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Financial crimes and transnational investigations: lawfare and economic war between countries

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Abstract
This paper demonstrates the extraterritorial effects of anti-bribery legislations of central countries, especially the United States of America, in order to show that they are much more like economic war tools than justice measures. Instead of questioning such procedures in international arenas, other central countries – such as England, France and Germany – started to use these same extraterritorial tools in their anti-bribery legislations, albeit in a less intense way.
The effects for the least developed countries – to the detriment of which these foreign laws are applied – are very negative, quite contrary to what the official agenda suggests. The fight against corruption does not take place, after all, in favor of the countries most affected by this white-collar crime and it is important that this becomes crystal clear, in order juridical, economic and political manipulations not to happen against them. After all, the anti-bribery discourse seems not to be more than a mere tool in the hands of these central countries in favor of their financial interests. This OECD paradigm in fact generates a vast territory for the occurrence of lawfare far beyond the borders of the leading countries – but for their benefit –, with harmful and impoverishing effects for their targets.

Keywords: *Financial crimes; transnational investigations; anti-bribey legislations; economic war; economic sanctions; lawfare.*

1. Introduction

The Foreign Corrupt Practices Act (FCPA), issued in 1977 by the United States of America, is clearly being increasingly used as a weapon of commercial war to the detriment of companies from other countries – most of them developing nations. In addition to the prison sentences eventually imposed on their officers and employees, large

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companies allegedly involved in corruption outside the United States of America have been increasingly financially punished, extremely severely, on American soil - and for the benefit of the US Treasury – without any justification for this in the light of international law.

Instead of questioning such practices in international courts, however, other leading countries, are putting into practice the efforts expressed in the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* by the Organization for Economic Cooperation and Development (OECD), which means they are adopting a similar strategy, even though they have not, of course, obtained as large financial returns as the United States of America.

Thus, this paper addresses this scenario from the concept of "lawfare", to demonstrate that criminal law – and, specifically, the discourse against corruption – at national and international levels has served the financial interests of leading countries in detriment, especially, of developing nations and their main companies.

2. International context and the use of anti-corruption laws as a weapon of economic war

Although the allusion that the field of criminal law is in crisis has become commonplace, the truth is that this phenomenon is not restricted to contemporary times. On the contrary, this much talked about crisis has been inherent to criminal law as a set of norms at least since the Enlightenment and the emergence of the first states of law (Sánchez 2012: p. 3). It is possible to point out, therefore, that crisis is the very regular functioning of the modern criminal justice system. Or that, in reality – at least from the perspective of punitive power – there is no crisis at all.[1]

Regardless of the lens through which contemporary criminal law is analyzed, it is undeniable that its trend and activity is quite expansive. This is the symptom that fundamentally distinguishes our time (Sánchez 2012: p. 8). A time that lives in the simple perversity of the ephemeral, that glorifies the moment, and that no longer wants the law as a minimally stable and lasting value of collective life, but as a mere instrument at the service of various strategies (Costa 2010: p. 8). Including the use of law as a weapon of war, a concept that, although called "lawfare" only in 2001 (by Charles Dunlap Jr.), comes from Hugo Grotius (1583-1645), the father of international law, as pointed out by Orde F. Kittrie. Indeed, in the first decade of the 17th century, European countries competed for control of maritime routes and Portugal, seeking to protect its economic interests, intended to forcibly exclude the Dutch East India Company from the Indian Ocean, having even allocated its fleet there as a way of persuasion. Irresigned, the Dutch East India Company hired Hugo Grotius to develop a theory that would wrap it up financially, which resulted in the 1609 work *Mare Liberum*, according to which all nations are free to use the oceans for trade, anticipating in more than four hundred years some of the technological and socioeconomic factors "that are making law a more powerful and prevalent weapon in twenty-first-century conflicts" (Kittrie 2016: pp. 4-5).

If the first use of what is now known as lawfare is related to trade disputes between countries, it is not surprising that in present times financial crimes, practiced in the

[1] This is not, however, the conclusion of Jesús María Silva Sánchez (2012: p. 5), for whom criminal law is in a crisis of legitimation, identity and epistemological legitimacy. José de Faria Costa (2010: pp. 12-13) points out that criminal justice is living dramatic moments of crisis, to a greater or lesser extent, throughout the world, with disaggregating consequences not only to the basic values of democratic regimes, but also to the social fabric itself. Undeniably, both authors are correct.

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economy of a *global village* (Marshall McLuhan), provide the most fertile field for its incidence. The market economy has become almost universally accepted, having imposed itself informally even in Cuba or, as in China, paved the way for a coexistence with dirigisme under the political logic of "one country, two systems", so that today's corruption operates far more in the financial markets than in government offices – and it is frequently related to modern crimes, such as influence peddling or insider trading (Fernández 2004: pp. 213-217), which often touch interests beyond the national borders in which they may have occurred.

That is why discussions about the transnationality of financial crimes are on the agenda. There are already those who defend the internationalization of interests protected by the penal rule, which would mean overcoming a way of thinking centered on the limits of application of the criminal rule to the protection of national legal assets – and from then on, undoubtedly, the association of a movement to defend a supranational public thing would be the next step (Tricot 2005: pp. 753-765).[2]

But there is no need to go that far. The 2008 financial crisis renewed the international community's efforts to fight corruption and money laundering (Kyriakos-Saad, Esposito and Schwarz 2012: p. 165) and, as is known, on the pretext of endorsing them based on the *Convention for Combating Bribery of Foreign Public Officials in International Business Transactions* (known as *Anti-Bribery Convention*) of the Organization for Economic Cooperation and Development (OECD) – which took place in November of 1997 – the United States of America, through the approval of the International Anti-Bribery and Fair Competition Act of 1998 – which amended the Foreign Corrupt Practices Act of 1977 (FCPA) – has been monitoring the entire world according to its own interests. After all, it is certain that the movement of the criminal justice system, anywhere in the world, has other functions besides those that are announced and marketed.

The approval of the International Anti-Bribery and Fair Competition Act of 1998 was preceded by an emphatic statement by then President Bill Clinton, saying that the Foreign Corrupt Practices Act of 1977 had removed competitiveness from American companies in countries where, in one way or another, the payment of bribes to senior public officials was crucial or common practice when signing international contracts. It was therefore necessary, he argued at the time, to pass legislation that would also subject foreign competitors to US laws, leveling the playing field (Spalding 2010: p. 391). This is exactly the justification presented by the OECD for the *Anti-Bribery Convention*:

[2] Juliette Tricot (2005: p. 757) argues that although most national legal systems foresee corruption as a crime, only the United States of America – through the Foreign Corrupt Practices Act (FCPA) – do so in relation to foreign public servants, which would remove the competitiveness of American companies. In reality, however, other regulations also foresee this conduct as a crime. One example is Brazil, that since 2002 applies it to the crime of active corruption in an international commercial transaction, provided for in article 337-B of the Brazilian Penal Code). In addition, the FCPA is applied far beyond North American borders, serving as a justification - albeit illegitimate - for the United States of America's role as the "police of the world".

"Investment, competition, and markets are global, and efforts to keep them fair and open have to be global too" (OECD 2011: p. 14).[3] It cannot be forgotten that "[u]ntil recently, bribing foreign government officials was not only permissible in large parts of the word; it was tax deductible" (Smith and Parling 2012: p. 253).

But other consequences, which Andrew Brady Spalding describes as "unwitting", have been observed since then: "Companies subject to anti-bribery legislation are investing less in countries where bribery is perceived to be more prevalent." While recognizing that some may assume that this is precisely the legislation's objective – developing countries depend on foreign investments to stimulate their economies and, therefore, local governments tend to implement legislative and structural reforms to curb corruption –, the author sheds light on the fact that this is, in reality, the path expected to be taken by means of "economic sanctions", not criminal laws. And this is not acceptable, after all, because the victims of criminal conduct end up suffering the consequences of its implementation, more so than those who practice it. Furthermore, the author suspects – and rightly so – "that despite these costs, the sanctions will fail to effect meaningful reform" (Spalding 2010: pp: 355-356).[4]

Therefore, the imposition of "de facto economic sanctions"[5] is also a lawfare tool that has been used very effectively by the United States of America around the globe. As it is known, the U. S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have considerable authority to prosecute foreign companies regardless of their country of origin or the location of corrupt activity. It is enough that the company has some connection with the United States of America, which can mean anything from obtaining some advantage in American markets – even in legal ways not connected to corruption practiced in another country – to simply maintaining assets in some American bank (Kaczmarek and Newman 2011: p. 747).

But not only that. A mere phone call or sending of an "e-mail, text message, or fax from, to, or through the" United States of America is sufficient to attract US jurisdiction beyond its borders, as the DOJ and the SEC expressly state in the Resource Guide to the US Foreign Corrupt Practices Act (DOJ and SEC 2020: p. 10).[6] The range for using US law as a weapon of war is therefore extremely vast, and the consequences for countries with high levels of perceived corruption are absolutely dire.

Between 2009 and 2018, China and Brazil were, respectively, the two countries that suffered the most penalties based on the Foreign Corrupt Practice Act (Instituto Brasileiro de Governança Corporativa 2019). On October 14, 2020, the US Department of Justice claimed before the Eastern District of New York that the Brazilian company J&F Investimentos S. A., based in São Paulo, paid approximately US$ 177,600,000 in bribes to Brazilian public employees between 2005 and 2017. On the same date, J&F Investimentos

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[3] Throughout the changes surrounding the Anti-Bribery Convention, some countries, including Germany, France, the United Kingdom and Japan, expressed concern that hasty ratification would put them at a competitive disadvantage, since "bribing public officials was a necessary part of business transactions in certain countries." It was established, therefore, that the Anti-Bribery Convention would only enter into force after the ratification of five of the OECD's ten largest exporters, "representing at least 60 percent of total OECD exports" (Kaczmarek and Newman 2011: p. 752).

[4] Andrew Brad Spalding (2010: p. 356) says that their "fears are likely more pronounced where the target country is poor; they may be more pronounced yet when the country otherwise enjoys economic conditions that are highly conducive to growth."

[5] Expression by Andrew Brad Spalding (2010: p. 351).

[6] If they are American companies or people, the use of e-mail, text message or telephone is not even necessary to give cause to law enforcement outside the United States of America because "[t]he 1998 amendments to the FCPA expanded the jurisdictional coverage of the Act by establishing an alternative basis for jurisdiction, that is, jurisdiction based on the nationality principle." (DOJ and SEC 2020: p. 11).

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S. A. "entered into a plea agreement with the government" and agreed to pay a US$ 256,497,026 fine and report to the DOJ "the status of its enhanced anti-corruption compliance policies and procedures for a term of three years" (Stanford Law School 2021a). The largest monetary sanction applied under the Foreign Corrupt Practice Act was also to the detriment of a Brazilian company: Odebrecht SA had to collect US$ 3,557,626,137 in favor of the American treasury (Stanford Law School 2021b) for the payment of bribes outside the United States of America (Stanford Law School 2021c).

Mexico, Nigeria, Indonesia, India and Gabon were subsequently the other countries most affected by the Foreign Corrupt Practices Act since the statute's enactment (Stanford Law School 2021d). In 2020 alone, more than US$ 5,800,000,000 of sanctions were imposed based on the Foreign Corrupt Practices Act (Stanford Law School 2021e). The scenario is revealing: in 2010 eleven of the twenty companies involved with the Foreign Corrupt Practices Act were outside the United States of America; these companies were responsible for 94 percent of the penalties imposed in this very same year (Smith and Parling 2012: p. 241) and, last but not least, out of the ten largest penalties paid by companies between 2008 and 2011, nine were from outside the United States of America (Cassin 2011). In the words of Kevin E. Davis:

"In theory, anti-corruption law can serve not just to condemn and to prevent, but also as a way of securing compensation for victims. When it comes to regulation of transnational bribery, practice has not yet fully caught up to the theory. The practice of imposing substantial monetary sanctions on multinational enterprises that are complicit in transnational bribery is a useful step toward the goal of compensation. Those sanctions are especially likely to result in actual payments when imposed by states in a position to move against assets the firms value. In principle, the resulting funds could be channeled to victims of corruption. In fact, the UN Convention commits its signatories, which include most countries in the world, to cooperate in transferring confiscated proceeds of corruption, and awarding compensation, to victimized states. To date, however, the funds collected rarely have been used for the purpose of compensation. They typically are remitted to the Treasury of the United States or whichever other country has launched the relevant legal proceeding" (Davis 2019: p. 8)

Consequently, it is no wonder that other leading countries are encouraged to issue laws with effects far beyond their borders – especially because another strategy would not have any effect, since the United States of America "are not accountable to international courts, as they have not ratified the treaties that may compromise them" (Zaffaroni 2006: p. 62).[7] The United Kingdom and its Bribery Act of 2010 is perhaps the most notable example. According to its Section 12 (2), British law applies to anyone who has a "close connection with the United Kingdom", even when no action or omission has occurred at its

[7] My translation of the original: *"no rinden cuentas ante tribunales internacionales, pues no ratificaron los tratados que puedan comprometerlos."*

borders (United Kingdom 2010). France, for its part, enacted Loi nº 2016-1691 (Loi Sapin II) in December of 2016, adopting extraterritoriality in crimes against the Public Administration if committed by someone of French nationality or by those who have habitual residence in French territory or on it develop all or part of their economic activity (France 2016).[8] In turn, Germany, Europe's largest economy, quickly joined the United States "as the world's leaders in foreign bribery prosecutions" (Funk 2014: p. 24).

Although it is know that "[s]overeignty in the age of globalisation and capitalism has been a widely contested doctrine", one cannot lose sight that "the use of extraterritoriality over the last few decades has been one-sided with little critical eye on the impact" on other countries and that "[b]alance is crucial in the current world of increased interdependence." However, it is clear that "only powerful states possess the regulatory acumen and political vitality to dictate the direction of regulation of corruption." It is not surprising, moreover, that the extraterritoriality of the law is being used only in favor "of a few elite states without much emphasis on the procedural fairness of the justified national interests" (Ojewumi 2017: pp. 38-41).

Indeed, in most of the numerous cases involving corruption that U. S. prosecutors have taken up since the mid-1970s, the connection with the United States of America was merely incidental (Davis 2019: p. 1), and it was not possible to state that criminal prosecution across borders would be justified on the principles of international law. The principle of universal justice would also not be invocable, since it may not be an exaggeration to say that any country in the world foresees corruption as a crime – although not all in relation to the foreign civil servant (among which are included some of those who joined the OECD Anti-Bribery Convention).

Furthermore, reliance on foreign institutions to combat and punish corruption of local officials rests on a presumption of ineffectiveness in national law that is highly contestable. After all, "[n]o matter how well intentioned and competent they might be, foreign legal institutions typically can only deploy coercive force within their own territory. Everywhere else they require the cooperation of local authorities" (Davis 2019: p. 14). Therefore, it is possible to conclude that either the local law is ineffective because the local authorities are already corrupted or weakened before the companies that operate there and, consequently, foreign institutions would not have practical conditions to bring those responsible to trial[9] or, on the other hand, the repressive legal system works as expected and the application of external anti-corruption laws is unnecessary and, at least, unfair. After all, this being the case, the same misconduct ends up being punished by multiple agencies, which will

"jeopardize some of the most fundamental attributes of due process, including: advance notice of what conduct will attract liability, advance notice of the forum in which liability will be adjudicated, timely adjudication of liability before an impartial tribunal, no more than one trial for each allegation of wrongdoing arising from the same transaction, and punishment proportionate to the harm or risk of the harm created" (Davis 2019: p. 15).

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[8] Loi nº 2016-1961: "Article 21 Le même chapitre V est ainsi modifié: 1º la sous-section 3 de la section 1 est complétée par un article 435-6-2 ainsi rédigé: « *Art. 435-6-2.* – Dans le cas où les infractions prévues aux articles 435-1 à 435-4 sont commises à l'étranger par un Français ou par une personne résidant habituellement ou exerçant tout ou partie de son activité économique sur le territoire français, la loi française est applicable en toutes circonstances, par dérogation au deuxième alinéa de l'article 113-6, et l'article 113-8 n'est pas applicable."

[9] Scott P. Boylan (1995: p. 2003), for example, explains that "[t]he United States currently has the means to combat the payment of bribes by U.S. citizens to corrupt Russian Government officials through the Foreign Corrupt Practices Act ('FCPA'). Unfortunately, U.S. officials have failed to vigorously enforce this legal mechanism vis-à-vis corrupt practices in Russia and the former Soviet Union."

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From there Kevin E. Davis draws a timely parallel between the neo-imperialist interventions in Africa, Asia, and Latin America – which were said to be "ways of bringing good governance to benighted peoples but were criticized for being ineffective, illegitimate, and unfair exercises of power by some groups of people over others" and the extraterritorial effects of anti-corruption laws in leading countries, also called "the OECD paradigm" (Davis 2019: p. 16). But perhaps the most correct term – due to its scope – is really "lawfare", after all companies from developed countries with strong economies find themselves dealing with the Foreign Corrupt Practices Act as well: in 2010 the German car company Daimler agreed to pay more than US$ 90 million (and retain a corporate compliance monitor) and to pay another US$ 90 million plus in disgorgement (and retain an independent compliance consultant), as Charles Smith and Brittany D. Parling point out. On the other hand, General Motors and Ford, its biggest competitors in the United States of America, never had any problems with the Foreign Corrupt Practices Act, "notwithstanding the fact that they largely sell the same kinds of vehicles through the same kinds of distribution networks in the same high-risk countries around the world" (Smith and Parling 2012: p. 249).

3.The discourse against corruption and enemy criminal law applied to organized crime (related to business)

Eugenio Raúl Zaffaroni says that, unlike productive capital, the globalized market is not managed by businessmen, but by economic conglomerates that, from time to time, navigate the gray waters of financial delinquency, falling victims of clashes with other competitors and causing real catastrophes in the markets by the collapse of their cardboard empires, phenomenon that motivated the boost of medieval-like inquisitive legislation – with spies, whistle-blowers, secret procedures and absurd guarantor positions – applicable to an endless set of infractions considered to be affected by *organized crime*. However, according to the author, this so-called *organized crime* is nothing more than a pseudo-concept invented by the media and politicians, and around which criminology never reached a consensus, so that countless heterogeneous criminal conducts – of different levels of severity – end up being attacked by the same legislative measures. The less widespread conception of *market crime* as organized crime shows the heterogeneity of the concept (Zaffaroni 2006: pp. 60-61) and its plasticity for any type of discourse manipulation.

It seems undoubtable that the labels *organized crime* and *corruption* are functional categories for the elimination of competitors without due constitutional guarantees for that purpose. Furthermore, still in the path of Eugenio Raúl Zaffaroni's reflections, "[t]he campaign against corruption seems to focus more on avoiding higher costs to foreign investors in peripheral countries than on the ethical principles that are enunciated or on the

structural damage they cause to local economies" (Zaffaroni 2006: pp. 61-62).[10] It is the truth. The history of the fight against corruption is the story of the corruption of that fight. Whether it is due to disrespect for the fundamental laws and guarantees of the accused in these emergency criminal proceedings, or because of the undeniable interests behind the major corruption scandals and their subsequent political use, the fight against corruption, as it has been conducted around the world, is nothing more than an instrument in the hands of the powerful. It is certainly not, as someone unsuspecting might gather from official propaganda, a remedy for democracy and human rights of the populations of peripheral countries.

On the contrary. Corruption cases become major scandals through the use of showy terms and the leak of sensitive information from ongoing criminal proceedings to a news-hungry media that produces headlines that are as scandalous as they are often dishonest. Reputations are destroyed in seconds and entire families are stigmatized for a lifetime, even if they are later proved innocent. In the case of public officials, elected in peripheral countries, whose worldviews are not aligned with central geopolitical interests, the objective becomes their total annihilation, in order to avoid that their leadership can, in the present or in the future, lead other people with the same ideals to positions of power. In the case of large strategic companies, the annihilation of their administrative board is a mere side effect of a war tactic that is not concerned with being precise.

The extraterritoriality of anti-corruption laws does not appear to bring any benefit to the countries and populations in which they are imposed – only for a small portion of those who impose it. The population of OECD members does not reach 20 percent of the world's population, so "although transnational bribery law affects the entire world, it is shaped by people who represent only a small fraction of the world's population" (Davis 2019: p. 17). From this perspective, the excited speeches in favor of democracy as a justification for the use of predatory powers beyond the borders of leading countries – notably the United States of America – sound very uncredible.

Gustavo Barbosa de Mesquita Batista recalls that "Law is a language that replaces the articulation of violence in the resolution of human conflicts" but that, at the same time, *emergencies* remove from the language of law the characteristics that oppose war (Batista 2020: pp. 180-181).[11] The use of the word "combat" – and it's impossible not to think of the official name of the OECD Anti-Bribary Convention: *Convention on* ***Combating*** *Bribery of Foreign Public Officials in International Business Transactions* – in normative proposals around the world reveals something that Achille Mbembe put very well into words: "The age of humanism is ending" (Mbembe 2016).[12]

4. As a conclusion

It is evident that the criticisms here launched do not mean a defense of decriminalization, let alone impunity for crimes of corruption by public agents, foreign public officials or public officials from international organizations. Perhaps such an assertion does not even need to be made – much less in view of conclusive considerations,

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[10] My translation of the original: *"la campaña contra la corrupción parece centrarse más en evitar mayores costos a los inversionistas extranjeros em países periféricos que em los principios éticos que se enuncian o en los daños estructurales que causan a las economías locales."*

[11] My translation of the original: *"O direito é uma linguagem que substitui a articulação da violência na resolução dos conflitos humanos."*

[12] MBEMBE, Achille. The age of humanism is ending. Mail & Guardian: Africa's best read, 22 Dec 2016. Avaiable at: https://mg.co.za/article/2016-12-22-00-the-age-of-humanism-is-ending/.

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since it is a logical, basic and indisputable premise. There is no notice of anyone who sees any benefit in this criminal conduct or who discusses its decriminalization. "Even the corrupt are against corruption", as it became common to say, not without a certain irony, in Brazilian legal debates.

It cannot be ignored, however, that international campaigns against corruption take place in favor of financial and political interests of leading countries, not for the benefit of marginalized populations of peripheral countries, where this type of misconduct is certainly more noticeable. Instead of promoting equal competition in local, regional or global markets, as stated, the laws and anti-corruption efforts of the United States of America and other key countries appear to be much more directed at imposing their own commercial agendas by withdrawing other players from relevant disputes and confiscating, in favor of themselves, the alleged benefits of this type of economic crime.

Furthermore, in addition to the illegitimacy of this type of procedure in accordance with international law – because neither the principle of defense nor that of universal justice are satisfied for the justification of extraterritoriality of anti-corruption laws –, interventions of this kind tend to weaken guarantees of the due process of law in peripheral countries and to strengthen populist discourses with anti-democratic tendencies.

Considering that the practical consequence of the extraterritorial effects of anti-corruption legislation is so opposite to that propagated by the official agenda, the right thing to do would be to withdraw these long arms from some jurisdictions of leading countries, notably those of the United States of America. Or, at least, reform the discourse. The expected morality of the fight against corruption does not live well with a speech so detached from its practical effects.

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