David, *Globalización, prevención del delito y justicia penal*, p. 25.
[24] *Ibidem,* p. 114.
[25] Guillermo Fierro, *op. cit.*, p. 19.

compel decisions towards a change of direction, abandoning lack of cooperation, state selfishness, and isolation within a narrow concept of territorial sovereignty[26].

It is in this context that MANTOVANI detects a political-ideological convergence among groups of politically homogeneous states, which have developed new forms of collaboration and international integration, aiming to soften the rigid concept of Sovereignty. He cites the post-World War II European continent as an example, which formed a supranational organization and envisions a common European criminal law[27].

4. The International Criminal Court

In 1995, the United Nations General Assembly establishes the Preparatory Committee (PrepCom) to finalize the text that will be adopted in a diplomatic conference. In 1996, after the PrepCom meetings, the General Assembly convenes a diplomatic conference of plenipotentiaries for the year 1998. Prior to that, in 1997, three PrepCom meetings discuss the definition of crimes, general principles of criminal law, procedural matters, international cooperation, and the penalties to be imposed. In the year 1998, from March 16 to April 3, the sixth PrepCom meeting is held to finalize the draft and agree on the procedures for the Conference. From June 15 to July 17, with the participation of plenipotentiaries from all states and the invitation of non-governmental organizations from around the world, the Rome Conference approved the Statute of the International Criminal Court and initiated the ratification process by the states.

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[26] Guillermo Fierro, *La ley penal y el derecho Internacional*, p. 19.

[27] *Diritto Penale*, p. 909. Continua o autor: *"il diritto penale europeo sovranazionale, avente come destinatari diretti i singoli individui, costituisce il grado più elevato delle unificazione, ma resta a tutt'oggi una aspirazione, trattandosi di un traguardo difficile, politicamente e tecnicamente".*

On July 1, 2002, after obtaining the minimum required number of 60 ratifications, the International Criminal Court came into force, possessing jurisdiction for the trial, on a subsidiary basis, of the crimes defined in its statute.

Responding to an international aspiration, the unease among legal experts was alleviated, and the Rome Statute includes a general part, something lacking in previous tribunals. The Nuremberg and Tokyo Tribunals only addressed the impossibility of invoking the defense of superior orders or obedience to hierarchical orders, superior responsibility, and the exclusion of the immunity of Chiefs of State. The Rwanda and ex-Yugoslavia tribunals, in addition to the provisions, also introduced the principle of ne bis in idem.

The Statute includes a detailed general part, and certain provisions such *as nullum crimen sine lege* (Article 22), *nulla poena sine lege* (Article 23), non-retroactivity (Article 24), individual criminal responsibility (Article 25), and minority at 18 years (Article 26) remain in line with modern penal systems. Others stand out due to their distinct regime. The responsibility of commanders (Articles 27 and 28) identifies the "author behind the author", expanding on ROXIN's Theory of the "Dominion of fact", and is characterized by the presumption of illegitimacy of superior orders directing the commission of acts falling under the scope of the crimes specified in the initial articles. Thus, there is no possibility for the agent to excuse themselves based on hierarchical obedience to received orders, claiming their legitimacy, as any order inherently involving the commission of acts condemned by the Statute will be considered illegitimate *per se*.

Criminal intent (Article 30) refers to the definition of intent. The Statute overly concerned itself with defining intent for a simple reason: it constitutes a material limit of the Tribunal's jurisdiction. The international court only has jurisdiction over intentional crimes, with no provision for the punishment of negligent crimes. Hence the need for accurately delineating

a concept that allows punishment solely for conduct intentionally directed towards the described crimes. Concerning the grounds for justification, the defense of necessity is absent, while self-defense is included. Regarding culpability, supra-legal reasons are admitted for its exclusion (Article 31). Despite a more detailed formulation of the general part, one aspect remains subject to criticism. The principle of non-prescription, outlined in Article 29, reveals a disappointing regressive moment in criminal science. Nevertheless, there are those who justify it given the difficulty of enforcing the Tribunal's decisions. A ruler or citizen judged by the court could hide within their territorial boundaries or under the cloak of Sovereignty, which would hinder and devalue the court's purpose. In such cases where patience and waiting for an opportunity for sentence execution are imperative, the surrender of the convicted criminal would be conditionally subject to political uprisings or government regime changes. Allowing for prescription would entail the possibility of never applying the sanctioned penalty.

Regarding the crimes, preference was given to those well-established in the international arena. Genocide, Crimes against Humanity, and War Crimes are included.

According to VILLALPANDO's conception, International Criminal Tribunals should encompass all aspects of International Criminal Law, converging all existing material efforts for the protection of human rights, the rights and prerogatives of the United Nations as an extra-state force for peace and security, Humanitarian Law due to the gravity of its violations, and Universal Criminal Law. This jurisdiction results from an incorporation of International Law into classical Criminal Law, which has traditionally been confined to domestic treatment. The convergence of these two disciplines and the novel perspective provided by their outcome promotes a special protection for the so-called international legal interests.

VASSALLI says that the importance of providing a supranational response to the international development of modern criminality imposes

on States a true cooperation, enhancing existing institutions, such as Extradition, which have become inadequate and outdated in the face of new criminal policies of collaboration that are expanding and evolving. The new criminal reality supports and demands an internationally oriented court that delimits the state's punitive authority. Following the example of VILLALPANDO, VASSALLI also believes that an international court should transnationally combat organized international crime, such as terrorism, drug and arms trafficking, economic offenses, among others, enabling a harmonized and coordinated response to all crimes that, due to their nature, transcend national borders, providing profound and significant advantages to the international community.

5. Final considerations

In the current realm of human relations, there is a need for a revision and an honest recognition of the validity of universal justice for a long-awaited – and long overdue – international legal and penal development. Criminal law, always in crisis as scholars insist, is tasked with ultimately maintaining behavior within the inherent risks of society. This society, not just today, has assumed new contours that go beyond the simple geographic or imaginary convention of the so-called territory of the State. The concept of legality should also follow this path, as it exists only in function and within the limits of the human being. In short: its extinction is not advocated, but rather an exceptional concession by the budding international sovereignty.

The current sovereign conception would lend greater strength to these thoughts, given the widespread and well-known erosion of its traditional concept, incapable of resisting the interests of this new global village - an apparently irreversible bias - formed by the recognition of an inherent nature that, in truth, has never ceased to exist: human nature.

The configuration is such that everyone is neighbors, very close to one another, and the actions of each directly reflect in the interests of all.

The economic and political interdependence of peoples, driven by the recognition of a shared nature, expands the concept of society and broadens the boundaries of effective intersections between one group and another, driven by the inherent sense of justice in human relations.

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