

Un sistema penal humanista y resocializador.

Libro homenaje al profesor José
Luis de la Cuesta Arzamendi

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Derecho Penal
y Procesal Penal

Agencia Estatal Boletín Oficial del Estado
Universidad del País Vasco

UN SISTEMA PENAL HUMANISTA Y RESOCIALIZADOR:
AL SERVICIO DE LA PERSONA, DE LA JUSTICIA SOCIAL
Y DE LA PAZ

LIBRO-HOMENAJE AL PROF. DR. DR. H. C. MULT.
JOSÉ LUIS DE LA CUESTA ARZAMENDI

VOLUMEN I

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VOLUMEN I

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82. CHASING A MOVING TARGET: INTERNATIONAL CORRUPTION BETWEEN GLOBAL MARKETS, CRIMINAL LAW AND ENFORCEMENT DILEMMAS

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I. CORRUPTION AS A TRANSNATIONAL AND SYSTEMIC PHENOMENON AND THE OFFENCE OF INTERNATIONAL BRIBERY

Corruption –as long emphasised by José Luis de la Cuesta, to whom this brief essay is dedicated with affection and deep admiration– is today a phenomenon that knows no national boundaries. It finds in globalisation particularly fertile ground for its expansion, fuelled by the growing concentration of decision-making powers, the increasing weight of economic interests and the weakening of States' regulatory capacities¹.

In his writings, De la Cuesta makes clear that corruption can no longer be understood as a merely isolated offence (*cohecho*) or as a simple malaise that affects public administration. Rather, it has evolved into a systemic and structural criminal phenomenon, capable of profoundly shaping democratic institutions, the quality of political life, market integrity and social justice.

¹ DE LA CUESTA ARZAMENDI, J.L.: «La corrupción ante el derecho y la justicia», in *Diario La Ley*, No 8153, 20 September 2013, Year XXXIV (La Ley 5149/2013), p 1 ff.

For these reasons, corruption calls for an integrated approach that combines punishment with judicial cooperation, criminal policy, prevention, political accountability and mechanisms of self-regulation.

From this perspective, De la Cuesta emerges as a thoughtful theorist of complexity and restraint in the fight against corruption. This has led him to dismantle the illusion of purely penal solutions and to advocate criminal-policy programmes inspired by a *vocación de integralidad*, aimed at ensuring the quality of governance, transparency, and the limitation and control of margins of discretion².

Sharing this underlying perspective, the following analysis briefly examines the origins, transformations and outcomes of supranational strategies for the criminalisation of international corruption, as well as their repercussions within domestic legal systems, with particular attention dedicated to the offence of bribery of foreign public officials, considered as an emblematic expression of the «criminal law of globalisation».

To this end, the Italian experience is analysed as an exemplar, characterised by a certain degree of judicial dynamism but also by significant operational difficulties and deep tensions, which appear to reflect challenges common at the global level.

II. ECONOMIC GLOBALISATION AND THE CRIMINOLOGICAL TRANSFORMATIONS OF CORRUPTION: ENFORCEMENT CHALLENGES

The criminalisation of international corruption stands as one of the most significant and conspicuous manifestations of the penal-legal sedimentation of an economic and criminological reality that transcends the boundaries of the nation state³.

This development is inseparable from the process of economic globalisation, which has produced profoundly asymmetric effects. While capital, economic elites and large corporations have acquired a genuinely global dimension, workers, citizens and democratic institutions have largely remained anchored to territorial contexts⁴, giving rise to a growing crisis of state sove-

² DE LA CUESTA ARZAMENDI, J.L.: «Corruption: a complex phenomenon. In need of a comprehensive criminal policy», in *Revue Internationale de Droit Pénal – e-RIDP*, 2019, p 10 ff.

³ MONGILLO, V.: *La corruzione tra sfera interna e dimensione internazionale. Effetti, potenzialità e limiti di un diritto penale «multilivello» dallo Stato-nazione alla globalizzazione*, Naples: ESI, 2012, pp. 1 ff.

⁴ BAUMAN, Z.: *Globalization: The Human Consequences*, Cambridge: Polity Press, 1998.

reignty and of States' capacity to govern transnational phenomena⁵. Although recent pandemic and geopolitical crises have shaken the belief in the unlimited movement of goods, capital and people, the deep structures of the global economy, grounded in market interdependence and the flow of investments, remain substantially intact.

In this context, the global expansion of economic activities has multiplied not only opportunities for development but also occasions for illegality, fostering in particular a renewed spread of corrupt practices in international markets⁶, especially in sectors marked by intense interaction with public administration, including public procurement, extractive industries, construction, transport, healthcare and defence⁷.

A central protagonist of these dynamics is the multinational enterprise, engaged in global competition in which corruption presents itself as an illicit shortcut to competitive advantages⁸.

Transformations in how production is now organised have further amplified these risks. The shift from vertically integrated multinational models to network-based transnational structures, revolving around global value chains and contract-based governance arrangements, has made decision-making processes and lines of responsibility increasingly opaque and difficult to trace.

Against this background, oversight obligations along supply chains have acquired central importance. The European Union has recently focused on corporate due diligence through Directive (EU) 2024/1760, which must be transposed by 26 July 2027, in order to enhance transparency and address corporate accountability gaps.

From the standpoint of criminal enforcement, international corruption challenges traditional conceptions of space and sovereignty, placing significant pressure on legal systems' capacity to exercise effective control. Corrupt conduct unfolds across multiple jurisdictions; evidence is dispersed among different legal orders, languages and procedural frameworks; and cultural and normative divergences may shape the very perception of criminal wrongfulness.

⁵ Inter alia, SASSEN, S.: *Losing Control? Sovereignty in an Age of Globalization*, New York: Columbia University Press, 1996; CASSESE, S.: *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Turin: Einaudi, 2009, p. 131 ff.

⁶ MALEM SEÑA, G.F.: *Globalización, comercio internacional y corrupción*, Barcelona: Gedisa, 2000; ROSE-ACKERMAN, S.: *Corruption and Government: Causes, Consequences, and Reform*, Cambridge: Cambridge University Press, 1999, pp. 9 ff., 27 ff., 177 ff.

⁷ OECD, *Foreign Bribery Report*, 2014.

⁸ In an extensive body of literature: LITVIN, D.: *Empires of Profit: Commerce, Conquest and Corporate Responsibility*, Mason, Ohio: Thomson, 2004; BAKAN, J.: *The Corporation: The Pathological Pursuit of Profit and Power*, London: Constable & Robinson, 2004.

ness, thereby nurturing what has been described as the «discreet virtues of corruption»⁹.

Faced with this impasse, States have nevertheless sought to respond, either independently or, more often, under the impetus of supranational harmonisation processes¹⁰, through three main strategies: the creation of new criminal offences with an international component, of which the bribery of foreign public officials is the paradigmatic example; the expansion of State criminal jurisdiction beyond traditional territorial boundaries; and the introduction of criminal or quasi-criminal liability for legal persons.

Alongside these developments, recent decades have witnessed the emergence of the so-called «compliance revolution», which has profoundly reshaped conceptions of corporate governance and organisational crime prevention. Nevertheless, the extent to which such expectations are realistically enforceable and the point at which they risk being reduced to a mere box-ticking exercise, continue to call for robust empirical assessment¹¹.

III. THE US ORIGINS OF THE INTERNATIONAL TREND TOWARDS THE CRIMINALISATION OF FOREIGN BRIBERY

The origin of the contemporary trend in the fight against international corruption can be traced back to 1977, when the United States adopted the *Foreign Corrupt Practices Act* (FCPA), in the aftermath of the Lockheed and Watergate scandals. This legislative intervention inaugurated an innovative model of business criminal law extending beyond national borders. Moreover, the FCPA did not limit itself to criminalising the bribery of foreign public officials but also introduced accounting requirements and transparency obligations designed to target the operational infrastructure of corruption¹².

This cornerstone of global criminal law has not been immune to shifts in US domestic politics, as recently illustrated by the abrupt change of course during the Trump administration, which marked a clear departure from the

⁹ G. KENIG, *Les discrètes vertus de la corruption*, Paris: Grasset, 2009.

¹⁰ On the international dimension of enforcement action: DE LA CUESTA ARZAMENDI, J.L.: «Iniciativas internacionales contra la corrupción», in *Eguzkilore*, 2003, p. 5 ff.; QUINTERO OLIVARES, G.: «Problemas de la dimensión internacional de la lucha contra la Corrupción», in *Libro homenaje al profesor Luis Rodríguez Ramos*, 2013, Valencia: Tirant, p. 1083 ff.

¹¹ GARRETT, B.L./MITCHELL, G.: «Testing Compliance», in *Law and Contemporary Problems*, Vol. 83, 2020, p. 47 ff.

¹² US DOJ – SEC: *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Second Edition, July 2020.

anti-corruption policy pursued under the Biden presidency, a policy that had even led to the adoption of an additional federal legislative measure extending criminal liability, in corruption-tainted international economic transactions, to the demand side and thus to foreign public officials¹³.

Nonetheless, the FCPA remains the foundational statute in this field. Approximately two decades later, that model triggered a domino effect, leading to the emergence of a dense network of European and international conventions and legislative instruments, including those adopted within the European Union (1997), the OECD (1997), the Council of Europe (1999) and the United Nations (2003). This proliferation of rules fuelled a form of *supranational penal inflation*, at times accompanied, particularly in the case of the UNCAC, by the promotion of holistic strategies combining repression and prevention.

These instruments, together with their respective Commentaries, constitute a genuine interpretative compass for the coherent and systematic interpretation of domestic provisions, ranging from Art. 322-*bis* of the Italian Criminal Code to Art. 286-*ter* of the Spanish Criminal Code, § 335a of the German StGB, and Arts. 435-1 ff. of the French Criminal Code.

Particular attention should also be paid, given its relevance, to the monitoring mechanism established under the OECD Convention, entrusted to the Working Group on Bribery (WGB) and based on peer review, which exerts significant reputational pressure on States.

The Italian legal system has likewise been directly affected by this process. Repeated observations by the WBG, followed in parallel by those of the Council of Europe's Group of States against Corruption (GRECO), contributed in 2012, through Law No 190/2012, to the revision of the offence of *concussione* (Art. 317 of the Criminal Code) and to the introduction of the offence of *indebita induzione* (Art. 319-*quater* of the Criminal Code). Since then, it has therefore no longer been sufficient to rely on the argument, which Matza and Sykes would characterise as a typical technique of neutralisation, that «that's how business is done», or, more colloquially, that «everyone does it». The payment of an undue advantage may exclude criminal liability only where it is intended to avert *unjust harm*, and not where it is aimed at securing an *undue advantage*, such as, for instance, the award of a contract at the expense of competitors, even when this occurs in order to escape an illegal demand by a public official¹⁴.

¹³ Foreign Extortion Prevention Act 2023, subsequently amended by the Foreign Extortion Prevention Technical Corrections Act 2024.

¹⁴ Further to the dichotomy between «the aim of the briber to avoid unjust harm (*concussione*) / the aim of obtaining an undue advantage» (*induzione indebita*) as drawn by *Corte Suprema di Cassazione* (Joint Sections) judgment no 12228 of 24 October 2013.

IV. THE TWO SOULS OF THE FIGHT AGAINST CORRUPTION: BETWEEN MARKET INTEGRITY AND DEMOCRACY/HUMAN RIGHTS

The original rationale underpinning the fight against international corruption lay in the need to curb corrupt practices in foreign markets, insofar as such practices were seen to distort competition and consequently undermine the very rules of the market economy. Correspondingly, the criminal-law response was conceived primarily in economic terms.

Over time, however, this justification has been complemented by a second, broader awareness. International corruption does not merely compromise the fairness of commercial exchanges; it also strikes at the foundations of democracy and human rights. Corruption thus emerges not only as a blot on the market but also as a stain on democracy and social life.

These differing sensibilities are reflected in the main international conventions in the field. Alongside the more explicitly «economicist» approach embodied in the 1997 OECD Convention, aimed at safeguarding the integrity of international business transactions, stands the more value-oriented and institutional perspective of the 2003 United Nations Convention against Corruption (UNCAC), as well as that of the Council of Europe. This latter approach broadens the protected interests to include the proper functioning of public administration, democratic institutions and fundamental rights. As a consequence, strategies of repression do not fully coincide.

Nevertheless, a common policy thread runs through these instruments. As a general rule, they refrain from requiring that passive international bribery be made a criminal offence, at least outside the framework of the European Union and in the absence of harm to the Union's financial interests, as reflected in Directive (EU) 2017/1371 of 5 July 2017. This restraint may be explained both by concerns of effectiveness, given the practical difficulties involved in prosecuting foreign public officials, and by considerations of diplomatic balance.

That said, even this long-standing boundary may begin to erode in the near future. The European Commission's 2023 proposal for a Directive on combating corruption –which has recently emerged from a prolonged stalemate in the trilogue negotiations¹⁵– points towards a possible paradigm shift, transforming what under the UNCAC amounted merely to an obligation to

¹⁵ With reference to the proposed Directive –in respect of which I anticipated certain critical issues, subsequently addressed in the context of the trilogue– see MONGILLO, V.: «Strengths and Weaknesses of the Proposal for an EU Directive on Combating Corruption», in *Sis. pen.*, 31 July 2023, p. 1 ff.

consider criminalisation into a genuine duty to criminalise passive international bribery.

V. THE «MULTI-LAYERED» STRUCTURE OF ART. 322-BIS OF THE ITALIAN CRIMINAL CODE AND THE DIFFICULTIES OF INVESTIGATION AND ENFORCEMENT

The Italian provision governing international corruption – Art. 322-*bis* of the Criminal Code, introduced by Law No 300/2000 – exhibits a distinctly multi-layered structure, characterised by intricate cross-references. This drafting complexity reflects an exceptionally intense evolutionary trajectory: in little more than twenty-five years, the provision has been amended no fewer than eight times, resulting in a continual redrawing of its scope under the pressure of supranational obligations and interactions.

From a structural standpoint, however, the provision retains a dual configuration.

The first layer concerns *intra-EU corruption*, originally modelled on the 1997 EU Convention. It is characterised by: (a) the extension of liability to single-offender crimes, now encompassing, alongside bribery, embezzlement, *concussione*, undue inducement and the misappropriation of goods or benefits; (b) the punishability of the foreign public official; and (c) the absence of any requirement that the conduct be aimed at securing an economic advantage. As a result, the protected legal interest is identified in the proper functioning and impartiality of European public administration. Over time, this sphere has been expanded to include international organisations, supranational courts and even public officials of non-EU States in cases where the financial interests of the Union are affected.

The second layer relates to active *extra-EU corruption*, originally conceived as a transposition of the 1997 OECD Convention. From an enforcement standpoint, this is the form of transnational bribery that has most frequently engaged the Italian judiciary to date. Initially confined to bilateral offences, limited to the briber and requiring a specific intent to obtain an undue advantage in international business transactions, extra-EU corruption was traditionally classified as an autonomous offence aimed at protecting fair competition in global markets¹⁶.

¹⁶ Tribunale di Milano, judgment of 19 January 2010; Corte di Appello di Milano, judgment of 7 April 2016.

This framework has, however, gradually been superseded. As early as the 2009 reform, the additional requirement of specific intent was removed, thereby allowing for the punishment of bribery for the exercise of functions, including so-called facilitating payments. The decisive turning point came with Law No 3/2019, which aligned extra-EU active corruption with the rationale underlying domestic and intra-EU corruption offences, resulting in a further expansion of criminal liability.

By contrast, passive corruption committed by public officials of non-EU States remains excluded save, as noted above, where the financial interests of the Union are harmed. This reflects the enduring tension between State sovereignty and the universalistic aspirations of transnational anti-corruption policies.

Overall, the Italian legal system ranks among the most rigorous regimes at the international level, as further evidenced by the criminalisation of *ex post facto* international bribery, a step not required by international instruments. The most significant critical issues instead arise at the level of enforcement, a dynamic that is not an Italian anomaly but rather a common feature of all legal systems engaged in combating transnational corruption.

Although Italian case law does not comprise a large body of decisions, the domestic legal framework has not remained a dead letter. The principle of mandatory prosecution, together with the autonomy of public prosecutors, has helped to mitigate the risk of political interference or considerations of national interest.

Nevertheless, in recent years a decline in criminal proceedings for international corruption has been observed, accompanied by increased dismissals and acquittals, reflecting structural enforcement difficulties.

The fragility of international judicial cooperation, the shortage of specialised investigative resources and procedural delays all undermine effective repression. While the establishment of the European Public Prosecutor's Office represents a significant step forward, its jurisdiction is limited to offences –including active and passive corruption (arts. 22 to 25 of Regulation (EU) 2017/1939)– affecting the financial interests of the Union, leaving broader forms of international corruption to national authorities, with Eurojust playing a complementary coordinating role in judicial cooperation among Member States.

Equally significant are evidentiary obstacles. Establishing the public official status of the addressee of the conduct, the existence of an undue offer or payment, and the requisite *mens rea* demands considerable investigative effort, exacerbated by the frequent overlap between corrupt practices and legitimate commercial arrangements. The criminological constants of international *grand*

*corruption*¹⁷ further amplify enforcement difficulties. Offences committed in locations remote from the prosecuting State, the involvement of complex corporate structures, the use of intermediaries and offshore corporate vehicles and transnational money laundering dynamics together delineate a phenomenon that is structurally opaque and elusive.

V.1 The Concept of «Foreign Public Official»

Among the principal issues arising in the application of international corruption offences, a decisive role is played by the classification of the foreign individual as a «public official» or a «person entrusted with a public service», since the very configurability of the offence depends on this requisite. The problem is compounded by the absence of uniform definitions across legal systems, which makes the determination of public official status particularly complex and calls for harmonising solutions.

In order to prevent enforcement gaps, the OECD Convention (as well as the UNCAC) adopts –and requires States Parties to adopt– an autonomous definition of «foreign public official», detached from the *lex loci*¹⁸. Italy has implemented this approach through a criterion of «functional correspondence» (Art. 322-*bis*(2) and (3) of the Criminal Code), thereby anchoring the assessment of the status in question to the domestic parameters set out in Arts. 357 and 358 of the Criminal Code. Under Italian law, what matters is not the formal status of the individual under foreign law, but rather the nature of the functions exercised or the performance of activities in the public interest, in short, «what one does» rather than «what one is».

The assessment of functional correspondence, however, cannot be reduced to a purely factual inquiry. It requires knowledge of the applicable foreign law, which is not always readily accessible. At this point, a preliminary misunderstanding should be dispelled. It is not necessary to establish whether the individual formally holds a public law status under the law of the country of origin¹⁹. What is essential is to ascertain, in light of foreign legislation, the

¹⁷ See HAVA GARCÍA, E.: «Gran corrupción: estrategias para evitar su impunidad internacional», in *Rev. Nuevo Foro Penal*, 2016, No 87, pp. 60-98.

¹⁸ Moreover, that autonomous notion – as also noted by DE LA CUESTA ARZAMENDI, J.L.: «Corruption: a complex phenomenon ...», p. 3 –, contrary to the FCPA, did not include political parties or candidates for public office in a foreign country.

¹⁹ Consequently, the concerns expressed in the OECD, *Phase 4 Report*, cit., pp. 46-48, according to which «the offence of foreign bribery in Italy is not autonomous, contrary to Article 1 of the Convention and Commentary 3» appear to rest on a misreading.

type of activities performed and the powers exercised within the relevant institutional framework. Accordingly, as clarified by the Italian Supreme Court of Cassation in its leading 2009 decision²⁰, courts are required, pursuant to the principle of *iura novit curia* and Art. 14 of Law No 218 of 1995 on private international law, to ascertain of their own motion the relevant foreign legal provisions, making use, where necessary, of institutional support or expert assistance. This results in an applicative model that requires the criminal court to adopt, as it were, a bifocal gaze capable, of combining the domestic legal perspective with a genuine comparative sensitivity. Italian case law, moreover, does not confirm OECD concerns about a systematic inability to establish the public official status of foreign individuals; on the contrary, it reveals a marked tendency to recognise such status, including with regard to senior officials of foreign state-owned companies.

V.2 The Role of Intermediaries: Proving the Corrupt Agreement

From an enforcement perspective, the most significant difficulties arise in relation to intermediaries²¹. While the involvement of third parties is a natural feature of economically and legally complex contexts, it becomes problematic when such actors serve as conduits for illicit payments, typically concealed behind sham consultancy or agency agreements.

The first difficulty concerns proof of the link between the sums paid to the intermediary and the promise or transfer to the foreign public official. This issue goes to the core of bribery as an agreement-based offence, which requires an illicit exchange, a *do ut des* or a *quid pro quo*.

The second obstacle, addressed in the following subsection, relates to establishing the corrupt intent (*dolus*), on the part of the principal, namely the awareness and willingness to use the intermediary as an instrument of corruption.

These difficulties are further exacerbated by the asymmetrical structure of international bribery under Art. 322-*bis*(2) of the Italian Criminal Code. In line with the OECD Convention, the provision criminalises only the active side of corruption, without providing for the punishability of the foreign public official, unlike the model applicable to domestic bribery. The unilateral offen-

²⁰ Corte Suprema di Cassazione (Section VI) judgment no 49532 of 5 November 2009.

²¹ In the vast majority of cases, bribes are paid through intermediaries: OECD: *Foreign Bribery and the Role of Intermediaries, Managers and Gender*, 2020.

ce of extra-EU bribery thus appears as an anomalous form of corruption and is structurally unbalanced. The absence of criminalisation on both sides often renders proof of the corrupt agreement exceptionally difficult, all the more so because any lowering of evidentiary standards compared to domestic corruption would be inadmissible. Nor can the offence of incitement to corruption, under Art. 322 of the Criminal Code, fully remedy this gap.

Rather, a partial compensatory tool is represented by the offence of trading in illicit influence, under Art. 346-*bis* of the Criminal Code. Despite its particularly troubled legislative history, this offence has remained substantially unchanged in the part concerning corrupt «pre-agreements», even after the markedly restrictive reform introduced by Law No 114 of 2024²². Under Italian law, trading in influence allows, where proven, the punishment of the illicit agreement between the principal and the intermediary, whereby the former mandates the latter to corrupt a foreign public official.

In its Report on Italy of 13 October 2022, the OECD Working Group on Bribery expressed concern about several acquittals in cases of international corruption, criticising the judicial application of the rules on circumstantial evidence and advocating a unitary assessment of indicia. This criticism, however, appears to rest on a misunderstanding. Art. 192(2) of the Italian Code of Criminal Procedure requires that, for facts to be inferred from circumstantial evidence, such indicia be «serious, precise and concordant». Italian courts do not appear to demand unreasonable or excessive detail as to the corrupt agreement, such as the exact date and place or the precise financial terms, but rather proof of the essential elements of the *pactum sceleris*, in accordance with the standard of proof beyond any reasonable doubt. A dilution of this standard would undermine a cornerstone of the right to a fair trial.

V.3 (Continued) Proving the Briber's Corrupt Intent

It is not uncommon for a company to pay a sum of money to an intermediary operating abroad, mandating them to do whatever is within their power to secure the conclusion of a transaction. In such cases, the intermediary may act with a high degree of autonomy, even engaging in conduct that exceeds the limits of legality. The question then arises whether, under Italian law, such behaviour on the part of the principal may entail criminal liability.

²² On the 2024 amendment, see MONGILLO, V.: «Il nuovo traffico di influenze illecite: evoluzione e dilemmi di un nodo irrisolto», in *DPP*, 2024, No 9, p. 1138.

International corruption, as defined in Art. 322-*bis* of the Italian Criminal Code, is an offence with a *mens rea* of intent, which presupposes a certain degree of awareness and volition on the part of the offender.

In common law systems, and particularly in the US, the scope of the mental element tends to be construed more broadly. Although the FCPA formally requires knowledge, enforcement practice often considers wilful blindness to be sufficient, that is, the attitude of deliberately choosing not to see the illegality of what is occurring in order to derive a benefit.

A comparable tendency appears to be emerging, albeit more cautiously, within Italian case law, through an expansion of the less demanding form of intent, namely *dolus eventualis*. A decision of the Italian Supreme Court of Cassation in 2021, albeit concerning domestic bribery, acknowledged that *dolus eventualis* may suffice for the *mens rea* required for corruption involving acts contrary to official duties under Art. 319 of the Criminal Code. Criminal liability may thus arise where the principal entrusts a third party with full freedom of action and accepts the risk that the objective will be pursued through unlawful means, even if the principal remains extraneous to the conclusion of the corrupt agreement²³.

Case law has further clarified that, in cases of corruption through an intermediary, it is not necessary for the corrupter to know the identity of the bribed public official, who may even remain unidentified, provided that it is established that the intermediary's activity was in fact directed at corrupting a person vested with public functions²⁴.

VI. CRIMINAL JURISDICTION AND COMPETITION AMONG STATES

From a comparative perspective, a widespread trend can be observed towards the expansion of the spatial reach of criminal law, pursued through two complementary strategies²⁵. On the one hand, States have broadened the criteria for asserting *extraterritorial jurisdiction*. On the other, they have stret-

²³ Corte Suprema di Cassazione (Section II) judgment no 23335 of 15 June 2021.

²⁴ See, for example, Corte Suprema di Cassazione (Section VI) judgment no 34929 of 23 July 2018; Id., judgment no 1 of 2 January 2015.

²⁵ Further on this point, MONGILLO, V.: «Criminalità di impresa transfrontaliera e giurisdizione penale 'sconfinata': il difficile equilibrio tra efficienza e garanzie», in *RIDPP*, 2023, No 1, p. 111 ff.; BLANCO CORDERO, I., «La aplicación de la ley penal en el espacio y la competencia de los tribunales españoles para conocer de la responsabilidad penal de las personas jurídicas», in *REDEPEC*, Vol. 6, July 2025, pp. 1 ff.

ched the *principle of territoriality*, giving rise to forms of «unbound territoriality»²⁶.

In common law countries, such as the US under the FCPA and the UK under the Bribery Act 2010, and more recently also in France following the adoption of the *Loi Sapin II* in 2016, the former approach has been preferred. National jurisdiction is extended on the basis of minimal and often tenuous connecting factors²⁷, sometimes sufficient to support claims of quasi-universal reach.

By contrast, in continental legal systems, and particularly in Italy, the same result is achieved primarily through an expansive interpretation of the principle of territoriality (Art. 6 of the Criminal Code). Under this approach, jurisdiction may be established even where only a fragment of the criminal conduct has taken place within the national territory, or where the offence has been committed abroad but with some form of participation originating in Italy²⁸. Accordingly, elements such as a bank transfer, a communication, a meeting or a corporate decision taken in Italy may suffice to ground domestic jurisdiction. In emblematic cases, such as *Saipem* in 2016, jurisdiction was affirmed on the basis of the mere conception (or ideation) of the criminal scheme in Italy²⁹. Subsequent case law, however, clarified that generic intent or mere travel cannot in themselves establish jurisdiction, in the absence of further elements qualifying the transfer as conduct preparatory to the unlawful activity³⁰.

This State «hunt for jurisdiction», fuelled also by significant economic and geopolitical interests, carries the risk of compressing defence rights, starting with the principle of *ne bis in idem*, which does not operate at international level, outside the EU. The growing tendency of certain European countries to emulate the US model, particularly with regard to negotiated instruments such as deferred prosecution agreements, also reflects a desire not to be excluded from a global enforcement dynamic.

Beyond the evocative, yet now largely utopian, hypotheses of universal criminal enforcement, the fight against transnational crime should not be reduced to a jurisdictional competition among States. Recent developments con-

²⁶ KRISCH, N.: «Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance», in *EJIL*, Vol. 33, 2022, No 2, pp. 481, 502.

²⁷ In the UK and France, even the carrying out of a minimal part of the briber's economic or commercial activity within the territory of the prosecuting State is deemed sufficient.

²⁸ Amongst many, *Corte Suprema di Cassazione* (Section IV) judgment no 17026 of 17 December 2008 and judgment no 16010 of 7 October 2021.

²⁹ *Corte Suprema di Cassazione* (Section VI) judgment no 11442 of 17 March 2016.

³⁰ *Corte Suprema di Cassazione* (Section VI) judgment no 56953 of 20 December 2017.

cern mainly the *ex post* management of jurisdictional conflicts through multilateral cooperation and negotiated justice. Transnational settlements, such as the agreement reached in the *Airbus case* in 2020³¹, aim to avoid excessive cumulative sanctions and to allocate financial penalties among the prosecuting States. However, they raise concerns regarding transparency, judicial oversight and the risk of selective enforcement, whereby corporations may end up bearing economic penalties that effectively conceal individual criminal responsibility³². Negotiated mechanisms may be acceptable, provided that they remain firmly anchored within a fully judicial framework and, in particular, are subject to approval by an independent and impartial judge.

VII. CONCLUDING ASSESSMENT AND OUTLOOK

More than twenty-five years after the entry into force of the 1997 OECD Convention, the overall assessment of strategies to combat international corruption appears inevitably ambivalent.

From the perspective of normative harmonisation, the process can largely be regarded as successful. Almost all States have introduced specific criminal offences, also under the universalising impetus of the 2003 UN Convention against Corruption.

The picture is markedly different, and far more problematic, when it comes to the effectiveness of enforcement. Convictions for foreign or non-domestic bribery remain extremely limited worldwide. Vast areas of the world remain essentially untouched by any application of the relevant criminal provisions. Even where enforcement does occur, it is highly uneven and often appears driven more by the need to preserve an individual State's international credibility, under the pressure of transnational governance mechanisms

In this context, strengthening international judicial cooperation and cross-border investigative capacities remains indispensable, but not sufficient.

Nor can the ambiguity of certain particularly aggressive enforcement models be overlooked. The evolution of the US FCPA is emblematic in this respect. Enacted in order to preserve the international credibility of US democracy and to prevent the transnational *Virus der Korruption* from producing a

³¹ In this case, the European defence giant agreed to pay €3.6 billion, apportioned between France, the UK and the US.

³² This distortion was addressed in the US with the Yates Memo in 2015: *Individual Accountability for Corporate Wrongdoing*, 9 September 2015.

contagion effect within the domestic system³³, this rationale cannot be elevated to the status of a legally protected interest (*bien jurídico*) without rendering the offence absolutely indeterminate and incompatible with fundamental principles of criminal law³⁴.

US enforcement statistics show that the vast majority of the most significant actions have involved foreign companies, to the point that some legal scholars in the US have described the FCPA as a kind of «*international anti-corruption business tax*» imposed on non-US multinationals³⁵. Nevertheless, President Trump, by executive order of 10 February 2025, suspended the application of the FCPA for 180 days, arguing that its enforcement had harmed US economic interests and national security³⁶. The country that first planted the seed of the fight against foreign bribery, forty years later, decided to sever part of its own ethical and entrepreneurial roots in the name of domestic economic and geopolitical expediency.

Finally, another fundamental issue remains unresolved: who protects the real victims of international corruption?³⁷ The residents of the most fragile States continue to bear its social and democratic costs, without confiscated proceeds being channelled into meaningful forms of compensation or reparation.

Ultimately, the problem lies less in abstract normative gaps than in the economic and geopolitical dynamics that continue to fuel transnational corruption. As long as corruption is perceived as a competitive factor by corporations, it will remain an evergreen phenomenon capable of adapting to any regulatory climate.

This brings us back to the starting point, namely the need for an integral criminal policy vision, as taught by José Luis de la Cuesta.

³³ On this rationale, see KUBICIEL, M.: «Auslandsbestechung und Institutionenschutz: Schutz inländischer Ordnungssysteme durch § 335a StGB», in HOVEN, E./KUBICIEL, M. (eds.): *Das Verbot der Auslandsbestechung*, Baden-Baden: Nomos, 2016, pp. 45 ff., 56; BOSWELL, N.Z.: «An Emerging Consensus on Controlling Corruption», in 18 U. Pa. J. Int'l Econ. L., 1997, p. 1166.

³⁴ See also SILVA SÁNCHEZ, J.-M.: «Doce tesis sobre el delito de corrupción de funcionarios extranjeros», in *Persuadir y razonar. Estudios jurídicos en homenaje a José Manuel Maza Martín*, Vol. II, Madrid: Marcial Pons, 2018, p. 655.

³⁵ LEIBOLD, A.: «Extraterritorial Application of the FCPA under International Law», in *WLR*, Vol. 51, 2015, p. 225 ff.

³⁶ This intervention was followed, on 9 June 2025, by the adoption of new guidelines: the US Department of Justice, Office of the Deputy Attorney General: *Guidelines for Investigations and Enforcement of the Foreign Corrupt Practices Act*, 9 June 2025.

³⁷ See PETERS, A.: «Corruption as a Violation of International Human Rights», in *EJIL*, Vol. 29, 2018, No 4, p. 1251 ff.

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El Libro-homenaje al profesor José Luis de la Cuesta Arzamendi constituye una obra colectiva de extraordinaria amplitud y profundidad científica que refleja, fielmente, la dimensión académica, institucional y humana de quien ha sido una figura de referencia del Derecho penal contemporáneo y de la Criminología. A través de más de 200 contribuciones tanto nacionales, como internacionales, la obra aborda los grandes desafíos actuales de las ciencias penales y criminológicas desde una perspectiva plural, crítica e interdisciplinar.

La estructura del libro combina, en primer lugar, testimonios que destacan la trayectoria universitaria, el liderazgo institucional y el compromiso ético del homenajeado, para dar paso a un extenso recorrido por la Parte General y Especial del Derecho penal, la Política Criminal, la Criminología, la Victimología, el Derecho penal Internacional, así como otras disciplinas afines. Temas como la Inteligencia Artificial, los Derechos Humanos, la Justicia Restaurativa, la Violencia de Género, la Criminalidad Económica, la Protección del medio ambiente, la Justicia Climática o la Justicia Penal Global evidencian la actualidad y relevancia de los debates recogidos.

Más que una recopilación de estudios, esta obra representa el reconocimiento de una comunidad científica internacional al legado intelectual del Prof. de la Cuesta Arzamendi y a su constante defensa de un Sistema Penal guiado por los principios de Humanidad, Dignidad y Justicia.

