

THE APPLICABILITY OF THE RULES ON INTERNATIONAL CRIMES IN OUTER SPACE

Pablo Antonio Fernández Sánchez, PhD¹

Visiting Professor at the University of Salerno, Italy

Full Professor of Public International Law at the University of Seville, Spain

INTRODUCTION

Human activities in outer space are relatively recent, which explains why international law has not historically been interested in regulating the general scope of the obligations of subjects of international law in this space.

Therefore, we can see that regulation has been gradual², depending on the activities carried out or the real possibilities of carrying them out³. For this reason, specific agreements of a conventional nature⁴ have been established and legal principles have been established to govern the activities of States in the exploration and use of outer space⁵.

With regard to international crimes, whether attributed to States or imputable to human beings, what interests us in this reflection is that, regardless of the legal status of outer space, there are jurisdictional frameworks for subjects of international law in this space, regardless of their legal qualification.

The rules that can generate state responsibility or individual criminal responsibility have their origin in both general international law and conventional international law.

I will pay special attention to the context of armed conflicts, where most of the rules of international criminal law are located. Therefore, despite the general prohibition of *ius ad bellum*, such as the principles of peaceful purposes of all space activities, the reality is that international illicit acts can occur in this area (the prohibition of the use of force, aggression, etc.) as well as the need to apply the rules of *ius in bello*, to sanction the violation of its rules, whether within the state or personal framework.

I will place special emphasis on the framework of individual criminal responsibility.

¹ pafernandez@us.es

² For a Research Guides, see Thomas J, Meskill Law Library, "Research Guides – Outer Space Law", in <https://libguides.law.uconn.edu/c.php?g=1047257&p=8099421>.

³ For a general view, see Heck A. (ed.), "Organizations and Strategies" in *Astronomy*, 6, 2006: 191–204.

⁴ I only mention their titles, leaving their specific identification for later: Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; Agreement on the Rescue and Return of Astronauts and the Return of Objects Launched into Outer Space; Convention on International Liability for Damage Caused by Space Objects; Convention on Registration of Objects Launched into Outer Space; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies.

⁵ I only mention their titles, leaving their specific identification for later: Declaration of legal principles governing the activities of States in the exploration and use of outer space; Principles governing the use by States of artificial satellites of the Earth for international direct television broadcasting; Principles relating to remote sensing of the Earth from space; Principles relevant to the use of nuclear power sources in outer space; Declaration on international cooperation in the exploration and use of outer space for the benefit and in the interests of all States, taking into account especially the needs of developing countries.



This will lead me to use a systemic methodology where all the rules are integrated, wherever they come from, given that the applicable law must be holistic. Therefore, the set of rules of public international law, whether general, conventional, specific, particular, universal or regional, as well as rules from national legal systems, will have to be present.

Primary and secondary sources are difficult to understand because the subject matter is new and because of the lack of state practice. However, the justification for the existence of the rules, as well as the justification for the opinions, will have as many references as possible, within the framework of the direct and indirect rules, as well as in specialized and updated bibliography.

THE GENERAL SCOPE OF INTERNATIONAL LAW OBLIGATIONS IN OUTER SPACE

The Scope of Application Ratione Loci or Ratione Geographiae

The scope of application *ratione loci* refers to the territorial scope of the rules of international law. In principle, international law arises as a consequence of regulating legal relations between States, so, uniquely, it is an interstate law to regulate the common interests of States⁶. The key to the international order that was generated in Westphalia had to do with territorial aspects because three major principles were established: respect for territorial limits, territorial and not personal jurisdiction, and the sovereign equality of States.

These spatial concepts, born in 17th century Europe, would spread to the rest of the world when the geographical horizons were broadened without altering the system of territorial States. In this way, medieval European entities became territorial States with a national base, such as Russia, Austria or Turkey, and non-European societies accepted the hegemony of the prevailing political system. In this way, in the East, Western political practices displace ancient customs and cultures. This is what justifies why Japan, in the 19th century, took only 20 years to dismantle its traditional feudal system and assimilate the techniques of Western diplomacy, international negotiation and forms of territorial defense.

The evolution of the spatial scope of application of International Law towards common spaces without a State territorial base, such as seas and oceans, Antarctica, the airspace overlying these common spaces, non-autonomous territories, etc. and the obligatory framework of States beyond their own territories, in matters that affect global public goods, such as the environment, food security, communication networks, etc.⁷

At this point, we are interested in reflecting on the legal nature of outer space as a global public good and, if so, its dimension of non-appropriable, but affected by the general or particular regulations of international law.

All the rules of International Law are established to generate an obligatory framework in the territory of each State where jurisdiction is exercised, in the international sense, that is, where the State exercises territorial, material, personal and temporal competences. The territory of the State is, therefore, the physical framework where the rules of International Law are executed. The responsibility for their

6 In relationship with outer space, see Craven, M., "Other Spaces": "Constructing the Legal Architecture of a Cold War Commons and the Scientific-Technical Imaginary of Outer Space", in *European Journal of International Law*, Volume 30, Issue 2, May 2019: 547–572, <https://doi.org/10.1093/ejil/chz024>

7 Pic, P., Evoy, Ph. & Morin, J.F., "Outer Space as a Global Commons: An Empirical Study of Space Arrangements" in *International Journal of the Commons* 17(1), September 2023: 288–301, DOI:10.5334/ijc.1271



application is, therefore, the responsibility of the State (regardless of whether their non-application corresponds to another subject of international law or to the nationals of a State in question).

Regardless of the lack of definition of the territorial limits, well defined by the recognized borders, by the obligations imposed by international treaties or by the application of general rules of international law, it is peaceful to consider that the territorial State competences end at the point where the Earth's atmosphere disappears, with the States having competences in the space overlying their territory, in the atmospheric space until outer space begins.

The Outer Space Treaty⁸ does not establish a specific limit, so very diverse opinions and criteria coexist. NASA considers that the limit begins at 80 km above sea level, or the International Aeronautical Federation, which places the beginning of outer space at the Kármán line (100 km)⁹. Other scientific measurements establish the limit at 118 km and even below 80 km.¹⁰

However, regardless of the exact measurement, the reality is that in outer space, States, as primary subjects of the international order, no longer have territorial competence to apply their own norms and international law.

In this way, there is no scope of application *ratione loci* within the framework of outer space, beyond the fiction of space objects as spaces of the “flag” States, as already exists within the framework of the Law of the Sea.

There is a part of the doctrine that qualifies this *ratione loci* referring to outer space as *ratione geographiae*¹¹. However, this denomination, which could be useful when we speak of outer space in general, as a stellar mass, is not useful when we speak of space objects where most of the current legal controversies arise. For this reason, I will continue to use the Latin denomination of this competence as *ratione loci*. This will be relevant in the analysis of the commission of international crimes, whether attributed to States or imputed to individuals, whether within the framework of the *ius ad bellum* or in the framework of the *ius in bello*.

There has been little practice in elucidating the existence of legal principles or rules, general or conventional, to determine the jurisdiction of a State over crimes committed in outer space. There is a relatively recent case that was brought to light by the New York Times. It was the case of astronaut Anne McClain, who while physically on the International Space Station, between December 2018 and June 2019, allegedly committed a federal crime, classified in the US criminal code, by accessing her ex-partner's bank account, without his consent, for which she is accused of identity theft and irregular access to financial records¹².

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies¹³, expressly states in its article 8:

8 Signed by 133 States.

9 Hungarian physicist Theodore Von Kármán who determined it at the beginning of the 20th century. See Gorn, M. H., *The Universal Man: Theodore von Kármán's Life in Aeronautics*, Smithsonian Institution Press, Washington, 1992.

10 <https://www.larazon.es/tecnologia/20220506/6bnjo4wq45hvbl7uhbs4docbw4.html#:~:text=Otro%20criterio%20distinto%20es%20el,a%20comienzos%20del%20siglo%20XX>.

11 Dunk, F. G. von der, *International Space Law*, University of Nebraska-Lincoln, US. 2018: 29, 62–63 (and literature cited there).

12 See the facts and comments by Biker, M., at <https://www.nytimes.com/es/2019/08/27/espanol/mundo/nasa-espacio-delito.html>, August 27, 2019.

13 General Assembly Resolution 2222 (XXI), annex, adopted 19 December 1966, opened for signature 27 January 1967, entered into force 10 October 1967.



“An object launched into outer space shall retain jurisdiction and control over such object, as well as over all personnel on such object, while in outer space or on a celestial body”

In the specific context of the International Space Station, where the events reported against astronaut Anne McClain occurred, there is an “Agreement between the Government of Canada, the Governments of the Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation and the Government of the United States of America on cooperation on the International Civil Space Station of 1998”¹⁴, whose article 22 on criminal jurisdiction expressly states that:

“Taking into account the unique and unprecedented nature of this specific form of international cooperation in space.

1. Canada, the European associated States, Japan, Russia and the United States may exercise criminal jurisdiction over personnel within or on any flight element that is a national of the respective country.”

The legal nature of this Agreement is that of any international treaty (an agreement of wills, subject to International Law, made between subjects of International Law), so McClain is removed from the American criminal jurisdiction, due to the nationality of the astronaut (competence *ratione personae*, as we will see later)¹⁵.

This means that, for the moment, the norm and practice are directed towards considering that the types and penalties usual in criminal law are also applicable in outer space. This fiction, coming from the Law of the Sea, is beginning to take root in International Law and we will soon have the opportunity to study more practice in this regard¹⁶.

Beyond crimes of a “national” dimension, the spatial jurisdictional framework to which international crimes are subject is governed by the rules of International Law, as we will see later, and is therefore subject to international treaties and international obligations.

The Scope of Application Ratione Materiae

It would be a different matter to establish a scope of application based on the specific subject matter involved, for example, the framework of liability, objective or subjective, for space activities carried out by States or other subjects subject to the powers conferred by States within the framework of international organisations or to the specific jurisdiction of a State.

It is clear that the rules relating to outer space are specifically designed to be applied by States within the framework of activities carried out in space. In this sense, the rules contemplated in the treaties already mentioned such as the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies¹⁷; the Agreement on the

14 In English: <https://www.state.gov/wp-content/uploads/2019/02/12927-Multilateral-Space-Space-Station-1.29.1998.pdf>; In Spanish: <https://www.boe.es/boe/dias/1999/01/06/pdfs/A00375-00386.pdf>

15 For a general view of the relationship between International Space Law and US law, see Mirmina, S., & Schenewerk, C. International Space Law and Space Laws of the United States. Cheltenham, UK: Edward Elgar Publishing, 2022. Retrieved Sep 15, 2024, from <https://doi.org/10.4337/9781788117890>

16 Moro, R., “El Derecho Penal Espacial”, in *Cuadernos de Criminología*, nº 21, 2013: 30-39 (<https://revistaqdc.es/el-derecho-penal-espacial/>).

17 General Assembly Resolution 2222 (XXI), annex, adopted 19 December 1966, opened for signature 27 January 1967, entered into force 10 October 1967.



Rescue and Return of Astronauts and the Return of Objects Launched into Outer Space¹⁸; the Convention on International Liability for Damage Caused by Space Objects¹⁹; the Convention on Registration of Objects Launched into Outer Space²⁰; and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies²¹, as well as norms recognized as legal principles by the organized international community, such as the legal principles governing the activities of States in the exploration and use of outer space²²; the principles governing the use by States of artificial Earth satellites for international direct television broadcasting²³; the principles relating to remote sensing of the Earth from space²⁴; the principles relevant to the use of nuclear power sources in outer space²⁵; the principles concerning international cooperation in the exploration and use of outer space for the benefit and in the interests of all States, taking into account especially the needs of developing countries²⁶.

This is without forgetting the application of certain aspects relating to the use of the geostationary orbit (General Assembly Resolution 55/122 of 8 December 2000), the concept of the “launching State” (General Assembly Resolution 59/115 of 10 December 2004), or the Recommendations for improving the practice of States and international intergovernmental organisations in registering space objects (Resolution 62/101 of 17 December 2007).

However, competence *ratione materiae* goes far beyond space rules. In principle, any rule of international law can extend its scope to be applied in outer space, which does not mean that this principle applies to rules of an internal nature. When an activity resulting from the exploration or use of outer space gives rise to state or individual responsibilities, States are competent *ratione materiae* to apply its legal effects, when the consequences may give rise to responsibilities. It is true that, in the case of state responsibility, the instrument to settle the dispute will have to be determined, and in the case of individual responsibility, the best applicable jurisdiction.

However, this does not mean that it can be extrapolated, *ratione materiae*, that all internal rules can be replicated in outer space because other jurisdictional aspects would have to be determined or the singularities of each specific case would have to be seen.

In fact, the Permanent Court of Arbitration, on December 6, 2011, aware of the complexity of this situation in outer space, adopted the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities²⁷, based on the 2010 UNCITRAL RULES²⁸.

We are not dealing with any international treaty or mandatory rules. It is simply a matter of offering solutions to the numerous legal conflicts that may arise in outer space. Therefore, they are only mechanisms for interested parties (generally private entities) to resolve their legal disputes, including a list of experts.

18 General Assembly Resolution 2345 (XXII), annex, adopted 19 December 1967, opened for signature 22 April 1968, entered into force 3 December 1968.

19 General Assembly Resolution 2777 (XXVI), annex, adopted 29 November 1971, opened for signature 29 March 1972, entered into force 11 September 1972.

20 General Assembly Resolution 3235, annex, approved 12 November 1974, opened for signature 14 January 1975, entered into force 15 September 1976.

21 General Assembly resolution 34/68, annex, approved on 5 December 1979, opened for signature on 18 December 1979, entered into force on 11 July 1984.

22 General Assembly Resolution 1962 (XVII) of 13 December 1963.

23 General Assembly Resolution 37/92 of 10 December 1982.

24 General Assembly Resolution 41/65 of 3 December 1986.

25 General Assembly Resolution 47/68 of 14 December 1992.

26 General Assembly Resolution 51/122 of 13 December 1996.

27 <https://docs.pca-cpa.org/2016/01/Permanent-Court-of-Arbitration-Optional-Rules-for-Arbitration-of-Disputes-Relating-to-Outter-Space-Activities.pdf>

28 <https://docs.pca-cpa.org/2016/01/UNCITRAL-2010-English.pdf>



Within the framework of application *ratione materiae*, these rules can resolve:

- space treaty arbitration, amongst States;
- investment arbitration, among States and private entities (i.e. investors);
- commercial arbitration, among private entities and States acting *jure privatorum*²⁹.

In this regard, Resolution 68/74 of the United Nations General Assembly, of December 11, 2013, recommends referring to the state regulations of the States responsible for the launch and/or activities carried out in outer space, the following:

“The State, taking into account its obligations as a launching State and as a State responsible for national activities in outer space under the United Nations treaties on outer space, should ascertain national jurisdiction over space activities carried out from territory under its jurisdiction and/or control; Likewise, it should issue authorizations for and ensure supervision over space activities carried out elsewhere by its citizens and/or legal persons established, registered or seated in territory under its jurisdiction and/or control, provided, however, that if another State is exercising jurisdiction with respect to such activities, the State should consider for-bearing from duplicative requirements and avoid unnecessary burdens”³⁰.

As Von der Dunk reminds us,

“a number of States has (at least so far) limited the scope of their national space law *ratione materiae* to specific space sectors.

Most importantly, in five cases States have national legislation in place essentially advising private involvement in launch activities only. This concerns following Norway in 1969 as referenced above, in 1998 Australia, in 2001 Brazil, in 2005 South Korea, and in 2017 New Zealand. In two cases—as of 2005 Canada and as of 2007 Germany—national law on private sector space activities so far only addresses private involvement in satellite remote sensing activities. In one case - as of 2017 Luxembourg - current national law exclusively focuses on prospective interests by private parties in space resource exploitation”³¹.

All this means that state and international practice is directed towards the application of the Law in outer space in accordance with the competence *ratione materiae*, which will derive jurisdiction, either to the international sphere, or through an agreement judicial, arbitral or other means of peaceful dispute resolution, either at the national level, when there is a connection *ratione personae* present.

The Scope of Application Ratione Personae

In principle, all States have the freedom to explore and use outer space, and each has, in turn, the inherent responsibility for the legal consequences. Obviously, the limitations for all this are imposed by the specific applicable law. This allows us to speak in international treaties, as we have already seen, of possible exploration and use activities. For example, article VI of the Treaty on Principles Governing

29 Vincenzo, C., “Resolving disputes in outer space: the role of international arbitration”, *DLA PIPER*, 6 April 2023 (<https://www.dlapiper.com/en/insights/publications/2023/04/resolving-disputes-in-outer-space-the-role-of-international-arbitration>).

30 UNGA Resolution on “Recommendations on national legislation relevant to the peaceful exploration and use of outer space”, UNGA Res. 68/74 of 11 December 2013. See also the Report of the Working Group on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space, UN Doc. A/AC.105/C.2/101, 3 April 2012. Emphasis added.

31 Dunk, F. G. von der, “Scoping National Space Law: The True Meaning of “National Activities in Outer Space” of Article VI of the Outer Space Treaty”, in *Space, Cyber, and Telecommunications Law Program Faculty Publications*, University of Nebraska – Lincoln, 2020, (<https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1116&context=spacelaw>)



the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (hereafter Outer Space Treaty), London/Moscow/Washington, done 27 January 1967³².

It also seems that nothing prevents a national, company or individual from exploring space³³. The exploitation of resources would be different because it could come into conflict with general or conventional norms. Indeed, the US Commercial Space Launch Competitiveness Act of 25 November 2015 (known as the Space Act)³⁴ or the US Executive Order on Encouraging International Support for the Recovery and Use of Space Resources of 6 April 2020³⁵, which states that “Americans should have the right to engage in commercial exploration, recovery and use of resources in outer space, pursuant to the Space Act’ and that ‘outer space is a legally and physically unique domain of human activity, and the United States does not view it as a global commons”, are good examples of these issues³⁶.

Luxembourg has also adopted the Law of 20 July 2017 on the exploration and use of space resources³⁷, by which any company that registers can make use of the exploitation of space resources, opening a Pandora’s box that is difficult to reject in view of the enormous strategic and economic interests in the exploitation of space assets. This opens the scope of application *ratione personae*, which goes far beyond the States themselves, including legal entities and natural persons.

This raises a very important question. Can and should States exercise jurisdiction over the activities carried out by their companies registered and domiciled in their state territory and by individuals considered individually, nationals or residents in their territory?

The answer is obvious, although this evidence will be substantiated throughout the following chapters.

Obviously, we must distinguish, as I will do later, between state companies, companies with a high level of participation by the State and those that receive subsidies or are covered by some type of state aid or distinction (for example, companies that are subject to the privilege of the MARCA ESPAÑA).

As for people, obviously, we must also distinguish between public officials, civilians or military personnel and individuals. Everything will depend on the objective or subjective consequences of the actions that can be attributed or imputed to a State or an individual.

In any case, it will always be the State that has the obligation to pursue the crime and to prosecute it, if appropriate. I will deal with this in the following chapters.

The Scope of Application Ratione Temporis

The jurisdiction *ratione temporis* determines the effectiveness of the provisions of international law over time, that is, determining the temporal effects of the application of the rules³⁸. Difficulties often

32 See the analysis of Dunk, F. G. von der, “Scoping National Space Law...” *op. cit.*

33 See Vermeylen, S., “Global legal pluralism and outer space law: The Association of Autonomous Astronauts as a socio-legal community”, in Cockell, Ch. S. (ed.), *The Institutions of Extraterrestrial Liberty*, Oxford University Press, 2022; online edn, Oxford Academic, 19 Jan. 2023), <https://doi.org/10.1093/oso/9780192897985.003.0026>, accessed 15 Sept. 2024.

34 <https://www.congress.gov/114/plaws/publ90/PLAW-114publ90.pdf>

35 <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-encouraging-international-support-recovery-use-space-resources/>

36 For the defense of the outer space as a global common, see Bittencourt Neto, O. de “Chapter 1: Outer space as a global commons and the role of space law”, in *A Research Agenda for Space Policy*. Cheltenham, UK: Edward Elgar Publishing, 2021. Retrieved Sep 15, 2024, from <https://doi.org/10.4337/9781800374744.00009>

37 <https://legilux.public.lu/eli/etat/leg/loi/2017/07/20/a674/jo>

38 Armand, T., “Jurisdiction Ratione Temporis”, 10 September 2024, in <https://jursmundi.com/en/document/publication/en-jurisdiction-ratione-temporis>.



arise within the framework of general international law, due to the very imprecision of the moment in which it produces its initial effects and, even, in the cessation of its effects. However, within the conventional framework, there are general rules that, in the absence of establishing the validity of a treaty, the general rules apply³⁹.

In this sense, the temporal duration of treaties is usually determined in their own provisions, which indicate the clause of their entry into force and, eventually, their temporary termination. Therefore, it is the States Parties that determine the conditions and the date of their entry into force. For example, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, of 19 December 1966, entered into force on 10 October 1967, since Article XIV-3 states that “This Treaty shall enter into force upon the deposit of instruments of ratification by five Governments, including those designated as Depositary Governments under this Treaty.” Thus, it clearly establishes, like almost all treaties, the conditions and the exact date of its entry into force.

In accordance with Article XVI, the particular termination date is also indicated for when a State wishes to withdraw from it: “Any State Party may communicate its withdrawal from this Treaty one year after its entry into force by written notification to the Depositary Governments. Such withdrawal shall take effect one year after the date of receipt of such notification.”

When the entry into force of an international treaty is not specifically specified, Article 24 of the Vienna Convention on the Law of Treaties of 23 May 1969⁴⁰ shall apply:

- “Entry into force. 1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.
3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides”.

In addition to these applicable rules, there are generally recognized principles in international law such as the non-retroactivity of treaties, which means that its rules cannot be enforced before their entry into force for the parties. In fact, Article 4 of the Vienna Convention on the Law of Treaties states the following:

- “4. Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States”.

In turn, Article 28 of the aforementioned Vienna Convention on the Law of Treaties also indicates the scope of application *ratione temporis* of treaties. In this sense, it expressly states:

- “Non-retroactivity of treaties. Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place

39 International arbitration law has produced an interesting purview in this regard. See Rubins, N. & Love, B., “The Scope of Application of International Investments Agreements: Ratione Temporis”, in Bungenberg, M., Griebel, J., Hobe, S. & Reinisch, A. (eds.), *International Investment Law: A Handbook*, Nomos, 2015: 481-494.

40 https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf



or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

This intention could well be the existence of an agreement of provisional application, that is, the “Partial or total implementation of an international treaty before its entry into force, by provision of the treaty itself or by the will of its negotiators, which ends generally with the entry into force of the treaty and in particular by notification by a State or an international organization of its intention not to become a party to it”.⁴¹

Another possible variable would be the application of a treaty before its entry into force when, exceptionally, a continuing or multi-offensive crime occurs, such as, for example, the disappearance of persons or other crimes under international law⁴². The jurisprudence of international courts has been constant and peaceful⁴³.

In general, conventional practice is not to indicate a specific period of termination of the effects, although there are also examples of this, such as, for example, the Treaty on the European Coal and Steel Community, whose article 97 indicated that the treaty was concluded for a duration of 50 years, so that on July 23, 2002 it ceased to apply⁴⁴ or the Kyoto Protocol that would end in January 2013, although its validity was extended by the so-called DOHA Amendment until December 2020, although obviously some States decided not to extend said validity⁴⁵.

A specific problem of outer space, within the framework of the *ratione temporis* competence, would be that of the measurement of time itself. If we accept that the concept of time is the rotation of the earth on its axis, in outer space, time does not exist, as we interpret it on earth, which, at most, is organized in different time zones.

Outside our planetary environment, significant differences could occur. This was already described by Einstein in 1907 when he spoke of the gravitational dilation of time as a consequence of the General Theory of Relativity⁴⁶. This could mean that the commission of a crime could result in different consequences depending on whether it is measured at the place of its commission or within the framework of terrestrial accounting.

This could mean a problem when determining international liability that should be resolved by the courts, when determining their own jurisdiction.

I am inclined to think that when these circumstances occur, terrestrial courts will advocate for the time zones of their location, but we will have to be aware of the variability of the circumstances, when we can find reliable practices.

41 Pan-Hispanic Dictionary of Legal Spanish (<https://dpej.rae.es/lema/aplicación-provisional>).

42 Judgment of the IACHR, July 29, 1988, (Velásquez Rodríguez Case), Series C No. 4, para. 155-157. See also, Judgment of the IACHR, January 20, 1989, (Godínez Cruz Case), Series C No. 5, para. 163 and Judgment of the IACHR, January 24, 1998, (Blake Case), Series C No. 36, para. 65.

43 Arteaga Padilla, E. & Guzmán González, P., “La desaparición forzada: Excepción a la competencia Ratione Temporis en el Derecho Internacional de los Derechos Humanos”, *Revista Justicia*, No. 17 - pp. 23-31 - Universidad Simón Bolívar - Barranquilla, Colombia, junio 2010: 28.

44 <https://europa.eu/ecsc/publications/actes.pdf>

45 https://unfccc.int/files/kyoto_protocol/application/pdf/kp_doha_amendment_english.pdf

46 A rigorous dissemination of this theory can be seen in Blanco Laserna, D., *The Theory of Relativity, EINSTEIN (Space is a question of time)*, National Geographic, Rodesa, Villatuerta, Navarra (Spain), 2015 (<https://grupocc-lab.com.mx/wp-content/uploads/2023/04/01-Einstein.pdf>).



SPECIFIC LEGAL PRINCIPLES OF INTERNATIONAL CRIMINAL LAW APPLICABLE IN OUTER SPACE

Principle of Extraterritoriality

First of all, I would like to point out the difficulties of extraterritorial application in general and of International Criminal Law in particular. Even more so when there are punishable actions by States, their officials or representatives (astronauts are), companies and individuals, since it generates too many variables to take each one into account.

The concept of territorial jurisdiction is relatively modern. It emerged in the world of International Law with the Peace of Westphalia⁴⁷. Until then, the basis of jurisdiction was personal⁴⁸. In fact, this type of jurisdiction was raised again in relation to space and cyberspace activities⁴⁹.

In this perspective, when territorial jurisdiction comes into play, it is when extraterritoriality is raised, that is, the capacity of the State to exercise legal control over people or facts beyond its own territory⁵⁰.

This legal technique of extraterritoriality⁵¹ breaks with the principle of territoriality⁵², a principle that, as the ICJ recognized, is not an absolute principle⁵³.

Various techniques or doctrines have been used to explain extraterritorial jurisdiction. Theories such as “effective control”⁵⁴ or “personal control”⁵⁵ or “authority and control”⁵⁶ have emerged. Now, all these theories, perfectly valid, relate to acts of the State, of agents or officials or persons who exercise State powers. Of course, it could extend to State companies and even to private companies with a high level of State participation and it could equally extend to those that are given financial or diplomatic support or with the endorsement of the State (for example, as I have already said, the *Marca España*, which can offer investment guarantees, State insurance, export credits, etc.).

Even in these clear cases of State intervention, within the framework of the jurisdiction of international courts, there have been legal controversies in the application of these various doctrines or unequal

47 Patton, St., “The Peace of Westphalia and its Effects on International Relations, Diplomacy and Foreign Policy,” in *The Histories*, Vol. 10: Iss. 1, Article 5, 2019. Available at: https://digitalcommons.lasalle.edu/the_histories/vol10/iss1/5

48 Scott, D., “Personal Jurisdiction in Comparative Context,” *The American Journal of Comparative Law*, Volume 68, Issue 4, December 2020, Pages 701–721, <https://doi.org/10.1093/ajcl/avaa020>

49 Zekos, G. I., “State Cyberspace Jurisdiction and Personal Cyberspace Jurisdiction,” *International Journal of Law and Information Technology*, Volume 15, Issue 1, Spring 2007: 1–37.

50 Menno, K., “Extraterritoriality,” in *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2020. (https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/93221900/Kamminga_2020_Extraterritoriality.pdf).

51 Palombo, D., “Extraterritorial, Universal, or Transnational Human Rights Law?,” in *Israel Law Review*, vol 56(1), 2023: 92–119 (DOI: 10.1017/S0021223722000139).

52 Sender and Wood have analyzed the extraterritoriality from point of view of the customary law. See Sender, O., & Wood, M., “Chapter 2: Extraterritorial jurisdiction and the limits of customary international law,” in *Research Handbook on Extraterritoriality in International Law*. Cheltenham, UK: Edward Elgar Publishing. Retrieved Sep 15, 2024, from <https://doi.org/10.4337/9781800885592.00009>.

53 *The case of the SS. Lotus (France/Turkey)*, PCIJ Series A, No. 10 (1927), 20.

54 Montejo, B., “32. The Notion of ‘Effective Control’ under the Articles on the Responsibility of International Organizations,” in Ragazzi, Maurizio (Ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, Brill Nijhoff, 2013: 387–404.

55 Çali, B., “Has ‘Control over rights doctrine’ for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it’s Strasbourg’s turn,” in *EJIL: Talk!*, July 21, 2020. Available at: (<https://www.ejiltalk.org/has-control-over-rights-doctrine-for-extra-territorial-jurisdiction-come-of-age-karlsruhe-too-has-spoken-now-its-strasbourgs-turn/>).

56 Wrangé P., “Does Who Matter? Legal Authority and the Use of Military Violence,” in *Ethics & International Affairs*, 2017;31(2): 191–212. (doi:10.1017/S0892679417000077).



approaches. Territoriality is not the majority doctrine, even in international human rights courts, from whose analysis we can learn for International Criminal Law. Within the framework of the ECHR, the ECHR has pointed out that

“Acts of the Contracting Parties that have been exercised outside their territory, or that have produced effects there, may entail the consideration of an exercise of their jurisdiction in terms of Art. 1”⁵⁷.

The jurisprudence of the ECHR has been variable. From the initial obligations of States beyond their territory, by the application of the doctrine of authority and control to the Bankovic doctrine where the ECHR pointed out that “the Convention was not designed to be applied by everyone, even with respect to the acts of the Contracting Parties”. Therefore, the ECHR declared the claim inadmissible due to the lack of jurisdictional links between victims and respondent States⁵⁸. It defended, therefore, a doctrine that we could call of “legal space”, rather than territorial.

In the inter-American system, the theory of “authority and control”⁵⁹ is generally affirmed. In this sense, the Spanish National Plan regarding public sector companies points out the obligation to respect human rights, “both within and outside the territory” (Guiding Principle 4-3).

However, in these cases we are always talking about state acts, in one way or another. We are talking about the responsibility of the State, which as we know in the international criminal field is very limited.

Another thing would be the same responsibility, but for acts of non-state agents, such as companies that may be operating in state activities, and which goes beyond mere individual criminal responsibility. Therefore, the difficulty of the legal approach is that here we are talking about non-state entities.

Could a company or an individual person invoke the violation of a rule of International Criminal Law (or of internal criminal rules, based on jurisdiction or the principle of extraterritoriality) that has been violated by a transnational company, against the State where the company is based or has been established? We could certainly resort to the doctrine of “lack of due diligence” (which appears for the first time in the framework of the Inter-American Court of Human Rights)⁶⁰.

The theory of “effective control” or the principle of “cause and effect”, or even of “authority and control” is not applicable, today, in the case of companies. This is the sign of international jurisprudence, including that of the Human Rights Committee⁶¹.

The framework of the Law of the Sea would be a good example to transfer some of its principles, in this sense that is analyzed here, to the spatial framework. For example, we also have rules that regulate the rights and obligations of Flag States (which regulate the responsibilities of ships) while the jurisdiction of the Port or Coastal State regulates issues related to the safety of maritime traffic or issues of an environmental nature⁶².

57 *Issa v Turquía*, App.31821/96, Judgment ECHR, 16 November 2004. Para.68 y 71.

58 *Bankovic y otros c Bélgica*, App no.52207/99, Judgment ECHR, 12 December 2001, para. 80-82.

59 *Coard v United States*. IACHR. Case N°10.951, 29 September 1999.

60 *Velásquez Rodríguez c Honduras*. Judgment IACHR, 29 July 1988, para.172

61 HRC, General Comment No.31 *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 June 2004) U.N.Doc. CCPR/C/21/Rev.1/Add.13

62 As an example, see Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag State requirements (OJEU L-31/32, 28 May 2009). Its transposition in Spain was done through the *Real Decreto 799/2011, de 10 de junio, por el que se establecen las obligaciones que incumben al Ministerio de Fomento en materia de seguridad marítima y prevención de la contaminación marina sobre buques españoles* (BOE n° 139, de 11 de junio de 2011).



We could therefore use this legal figure of the Flag State, shifting the same burden to transnational companies and requiring them to comply with the relevant regulations to justify concurrent or subsidiary jurisdiction with that of the territorial sovereign.

In the space field, we could use the aforementioned Spanish National Action Plan on Business and Human Rights, dated September 1, 2017, as a reference, in accordance with the Guiding Principles on Business and Human Rights of June 16, 2011 (A/HRC/17/31) and the 2030 Agenda for Sustainable Development (Resolution 70/1 of the United Nations General Assembly, dated September 25, 2015) and the Spanish Strategy for Corporate Social Responsibility, dated October 24, 2014, as sufficient grounds to invoke the enforceability of human rights by companies and the obligation of the State in this matter, including those engaged in space activities. At the very least, there is an express and implicit recognition of jurisdiction, in the international sense, which could even be considered, at the very least, as a unilateral act of the State, invocable at the international level.

Principle of Territorial Extension of the Norm or “Contingent Unilateralism”

This doctrine of “contingent unilateralism” means that a territorial extension of the application of the norms occurs when the protected legal right cannot be guaranteed by the territorial sovereign⁶³.

Here the theory of “territorial extension” or the “doctrine of effects” comes into play. To do so, of course, it is necessary that the internal regulations determine the nature of the violation of the norm and its location. International Law would have customary⁶⁴ and even conventional norms, such as territoriality, nationality, protection, universality, which would allow finding legal support.

For example, Guiding Principle 2 of the Spanish National Plan on Business and Human Rights requires Spanish companies based abroad to exercise “due diligence” in the area of human rights, recognising the State’s obligation to protect human rights, including from abuses that may result from business activity.

Likewise, in environmental matters, the CJEU, in its 2011 ruling on the Aviation Directive, found links of recognition for this doctrine. The element, therefore, was not the extraterritorial application of the norm, which would then regulate norms beyond its borders, but rather that the link would be established by take-off or landing at a national airport, that is, a “territorial connection”. The State, in this case, is obliged to take into account the consequences, even if the geographical space where these circumstances are located is not that of its sovereignty.

“Territorial extension” is an EU practice to give a global scope to European regulations, which could well be used in the practice of outer space. It is radically different from “extraterritoriality” because it is not a direct instrument for achieving legal effects of European regulations outside the territory of the Union. The aim of this theory devised or put into practice, as I say, by the CJEU, is to achieve a universal effect for the defense of general interests. We must not forget that human rights belong to the category of general interests and, consequently, their serious violation, wherever it may be, must be grounds for prosecution and sanction, where appropriate.

In principle, this extended right could not be applied to conduct produced in third States or against citizens of third States because it would violate sovereign equality, territorial integrity and the princi-

63 Scott, J., & Rajamani, L., “EU Climate Change Unilateralism”, in *European Journal of International Law*, Volume 23, Issue 2, May 2012: 469–494, <https://doi.org/10.1093/ejil/chs020>

64 See Scharf M.P., “Outer Space Law”, in *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*. Cambridge University Press, 2013:123-138.



ple of non-intervention that each and every State has. If for pure and simple extraterritorial application, the cooperation of third States is required, in the case of “territorial extension”, it is not required because the application is directed to the institutions, member states and citizens dependent on the jurisdiction of the EU or its States. In the case of outer space, there are also rules aimed at institutions, States and individuals operating in outer space.

When the EU regulates the verification of carbon emissions from maritime or air transport, for example, verifiable data on the said emissions must be incorporated, for the purposes of applying emissions trading, regardless of where the ship or aircraft is located, as long as it has a connection point with the EU territory, that is, the said ship or aircraft touches a European port or airport, on the way there or on the way back or in both directions. As regards international criminal law, in its application in outer space, in accordance with the areas of application already analyzed, similarities or analogies can be found for the approach to the application of this theory of “territorial extension”.

The CJEU has ruled on several occasions in favor of the territorial extension of European standards, in very specific circumstances, which can serve as an example and reference for us, in the context of the application of International Criminal Law, in outer space. For example, in the *ICI v. European Commission* case⁶⁵, as early as 1972, the question arose as to whether a subsidiary of a European company, whose decisions are taken within the company based in the EU, should be subject to European standards.

In the *Air Transportation of America* case, it considers that the application of European standards outside its territory, in this case, has a legitimate purpose⁶⁶.

Could this idea be applied to human rights and the framework of International Criminal Law? From the perspective of international judicial bodies (ECHR or IACHR), what is being applied is only the concept of extraterritoriality, among other things because it requires the cooperation of third States, as we have seen, or because there is a direct relationship with the “effective control” of the State in question. However, in relation to the application of International Criminal Law there should be no objection, since cooperation would not be required and the sovereignty of third States would be safeguarded.

Principle of Universal Jurisdiction

Universal jurisdiction is a legal institution that has entered fully into all areas of social life in recent times. Public debates on it have not been limited only to the field of law or the academic field, but have transcended journalism, NGOs and national and international institutions. This indicates the high degree of interest in it.

However, for internationalists it was not, as a legal institution, so new⁶⁷. It had already been invoked with some regularity, especially in the context of war crimes and other international crimes and it appeared in multiple international treaties, formulated directly, through the obligation *aut dedere aut judicare* or allowing any possible jurisdiction⁶⁸.

65 Judgment of the Court of Justice of July 14, 1972. *Imperial Chemical Industries Ltd. v Commission of the European Communities*. Case 48-69.

66 “Examination of Directive 2008/101 has disclosed no factor of such a kind as to affect its validity.”. Decision, paragraph. 2, Case C-366/10.

67 Hovell, D., “The Authority of Universal Jurisdiction”, in *European Journal of International Law*, Volume 29, Issue 2, May 2018: 427–456, <https://doi.org/10.1093/ejil/chy037>.

68 Fernández Sánchez, P. A., “Universal Jurisdiction and Terrorism”, in *Groningen Journal of International Law*, vol 6(1) 2018: 24-48. ISSN: 2352-2674.



However, despite the extensive bibliography, the legal nature of the institution had not been directly addressed and much less in relation to its possible application in outer space. All academics have obviously used conventional practice and norms, but in a confused way and without paying attention to the analysis of their nature, without specifying the core of their foundation. Therefore, we must approach the study of this institution from this perspective and taking into account its application in outer space, which is the object of our concern.

It is true that this legal institution is closely related to war crimes, which has been its natural field for a long time⁶⁹.

I do not intend to go into the conceptual levels of competence and jurisdiction, among other things because there is a wide legal literature on both. But I will take into account the particularities of these concepts in International Law, because as Professor Sánchez Legido states in his magnificent work on universal jurisdiction, these notions are polysemic, therefore, as he himself says “it is convenient to specify that, in the context of the so-called universal jurisdiction, the notion of jurisdiction refers to a core of problems related to the projection of state powers in space”⁷⁰.

Furthermore, the emergence of internal law in this legal institution has led to talk of universal criminal and civil jurisdiction, as a corollary of said emergence, taking into account that for International Law this dichotomy was not necessary. In International Law, reparation or satisfaction was always spoken of. Now we are talking about criminal sanctions or civil compensation, as if it were internal law. Does this mean a permeabilization of one over the other? Of which over which? Will this permeability be exercised in the practice of space activities?

Like any other international legal norm, the competence attributed to the State for the exercise of universal jurisdiction can have a plurality of origins, and can even have a multiple nature. Perhaps we find Jean-Michael Simon's statement exaggerated when he states that

“possibly one of the first general references to the competence to extend the exercise of sovereign power beyond its territorial limits over unlawful acts is found in the study of the Dutch jurist Hugo Grotius (1583-1645), who, faced with the predominance of the *ius naturale* in the Middle Ages, formulated in 1625 that “It must also be recognized that kings, and any other with rights similar to these, can demand that a punishment be imposed not only for the evils perpetrated against them or against their affairs, but also against all evils that are not specifically directed against them, but that violate in an extreme way any person, natural law or the law of nations”⁷¹.

It is not that Groccio was thinking at that time about what we now call “universal jurisdiction”, because in fact, at that time, the conception was that the sovereign was immune and unassailable because *par in parem non habet imperium* (among equals, none has more power). However, I do believe that he also had in mind that a *ius gentium* could not be constructed without considering a criminal law that would allow its violations to be punished within the framework of domestic courts.

Now, as Luis Peraza Parga says, “the principle of universal jurisdiction is easy to explain but complicated to interpret and execute”⁷². Therefore, since the rule exists, which cannot be ignored, it is necessary

69 To explore the practice, see Rosen, N., “Evaluating the Practice of Universal Jurisdiction Through the Concept of Legitimacy”, in *Journal of International Criminal Justice*, Volume 19, Issue 5, November 2021, 1067–1097, <https://doi.org/10.1093/jicj/mqab073>

70 Sánchez Legido, Á., *Jurisdicción universal penal y Derecho Internacional*, Ed. Tirant Lo Blanch, Valencia, 2003: 21.

71 Simon, J. M., *Jurisdicción universal. La perspectiva del derecho internacional público*, in *Revista Electrónica de Estudios Internacionales*, vol. 4, 2002: 26. The same reference in Peraza Parga, L., *Jurisdicción universal: De Argentina a Guatemala, pasando por México*, in *La Insignia*, México, December 2004, http://www.lainsignia.org/2004/diciembre/der_024.htm

72 Peraza Parga, L. *La Jurisdicción universal y el ejemplo del Tribunal Constitucional español*, in *La Insignia*, México,



to specify what its origin is or what nature it has, to determine whether it is extensible to the extraterrestrial spatial area.

Practice shows, as will be seen a little later, that the invocation, rather than a conventional rule, is the legal principle or the customary rule, which is invoked. This, even in the field of International Criminal Law, is generally accepted by doctrine, including criminal doctrine⁷³.

A legal principle is the origin, the core, the reason, the condition, the cause of a norm where ideas, values, concepts are collected, that is, which indicate subjective truths because they belong to the world of what should be⁷⁴. Therefore, we are faced with fundamental legal norms that conform to the legal values or to the *opinio iuris* of universal scope that are contained in positive legal norms.

In this sense, there is a general principle of law, which is key to our analysis, the principle *delicta puniri reipublicae interest* (The punishment of crimes is in the public interest)⁷⁵. Obviously, this general principle of law is transferable to the international legal system applicable to outer space, because it recognizes a fundamental value that informs a legal system, in the whole of it or in a sector of it⁷⁶.

From this perspective, universal jurisdiction would not be, *prima facie*, a general principle of International Law but it would be, as a consequence of *delicta puniri reipublicae interest*, in the sector of International Criminal Law. We are therefore faced with a legal principle of International Criminal Law deduced from a general principle of law, but also induced by the recognition of said principle.

In this context of outer space, then, the principle of universal jurisdiction is a specific principle of International Criminal Law. We are therefore faced with an abstract proposition that provides a basis for the fact that if a rule of International Criminal Law is violated, those interested in its restoration must be all the subjects of the law. It is the very basis by which States are obliged not to recognize unlawful situations.

If we add to this idea that we could be in the presence of serious violations of human rights, which are based on well-established values, such as human dignity, freedom, justice or equality, stated as principles in most of the world's constitutions, we could affirm the existence of a legal principle that attributes competence to the State for the exercise of universal jurisdiction in the necessary case of space activities.

In short, as Yoram Dinstein said a few years ago, "individual responsibility means subjection to penal sanctions. When a human being individually contravenes an international duty, he directly commits it and, therefore, he commits his life, liberty and property. Thus, international obligations are intricately linked to the development of international criminal law"⁷⁷.

However, I do not believe that the existence of the principle of universal jurisdiction is sufficient for the exercise itself or for the attribution of competence to a judge to hear the matters involved in it. In addition, an internal legal act would be needed that attributes competence or, at least, a minimum practice that could be invoked as a basis for the existence of the principle in those legal systems that allow it.

octubre de 2005, http://www.lainsignia.org/2005/octubre/int_006.htm.

73 Fernández Sánchez, P. A., "El derecho aplicable por la Corte Penal Internacional", in Carrillo Salcedo, Juan Antonio (Ed.): *La Criminalización de la Barbarie: La Corte Penal Internacional*, Ed. Consejo General del Poder Judicial, Madrid, 200.: 245-266. ISBN 9788489230248).

74 Díez-Picazo, L. *Los principios generales del derecho en el pensamiento de Federico de Castro*, in *Anuario de Derecho Civil*, t. 36, nº IV, 1983: 1267-1268.

75 This principle is mentioned by Mans Puigarnau, J. M., *Los Principios Generales del Derecho – Repertorio de Reglas, Máximas y Aforismos Jurídicos con la Jurisprudencia del Tribunal Supremo de Justicia*, Bosch, Casa Editorial, Barcelona, 1957: 131.

76 Schawarzemberger, G., *The Fundamental Principles of International Law*, in RCADI, vol. 87, 1955-I, p. 201.

77 Dinstein, Y., *International Criminal Law*, in *Israel Yearbook on Human Rights*, nº 5, 1975: 55.



Would we then be talking about a subsidiary principle? This would seem to be the case if we spoke of it as a corollary of the principle *aut dedere aut judicare*. Now, the obligation *aut dedere aut judicare* is of an exclusively conventional nature, so that, in this conventional context, this obligation *aut dedere aut judicare* is a corollary of the principle of universal jurisdiction, which, in the context of the general rules of International Law, it is not.

Perhaps, as we will see later, we could call this obligation *aut dedere aut judicare*, as Jaume Ferrer does, territorial universal jurisdiction⁷⁸, or conditional, which could explain so much confusion.

It might seem, therefore, that the invocation of this principle of universal jurisdiction could be what some have called a delegated principle. However, in this sense I fully share the idea of Jean-Michael Simon, when he says that it is not a question of “delegating a competence” but of a unique legal interest of the affected States, it is not, therefore, a question of “delegating a competence” but of this interest constituting per se a sufficiently relevant contact in legal terms⁷⁹.

It is true that when universal jurisdiction is analyzed as a corollary of the principle *aut dedere aut judicare*, the obligation for the State is resolved with the obligation of the State in the right of option. On the contrary, when the source of the principle of universal jurisdiction has a nature of general norm, no obligation of the State is generated, but, in any case, a right of the State.

In this sense, Professor Sánchez Legido develops this idea, relying not only on the doctrine, individually treated, but on international jurisprudence, on the position of the International Law Commission of the United Nations and, even, on the position of some cases of internal law⁸⁰.

Luis Benavides considers that the principle of universal jurisdiction is an exceptional jurisdiction and an auxiliary principle, although he does not believe that the jurisdiction of the territorial State should be preferred⁸¹.

Therefore, it cannot be only the corollary of the principle *aut dedere aut judicare* because this supposes, as I have already said, an obligation of option, within the framework of the conventional. As Professor Benavides points out, universal jurisdiction is the result of a right of the State to exercise this jurisdiction for the commission of certain international crimes, but without obligation. On the contrary, the principle *aut dedere aut judicare* implies an obligation of option or alternative within the conventional framework that establishes it. In fact, Professor Benavides presents an interesting table where he establishes the differences between both legal institutions. Among these differences, in addition to the one already mentioned, he points out the following: universal jurisdiction is a principle based on customary international law, which is applied to a limited number of crimes, exceptionally by all States, while the principle of *aut dedere aut judicare* is a clause of conventional law, which today covers more than twenty conventions with very diverse crimes, which can only be invoked by the States parties⁸².

One may or may not share this opinion, but one cannot deny its correct foundation. However, one must bear in mind that, today, the majority of crimes to which both principles can be applied coincide. For example, the legal basis of war crimes is not exclusively conventional, nor is that of genocide (a Convention which, by the way, does not contemplate the principle of *aut dedere aut judicare*), nor

78 Ferrer Lloret, J., *Impunidad versus inmunidad de jurisdicción: la sentencia del Tribunal Internacional de Justicia de 14 de febrero de 2002 (República Democrática del Congo contra Bélgica)*, in *Anuario de Derecho Internacional*, vol. XVIII, 2002: 315.

79 Simon, J. M. *Jurisdicción universal...* op. cit.: 34-35.

80 Sánchez Legido, Á., *Op. cit.*: 254 a 258.

81 Benavides, L., *The Universal Jurisdiction Principle: Nature and Scope*, in *Anuario Mexicano de Derecho Internacional*, Vol. 1, 2001: 32.

82 *Ibidem*, p. 36.



that of torture nor that of many others, for this reason, among other considerations, the principle of reciprocity does not operate.

I do not, therefore, fully share the opinion of those who consider, like Eric David⁸³, that genocide (as with any other crime under international law susceptible to the application of universal jurisdiction, as the International Tribunal for the former Yugoslavia itself does with respect to war crimes⁸⁴) can be subject to the principle of *aut dedere aut judicare*, even though it is not expressly recognized in the 1948 Convention.

I do believe, on the contrary, that the principle of universal jurisdiction can be applied, and this is because the basis and legal foundation is the violation of a norm of *ius cogens*, of a customary and not exclusively conventional nature.

This difference between the principle of universal jurisdiction and the principle of *aut dedere aut judicare* is so important that it is what determines that a large part of the doctrine, including important Judges of the International Court of Justice, have not yet been able to differentiate the two principles. This has led a large part of the doctrine to consider that for the application of the principle of universal jurisdiction, the physical presence of the accused in the territory of the State where it is being exercised is necessary, as if it were the principle *aut dedere aut judicare*, for which this singularity or condition of physical presence is required⁸⁵.

I do not believe that the constitution of the principle of universal jurisdiction, in the framework of crimes under International Law, as a legal principle of International Criminal Law applicable to space activities can be doubted, because if not, the impunity of a crime under International Law would be privileged.

The principle of universal jurisdiction should not be confused with the legal institution of the vicarious administration of justice, which is a German and Austrian practice⁸⁶ by which German courts have jurisdiction to prosecute foreigners who have committed crimes abroad and who, being in German territory, do not have extradition because it cannot be requested or is not granted or for any other reason it is not executed or applied⁸⁷.

As Höpfer & Angermainer would say, the principle of universal jurisdiction only establishes the law without conferring jurisdiction on the custodian state, while the legal institution of the Vicarious Administration of Justice assumes jurisdiction⁸⁸.

This has allowed Austrian courts to hear crimes of genocide in view of the absence of an explicit obligation of the Genocide Convention on universal jurisdiction, which has allowed the Vicarious Administration of Justice to award jurisdiction to Austria over the crime of genocide⁸⁹.

Now, as Prof. Reinoso Barbero⁹⁰ says, this principle of universal jurisdiction cannot contradict other norms, it must be susceptible of application in the absence of them and it must be considered as such, in the case of International Law, by the States, or above all, if it has been recognized by jurisprudence.

83 David, E., *Principes de droits des conflits armés*, Ed. Bruylant, Bruselas, 3^a ed., 2002: 668.

84 *Case Blaskic (IT-95-14)*, *Judgments of 29 october 1997*, par. 29.

85 On these questions, see Sánchez Legido, Á., *Op. Cit.*: 268-293.

86 See section 7 (2) (2) of the German Penal Code and section 65 (1) (2) of the Austrian Penal Code.

87 Meyer, J., *The Vicarious Administration of Justice: An overlooked Basis of Jurisdiction*, in *Harvard International Law Journal*, vol. 31, n° 1, 1990: 115-116.

88 Höpfer, F. & Angermainer, Cl., *Adjudicating International Crimes*, in REICHEL, Philip: (Ed): *Handbook of Transnational Crime and Justice*, University of Northern Colorado, Greeley, Colorado, 2005, note 70: 336-337.

89 *Ibidem*, note 72: 337.

90 Reinoso Barbero, F., *Los principios generales del Derecho en la jurisprudencia del Tribunal Supremo*, Editorial Dykinson,



Resolution 3074 (XXVII) of 3 December 1973 of the United Nations General Assembly already indicated in its first principle that “crimes against humanity, wherever and whenever committed, shall be the subject of investigation, and persons against whom there is evidence of guilt in the commission of such crimes shall be sought, arrested, prosecuted and, if found guilty, punished.”

More recently, on 16 December 2005, the United Nations General Assembly approved the Basic Principles and Guidelines on the Right of Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law to a Remedy and Reparation, among which it states the following:

“To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.” (emphasis added)⁹¹.

As can be seen, the General Assembly indirectly recognises the non-exclusively conventional nature of universal jurisdiction. And it undoubtedly represents, by its composition, the *opinio iuris* of States.

The United Nations Commission on Human Rights, in its Report on the issue of impunity for perpetrators of human rights violations (civil and political), in its principle 20, when it speaks of the jurisdiction of foreign courts, it is true that it says that “the jurisdiction of foreign courts is exercised within the framework of a universal jurisdiction clause provided for in treaties in force, or of a provision of domestic law establishing a rule of extraterritorial jurisdiction for serious crimes under international law”⁹².

Therefore, it only speaks of a conventional provision or an internal rule but does not say what the basis of the internal rule is, which could not be other than a general rule of Public International Law. The general rule would be universal jurisdiction that would underpin the internal law that establishes the jurisdiction of domestic courts.

In fact, in principle 22, the cited document states that “in the absence of ratification that allows such a universal jurisdiction clause to be applied to a country where the violation has been committed, States may take measures in their domestic legislation to establish their extraterritorial jurisdiction over serious crimes under international law committed outside their territory and which, by reason of their nature, affect not only domestic criminal law, but also the international repressive order to which the notion of borders is foreign.”

Within the framework of regional governmental international organizations, for example, the Organization of American States has noted that:

“The IACHR has already stated that the normative evolution of public international law has consolidated universal jurisdiction, by virtue of which, when the organs of national criminal jurisdiction do not want or cannot fulfill the function of investigating and

S. L., Madrid, 1987: 114-115.

91 <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>

92 Doc. Distr. General E/CN. 4/Sub. 2/1997/20/Rev.1 2 october 1997.



punishing such international crimes, any State has the authority to “pursue, prosecute and punish those who appear to be responsible for such international crimes, even those committed outside its territorial jurisdiction or that are not related to the nationality of the accused or the victims, since such crimes affect all of humanity and violate the public order of the world community”⁹³.

For its part, the European Council of the European Union itself, in its Decision 2003/335/JHA of 8 May 2003⁹⁴, without making express mention of universal jurisdiction, does declare that “Member States shall cooperate in the investigation and prosecution of the crimes referred to in Article 1, in accordance with national law and relevant international agreements.”

Therefore, it is accepting that there are international treaties that admit universal jurisdiction and that there are national laws that allow it, within the framework of customary international law⁹⁵. What it also seems to say is that a national legal basis is required for this.

On the other hand, most of the most qualified doctrine has also established the nature of universal jurisdiction as a general rule of a customary nature, although it is true that others, more interested and with less foundation⁹⁶, or not, deny it. For example, Professor FLETCHER denies this character, in his capacity as a criminal lawyer, because he does not understand that customary law serves as a basis for criminal justice and also because, in his opinion, the principle *non bis in idem* is often at stake. His great concern is the rights of the accused⁹⁷.

I can understand these arguments, but I do not share them because in International Law, custom is a very important source of law and, therefore, also of International Criminal Law. In fact, the Statute of the International Criminal Court accepts the customary norm as applicable law⁹⁸. As regards the principle of *non bis in idem*, it has its particularities in International Criminal Law, because, for example, a person may have been tried and granted an amnesty or a law of final point or a law of due obedience applied, which would entail, at the very least, the violation of the victims’ right of access to justice to which they are entitled. In other cases, this legal principle should be guaranteed as the maximum expression of the fundamental content of the right to a fair and equitable trial.

In this sense, the Statute of the Tribunal for the former Yugoslavia determines that a trial before the Tribunal itself, even after the trial in the national court, would be appropriate under the principle of *non bis in idem* if “the national court acts in a partial or non-independent manner, [or] the proceedings were designed to protect the accused from international criminal responsibility...”⁹⁹.

We would be talking, now again, about George Scelle’s famous theory known as functional splitting, through which he affirms that the executive, legislative and jurisdictional functions of the interna-

93 See *Asilo y Crímenes Internacionales*, of 20 October, 2000, in el the *Informe Anual de la Comisión Interamericana de Derechos Humanos*, OEA/Ser./L/V/II.111 doc. 20 rev., 16 April 2001, <http://www.cidh.oas.org/asilo.htm>

94 Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, OJ L 118, 14.5.2003: 12/14.

95 Among others, see Rodley, N., *The Treatment of Prisoners under International Law*, Clarendon Press, Oxford, 2nd ed. 1999: 130 y 133. Bodansky, D., *Human Rights and Universal Jurisdiction*, in Gibney, Mark (Ed), *World Justice: U.S. Courts and International Human Rights*, Westview Press, Boulder/San Francisco/Oxford, 1991; Gilbert, G. *Crimes Sans Frontières: Jurisdictional Problems in English Law*, in *British Yearbook of International Law*, n° 61, 1992: 63, 415, 423, 424; or, in the French doctrine, Huet, A. & Koering-Joulin, R., *Droit pénal international*, Presses Universitaires de France, Paris, 1994: 191.

96 Universal jurisdiction has been contested by Henry Kissinger, who has even gone so far as to call it “judicial tyranny.” See Kissinger, H., *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, in *Foreign Affairs*, July/August 2001. This view was challenged by Roth, K., *The Case for Universal Jurisdiction*, in *Foreign Affairs*, September/October 2001.

97 Fletcher, G. *Against Universal Jurisdiction*, in *Journal of International Criminal Justice*, vol. 1 (2003), pp. 580-584.

98 Fernández Sánchez, P. A., *El derecho aplicable por la Corte Penal Internacional*, *op. cit.*: 245-265.

99 *The Prosecutor v. Dusko Tadic, a/k/a “Dule”*, Case No. IT-94-1-AR72 (13 Feb. 1995).



tional community are performed by the same internal organs of the national legal systems that act as international organs. In short, when International Law is applied, an internal court is acting as an international one¹⁰⁰.

To be honest, Scelle was not thinking that an internal agent, for example, a judge, has a double role, one internal and one international simultaneously, but, as Antonio CASSESE explains very well, that he operates as a Mr. Jackel and Mr. Hyde, exhibiting a double personality, in other words, they are national organs that can function as national or international agents¹⁰¹.

In fact, when Antonio Cassese asks himself whether this doctrine can be valid today, he comes to the conclusion that, in an international society that remains strongly inter-state, where many internal judges, in the exercise of universal jurisdiction, act on behalf of the international community as a whole, safeguarding the international legal order, it is where Scelle's doctrine of functional splitting is perceived to be fully in force. And, obviously, I agree with the Florentine master. Carlos Villán Durán thinks the same¹⁰².

In this sense, as Delmas-Marty says, "criminal law can be applied, by virtue of the principle of universal jurisdiction, by national judges who are thus "globalized." As international norms are integrated into internal law, national judges become in effect, through a sort of "functional splitting," the guardians of international law (regional or global), in the sense premonitory imagined by Georges Scelle in the 1930s. The conditions vary depending on whether or not the system admits direct applicability, but it is sufficient that the matter falls within its ordinary jurisdiction (territorial or personal). More surprising is that the "globalization of judges" leads to an extension of their jurisdiction to facts that have no connection with the State (facts committed abroad by foreigners, on foreign victims). This universal jurisdiction should logically be based on the protection of universal values"¹⁰³

Regarding doctrine, for example, the Resolution of the *Institut de Droit International* on Universal Criminal Jurisdiction regarding the crime of genocide, crimes against humanity and war crimes, adopted on August 26, 2005, recognizes that "universal jurisdiction is based primarily on customary international law."

At the conventional level, International Treaties have been signed that not only sanction criminal conduct against humanity but also establish as a general principle in all of them that of a possible universal jurisdiction, by establishing the obligation to judge or extradite and not exclude any other criminal jurisdiction. Therefore, the corollary of this obligation *aut dedere aut judicare* and of not excluding any other criminal jurisdiction is the conventional possibility of using universal jurisdiction. The range is very varied.

For example, in the context of armed conflicts, the four Geneva Conventions on International Humanitarian Law of 12 August 1949 and its Additional Protocol I, the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 and its Second Additional

100 Among others references, see Scelle, G., *Droit International Public: Manuel Élémentaire*, Paris, Domat-Montchrestien, 1944: 21-22; also, Scelle, G., *Théorie du gouvernement international*, en *Annuaire de l'Institut de droit public*, 1935: 54-57; or Scelle, G., *Théorie et pratique de la fonction exécutive en droit international*, in *Recueil des Cours de l'Académie de La Haye* vol. 5, 1936: 91-106.

101 Cassese, A., *Remarks on Scelle's Theory of 'Role Splitting' (dédoulement fonctionnel) in International Law*, en *European Journal of International Law*, 1990, vol. 1, note 6. To follow the entire plot line, see pp.210-34.

102 Villán Durán, C., *La protección internacional de los derechos humanos en el Sistema de las Naciones Unidas y de sus organismos especializados*, in *Memorias del Seminario los Instrumentos de Protección Regional e Internacional de los Derechos Humanos*, Secretaría de Relaciones Exteriores, México, 2004, 71.

103 Delmas-Marty, M., *Estudios jurídicos comparados e internacionalización del derecho*, in http://www.college-de-france.fr/media/int_dro/UPL24919_rescoursespdm0203.pdf, p. 20.



Protocol of 26 March 1999 or the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989, even with its enormous limitations¹⁰⁴, establish the universal jurisdiction that we have had occasion to point out.

This principle of universal jurisdiction is included in the 4 Geneva Conventions on International Humanitarian Law. It is in this body of law where this principle is explicitly reflected. Thus, Article 49 of the First Convention, for example, states the following:

“...Each Contracting Party shall be obliged to seek out persons accused of having committed or ordered the commission of any of the grave breaches and shall bring them before its own courts, whatever their nationality. It may also, if it so prefers, and in accordance with the provisions of its own legislation, hand them over to be tried by another interested Contracting Party, if the latter has formulated sufficient charges...”¹⁰⁵.

As can be seen, the scope of this obligation is not limited to the principle of *aut dedere aut judicare* but goes beyond that and contemplates full universal jurisdiction.

In addition to this issue, it should not be forgotten that on November 26, 1968, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was signed, which, although it has not been widely ratified, practice shows that it is considered customary law. This is evidenced by the constant trials that are still taking place against war crimes or crimes against humanity during the Second World War or in subsequent situations, against which the exception of incompetence *ratione temporis* and the exception *rationae personae* or *ratione loci* are never applicable.

In this sense, the French Court of Cassation that judged the Klaus Barbi case, in its judgment of December 20, 1985¹⁰⁶, considered crimes against humanity to be imprescriptible, and therefore considered itself competent to judge the acts committed during the Second World War¹⁰⁷. The same thing happened when an American television channel discovered Erick Priebke on May 9, 1994, living in Bariloche, Argentina. Italy requested his extradition, accusing him of the reprisal carried out on March 24, 1944 when, together with Karl Hass, 335 people were arrested and shot on the Via Ardeatina in Rome. Priebke and Hass were sentenced to life imprisonment by the Military Tribunal of Rome on March 7, 1998.

For its part, the Additional Protocol I to the four Geneva Conventions states in its article 86 that

“The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so”.

Therefore, it speaks of an obligation of the High Contracting Parties, beyond the fact that they are Parties to the conflict, that is, the obligation to suppress and take such measures as may be necessary to put an end to all other breaches... resulting from failure to comply with a duty to act by any State Party.

Article 88 of the same Protocol obliges the High Contracting Parties to provide “the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the

104 Fernández Sánchez, P. A. (Ed.) *The Limitations of the Law of Armed Conflicts: New Means and Methods of Warfare*, Brill/Nijhoff, Leyden (The Netherlands), Boston (USA), 2022 (ISBN: 978-90-04-46885-6).

105 This provision is also included in Article 50 of the Second Convention, Article 129 of the Third Convention and Article 146 of the Fourth Convention.

106 *Journal de Droit International*, 1986, pp. 129-142.

107 For a more detailed study of the circumstances taken into account by the Court, see the study of Wexler, L.S., *The interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbi and back again*, in *Columbia Journal of International Law*, vol. 32, 1994.



Conventions or of this Protocol” and, “The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters”.

In the context of serious infringements of cultural heritage in periods of armed conflict, Article 16-2 of the Second Additional Protocol of 26 March 1999 to the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 states the following:

“With respect to the exercise of jurisdiction and without prejudice to Article 28 of the Convention: (4 this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable or affect the exercise of jurisdiction under customary international law”.

If we look closely, it speaks of the exercise of jurisdiction under applicable international law or customary international law, which cannot be other than universal jurisdiction.

Finally, article 9 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of December 4, 1989, clearly states that “The present Convention does not exclude any criminal jurisdiction exercised in accordance with national law”. Therefore, it is admitting universal jurisdiction as long as it is admitted in domestic law.

In another criminal framework, and without meaning to be exhaustive, we can find the Tokyo Convention on Offences or Other Acts Committed on Board Aircraft of 14 September 1963, in its article 3.3, “this Convention does not exclude any criminal jurisdiction exercised in accordance with national laws”, as well as article 4-3 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 or article 5-3 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 or article 3-3 of the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973 or art. 5-3 of the New York Convention on the Taking of Hostages of 17 December 1973 or art. 6-5 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988 or Article 5-3 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 10 December 1984 or Article 6-2 of the European Convention for the Suppression of Terrorism of 27 January 1977.

It is true that none of these international conventions make express mention of the principle of universal jurisdiction, but from their respective texts we can deduce the imposition of the principle *aut dedere aut judicare*, the preference of jurisdictions in relation to the place where the crime was committed, the nationality of the offender or the place of detention, and the reference to any other criminal jurisdiction. Therefore, in my opinion we are talking about universal jurisdiction, that is, the possibility that a person can be tried by any State for crimes under international law committed abroad, against nationals or even against foreigners¹⁰⁸. This is also a majority opinion in both Spanish and foreign doctrine¹⁰⁹.

108 The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 21 March 1950 establishes for the first time in a clearer manner the principle of universal jurisdiction.

109 Among them, see Abellán Honrubia, V., *La responsabilité internationale de l'individu*, in *Recueil des Cours de l'Académie de Droit International*, vol. 280, 1999, p. 373; Remiro Brotons, A., *El caso Pinochet. Los límites de la impunidad*, Biblioteca Nueva, Madrid, 1999, p. 56. Among Foreign doctrine, it is enough to look at the separate opinions of the Judges Buergenthal, Kooijmans & Higgins, in the *Case concerning the Belgian arrest warrant against the Congolese Minister for Foreign Affairs*, judgment of 14 February 2001.



Moreover, there have been cases in which what is being analysed is not the State's right to universal jurisdiction, but the obligation *aut dedere aut judicare*, even if it is not formally included in a treaty. Let me explain, the German Constitutional Court, in a case where it was a matter of interpreting article 7 of the Convention against genocide, which establishes that "For the purposes of extradition, genocide and the other acts listed in article III shall not be considered political crimes. The contracting parties undertake, in such a case, to grant extradition in accordance with their legislation and the treaties in force", and referring to this article, stated the absolute obligation of Germany to extradite or prosecute. In this way it said that the "Federal Republic of Germany would be obliged to comply with an extradition request from Bosnia-Herzegovina"¹¹⁰.

CONCLUSIONS

Outer space is an unregulated world because, until now, some conventional rules have been defined but they have been very precarious, either due to the number of States parties or the limited scope of their purpose.

On the other hand, there has been very little practice in space activities, not only because of the technical difficulties and costs of operations but also because of the lack of scientific knowledge to be able to calculate the benefits that these space activities could bring.

However, in recent years there has been an enormous multiplication of activities, which go beyond those of the States, which involve companies, people, diverse themes and so on.

We jurists must provide solutions to the enormous legal challenges that will necessarily arise.

And the fact that there is a *corpus iuris specialis*, as I have said, is not enough. We need to arbitrate solutions for the issues that will arise.

Within the framework of strict International Criminal Law, which is the subject of my reflection, questions may arise arising from the commission of international crimes, which may be committed by States, by private companies, operators or owners, and by individuals who participate, directly or indirectly, in space activities. These crimes include, among others, aggression, genocide, crimes against humanity and war crimes, which must be accompanied by a procedure for prosecution, an accusation if appropriate and, where appropriate, a criminal sanction.

Can outer space be considered to operate as a legal space, projected by the earth? Even if this were the case, International Law (including, therefore, International Criminal Law) is eminently interstate and, in any case, even recognizing the existence of international spaces where the legal norms of International Law operate and the existence of global goods¹¹¹, which require obligations *erga omnes*, the application of the norms cannot be extended to the parceled framework of a territory, as is done on Earth.

Therefore, we have to resort to analogous processes of interpretation, taking into account general criteria, principles and legal instruments that allow us to establish State competence to determine jurisdiction.

110 Bundesverfassungsgericht (2000), „BVerfG, 2 BvR 1290/99 von 12.12.2000“, 82. (<http://www.bverfg.de/entscheidungen/frames/2000/12/12>).

111 The emergence of this new concept has been conceptualized since the very birth of International Law (then called *totus orbis*) but has been revitalized and recognized recently. See Fernández Sánchez, P.A., "¿De verdad Francisco de Vitoria fue el padre del derecho internacional?", in *Anuario Mexicano de Derecho Internacional*, vol. XXII, 2022, pp. 151-193 (ISSN 1870-4654).



In this sense, I have dealt with two issues that seem essential to me in the framework of International Criminal Law: State competences and the application of reconcilable and practicable principles in this sector of Law.

Within the framework of competence *ratione loci* or *ratione geographiae*, there is not even a legal delimitation of when the airspace of a State ends or when outer space begins. This means that States can be considered to cease to have territorial jurisdiction outside the limits of the atmosphere, regardless of where that limit is located.

However, current space activities are carried out within the spatial framework of artefacts or objects that are either state-owned or registered and subject to a specific State. There is even an international treaty that regulates the state jurisdiction of the States present on the International Space Station, where legal issues of a criminal nature have already arisen, with jurisdiction being attributed in accordance with that treaty.

Another competence to be taken into account is the competence *ratione materiae*. This framework of competence can determine the attribution of responsibility, whether objective or subjective. It is clear that the rules contemplated in the *corpus iuris spatialis*, by reason of their own subject matter, are designed for legal operators who carry out space activities.

When an activity resulting from the exploration or use of outer space gives rise to state or individual responsibilities, States are competent *ratione materiae* to apply its legal effects, when responsibilities may arise from the consequences. This is especially relevant in the context of International Criminal Law.

Perhaps the most important jurisdictional framework is the jurisdiction *ratione personae*, because it is where the State's jurisdiction in a space not assigned to another State is best based. Therefore, this type of jurisdiction draws heavily on the law of the sea, which also draws on air law.

In fact, many States have regulated this type of jurisdiction to attribute jurisdiction in the State in question.

As for the jurisdiction *ratione temporis*, it is much more complex. The presumption, until now, is that the measurement of time in outer space is the same as on Earth, which is not true. Not even on Earth is time measured the same in all meridians, which leads to different timetables being established, even in the States that have jurisdiction with several meridians.

For the purposes of applying international treaties, there are rules contained in the Vienna Convention on the Law of Treaties, so, in any case, if there were treaties, it would be necessary to abide by what is determined in them. This is particularly relevant in the framework of International Criminal Law because it can determine international criminal responsibility based on the time of the commission of the crime, or even the continuity of the crime. Let us think about the disappearance of a person or another international crime.

As for the specific legal principles of International Criminal Law, which may be applied to space activities, I have collected three of them: the principle of extraterritoriality, the principle of territorial extension of the norm or "contingent unilateralism" and the principle of universal jurisdiction.

The State, in principle, has exclusive and excluding jurisdiction over its own territory. This complicates the exercise of its own jurisdiction in outer space, because the State does not have territory in said space.

However, territorial jurisdiction is not an absolute right. There are doctrines that operate as effective control, personal control or authority and control, which serve to be able to exercise, where appro-



priate, the principle of extraterritoriality. For its exercise, the cooperation of other States is required. Therefore, in the case of the commission of an international crime, imputable to a person, legal or physical, the cooperation of another State can be requested so that it makes the potential accused available to national judges.

The Law of the Sea has given us some experiences that can be transferred to outer space, such as the flag of the ship, even the responsibility of the commander, etc., which can be perfectly transferred to outer space.

However, there are times when another legal principle can also be invoked, which does not even require international cooperation, I am referring to the principle of territorial extension of the norm or “contingent unilateralism”. It is true that this principle is relatively new and that it has little practice but that it can be very attractive, as it has been in the framework of the fight against climate change.

This doctrine would allow to give global scope to the regulations of International Criminal Law. This could be so because the rules are directed at the States themselves, their bodies, their officials, their nationals, whether companies, NGOs or private citizens, dependent on the jurisdiction of a particular State, who are operating in outer space.

Finally, the principle of universal jurisdiction, which is especially practiced in the commission of international crimes. Its legal nature, as has been demonstrated, is that of a general principle of International Law, a customary norm and of a conventional nature, in those treaties that include it as an obligation derived from the conventional corollary of the principle *aut dedere aut judicare*.

There is no situation in which this principle cannot be applied in space activities, because it supposes a generalized and consolidated *opinio iuris*, as long as its express regulation is included in the internal regulations of the States and their courts can exercise jurisdiction, in accordance with their own laws.

It is true that the States have been regulating the exercise of this principle, taking into account cases of territoriality or active nationality.

Obviously, when we are faced with international conventional rules that expressly include the principle of the exercise of universal jurisdiction, national law must give way to international criminal law because otherwise international liability could arise. There are many international treaties that include this obligation, especially in the area of major international crimes, including crimes against humanity and war crimes.

Seville, September 14, 2024

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