Treaty Crimes and Argentine Criminal Law: Internalization of Criminal Law and Its Effects on Domestic Law

by Nicolas Santiago Cordini[*]

ABSTRACT: The establishment of criminal regulations of both substantive and procedural law based on instruments of international law, known as the internationalization of criminal law, is not a new phenomenon. The novelty of this phenomenon is the scale at which it has spread. It is implemented through various mechanisms, ranging from the cooperation between States, harmonization and approximation, to the integration of various criminal law systems. Harmonization presupposes a mechanism for the interaction of the various criminal law systems; in this sense, harmonization is an imperfect process, as the systems retain some of their differences. International conventions delineate new criminal offences, commonly called 'treaty crimes". In this paper, we propose to look at criminal harmonisation via the lens of treaty crimes. Our hypothesis is that the national legislator rarely deviates from the definition provided by the international standard, but does so on occasions where different obligations overlap or in cases of non-mandatory criminalization. To that purpose, we will look at how several international treaties have been applied in Argentine law, as well as how the obligations to criminalize have been implemented.

KEYWORDS**:** Argentine; Crime; International Criminal Law; Treaty.

I. Introduction

Criminal law arose independently as an expression of nation-state territorial sovereignty (*ius puniendi*), and the use of legitimate force through the criminal law instrument – as an expression of state sovereignty – continues to be a primary interest of states in the regulation of both substantive and procedural criminal law, as well as the organization and functioning of judicial bodies, even today.

The establishment of criminal regulations of both substantive and procedural law based on instruments of international law, known as the internationalization of criminal law, is not a new phenomenon. The novelty of this phenomenon is the scale at which it has spread. It is implemented through various mechanisms, ranging from the cooperation between States, harmonization and approximation, to the integration of various criminal law systems. These processes have developed at different scales and

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speeds and have had different effects on different areas of criminal law, accelerating or slowing down depending on political, economic and social agendas.[1]

Just as classical criminal law is the product of national, uniform and closed legal systems. Today's criminal law, a product of economic globalization and supranational integration, is increasingly unified, although at the same time with fewer guarantees, in which the rules attribution of liability are more flexible and in which the substantive and procedural criminal guarantees are relativized.[2] In addition to the effect mentioned above, the phenomenon of internalization challenges at least two central ideas of classical criminal law. First, that the national legislatures and judges are sovereign subjects responsible for sanctioning and applying criminal rules and, second, the supposed link between criminal law and the culture of each state (*Kulturgebundenheit*), an idea that served as a means of containment before the importation of criminal legislation originating from other legal systems.[3]

In this paper, we propose to look at criminal harmonization via the lens of treaty crimes. To that purpose, we will look at how several international treaties have been applied in Argentine law, as well as how the obligations to criminalize have been implemented.

II. What is Meant by Criminal Harmonization?

Harmonization presupposes a mechanism for the interaction of the various criminal law systems that lies midway between the extremes of judicial cooperation between non-integrated criminal law systems that remain independent and the unification of criminal law that implies perfect integration. In this sense, harmonization is an imperfect process, as the systems retain some of their differences.[4] Currently, there is no legal definition of the term "harmonization of criminal law", although it is widely used in political and academic debates.[5] The term "harmonization" only appears in the

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[1] Mark Pieth, *Los actores del cambio*, in LOS CAMINOS DE LA ARMONIZACIÓN PENAL (Mireille Delmas-Marty, *et al.* eds., 2011), at 461.

[2] Jesús-María Silva Sánchez, *La expansión del derecho penal,* in LA EXPANSIÓN DEL DERECHO PENAL –ASPECTOS DE LA POLÍTICA CRIMINAL EN SOCIEDADES POSTINDUSTRIALES (Silva Sánchez, Jesús María eds., 2001), at 111.

[3] Nicolás Cordini, *La armonización del Derecho penal: un proceso con diversos actores y a distintas velocidades*, 9(13) REVISTA JURÍDICA DERECHO 51 (2020), at 52; Joachim Vogel, *Europäische Kriminalpolitik – europäische Strafrechtsdogmatik*, 149(9) GOLDAMMER'S ARCHIV FÜR STRAFRECHT 517 (2002), at 518, 520: "the internationalization of criminal law and criminal procedure is a form of the emergence of inter-legality. Inter- and supranational legal systems influence national criminal legal systems and provoke their resistance [...] The fact that criminality acts, due to globalization, in an increasingly transnational way, as in the case of international terrorism, international organized crime or illegal drug or human trafficking, acts as a driving force for internationalization".

[4] Mireille Delmas-Marty, *Los procesos de interacción*, in LOS CAMINOS DE LA ARMONIZACIÓN PENAL (Mireille Delmas-Marty *et al.* eds., 2011), at 527-228.

[5] Felicitas Tadic, *How Harmonious Can Harmonisation Be? A Theoretical Approach Towards Harmonisation of (Criminal) Law*, in HARMONISATION AND HARMONISING MEASURES IN CRIMINAL LAW (André Klip, Harmen van der Wilt eds., 2002), at 1, 2.

Treaty establishing the European Community, but not concerning criminal law. This absence of definition has not been compensated for in the scholarly literature. A shared core definition of the term can be found by analyzing the current legal literature. This can be summarized, following Tadic and Joutsen, as "the elimination of differences between the criminal law systems of different states".[6] The core of this common meaning is the elimination of inequalities.[7] The harmonization of criminal law should not aim at eliminating differences between legal systems, but rather at removing frictions to make the different systems more coherent.[8] By shifting the focus from the elimination of differences to the elimination of frictions, a crucial step is taken as it returns the interpretation of the term "harmonization" to its natural meaning while avoiding confusion with the terms: "unification" of criminal law and with "approximation".[9] At the same time, it provides guidelines for the effective use of criminal harmonization; it should only intervene when frictions exist and need to be addressed. This idea should guide criminal justice policymakers when deciding whether or not to harmonize criminal law. According to Calderoni, the term "harmonization" means "the process of modifying different criminal legislation in order to improve their consistency and eliminate frictions among them".

> Harmonization of criminal law is a broad and flexible concept. This means that there is no specific procedure for harmonizing legal systems, nor do specific legal instruments exist. Harmonization can thus result from very different activities and processes […] Harmonization is a horizontal concept. The ultimate goal of harmonization is to remove all frictions among different systems, thus achieving a legal harmony. However, harmonization does not give us the content of this (rather utopian) legal harmony. There is no "best solution" or "best legislation". There is no predetermined benchmark. Harmonization involves elements that are different, but equal in value. No legal system has higher status or consideration. This makes harmonization of criminal law a horizontal concept. This is a fundamental premise when assessing the level of harmonization among different legal systems.[10]

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[6] *Id.* at 8; Matti Joutsen, *International Cooperation Against Transnational Organized Crime: The Practical Experience of The European Union*, 59(1) RESOURCE MATERIAL SERIES 394 (2002), at 395, 410.

[7] FRANCESCO CALDERONI, ORGANIZED CRIME LEGISLATION IN THE EUROPEAN UNION: HARMONIZATION AND APPROXIMATION OF CRIMINAL LAW, NATIONAL LEGISLATIONS AND THE EU FRAMEWORK DECISION ON THE FIGHT AGAINST ORGANIZED CRIME (2010), at 2.

[8] Ursula Nelles, *Definitions of Harmonisation*, in HARMONISATION AND HARMONISING MEASURES IN CRIMINAL LAW (André Klip, Harmen van der Wilt eds., 2002), at 23, 34.

[9] Calderoni, *supra* note 7, at 6: "The process of revising various criminal laws to eliminate disparities that diverge from the minimum standard set out in a Framework Decision is known as "approximation of criminal law ". It is typical of the European Union (EU). Approximation is a vertical concept in which the objective is to eliminate discrepancies across legal systems when they are in conflict with EU minimum standards. The method is measured against these minimum standards. The EU minimum standards must have precedence in national legislation because Member States are required to incorporate Framework Decisions into national law"; Martin Boodman, *The Myth of Harmonization of Laws*, 39(4) THE AMERICAN JOURNAL OF COMPARATIVE LAW 699 (1991), at 700, 704.

[10] Calderoni, *supra* note 7, at 3.

The first step in the harmonization process is to identify similarities and differences between penal laws to identify possible frictions. This process is understood without prejudice to the system attribution of criminal liability and the effectiveness of the national criminal law. The assessment of the degree of harmonization between the different systems is independent of the possible differences in attribution in one or more States; these may (or may not) be harmonized. The assessment of the degree of harmonization between States is independent of the quality and/or effectiveness of the legislation itself. It may be that national laws are harmonized but do not achieve their objectives (*e.g.*, preventing and/or combating crime). In this case, a high level of harmonization corresponds to legislations of low quality in terms of effectiveness.[11]

III. Types of Harmonization: The So-Called "Treaty Crimes"

When talking about criminal harmonization, we can identify two different types. The first, known as "negative harmonization", has been promoted through the determination of common international standards (political-criminal guarantees) limiting the punitive power of the state, *i.e.*, through the recognition and development of common legal positions, which influence and restrict criminal law.[12] Thus, at the international level, we find the International Covenant on Civil and Political Rights (UN, 1966) and at the regional level the American Convention on Human Rights (OAS, 1969). The second type is "positive harmonization", which consists of obliging states, through an international commitment (a treaty), to introduce certain crimes into their respective national legislations, under the terms established by the respective treaty, or to harmonize them following international standards (if they already have such offences) and to create certain minimum structures in the criminal process that facilitate their prosecution. This form of harmonization has grown considerably in recent decades, but this does not imply that it is chronologically later than negative harmonization, since it is possible to find antecedents of this phenomenon even at the

[11] *Id.*, at 4.

[12] Ulrich Sieber, *Los factores que guían la armonización del Derecho penal*, in LOS CAMINOS DE LA ARMONIZACIÓN PENAL (Mireille Delmas-Marty *et al*. eds., 2011), at 481, 487; Vogel, *supra* note 3, at 518: "the 'negative' harmonization, also known as 'limited' harmonization, focuses on aligning international minimum punitive and procedural standards in favor of citizens"; Ulrich Sieber, *Grenzen des Strafrechts*, 119(1) ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTWISSENSCHAFT 1 (2007), at 3-16: "this trend toward harmonization of criminal is the result of four major forces; forces that lead not only to a convergence of substantive and procedural rules, but also, to a degree, to a supranational criminal law for larger territories and in some cases, even for larger territories and in some cases, even for the corresponding supranational institutions. These four factors are: (a) the increasing development and international recognition of common legal positions; (b) the increased interest in international security, primarily due by transnational crime, as seen in the areas of economic crime, cybercrime, organized crime and terrorism; (c) the growing influence of various players from the nation -states in the field of criminal policy; and (d) the expansion of the international cooperation based on new institutions with new legal tools that are far more effective than prior systems)".

beginning of the 20th century.[13] What is striking is the pace that this mechanism has acquired through the UN Conventions, specifically the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 1988), the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (UNTOC, Palermo, 2000) and the UN Convention against Corruption (UNCAC, Merida, 2003).

These conventions, among other obligations, delineate new offences, commonly called "treaty crimes", which can be defined, following Boister, as a set of offences "established in domestic law as a result of an obligation undertaken to criminalize in a multilateral suppression convention".[14] Unlike the crimes under international criminal law – today criminalized in the Rome Statute that gives rise to the International Criminal Court – they are not directly binding (self-executing), nor do they have a supranational criminal jurisdiction responsible for prosecution and punishment.[15] These criminalization obligations contained in international conventions must be implemented by the signatory states following their legal systems. These conventions leave it up to the signatory states to define the particular offences that are broadly delineated in them. The treaty crimes are not based on any fundamental legal conception, but pursue, unilaterally and because of a criterion of expediency, certain purposes linked to international security.[16] In turn, as they are neither systematically organized nor based on a unitary criminal theory, the classification of criminal norms and the selection of a criminal theory applicable to them have been left at the mercy of the signatory states.[17]

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[13] League of Nations, International Convention for the Suppression of the Traffic in Women and Children (1921).

[14] Neil Boister, *Treaty Crimes, International Criminal Court?*, 12(3) NEW CRIMINAL LAW REVIEW 341 (2009), at 342.

[15] KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL II: THE CRIMES AND SENTENCING (2014), at 222.

[16] Nicolás Cordini, *Derecho penal transnacional: hacia una dogmática jurídico-penal regional*, 13(26) POLÍTICA CRIMINALE 1140 (2018), at 1141, 1444: "thus, the achievement of certain security objectives (the fight against terrorism and organized crime), the suppression of certain undesirable crimes (pornography and child prostitution) or the protection of financial interests (preventing money laundering)"; ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2d ed. 2007) "Treaty crimes are not generally considered a crime concerning the international community. It may affect the interests of more than one state, but not all states that collectively constitute the international community)"; William Shabas, *International Crime*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW (David Amstrong ed., 2008), at 268-269: "treaty crimes can properly be defined as *mala prohibita* but not, in general, as a *mala in se* rule".

[17] Kai Ambos, *Zur Zukunft der deutschen Strafrechtswissenschaft: Offenheit und diskursive Methodik statt selbstbewusster Provinzialität*, in DIE VERFASSUNG MODERNER STRAFRECHTSPFLEGE. ERINNERUNG AN JOACHIM VOGEL (Klaus Tiedemann *et al*. eds., 2016), at 321, 324: "dogmatic, categorical or systematic discussions have receded in the process of codification of so-called 'treaty crimes'"; Walter Perron, *Europäische und transnationale Strafrechtspflege als Herausforderung für eine moderne Strafrechtdogmatik*, in DIE VERFASSUNG MODERNER STRAFRECHTSPFLEGE. ERINNERUNG AN JOACHIM VOGEL (Klaus Tiedemann *et al*. eds. 2016), at 307, 316: "The criminal law resulting from the process of internationalization is a law oriented towards responding to mainly practical demands. The style of argumentation used is rather pragmatic and, in the first instance, oriented towards factual arguments".

IV. Features of Treaty Crimes

Prototypes of such offences have been the criminal law against drugs as outlined in the UN conventions, as well as the offences defined in the UNTOC and the Protocols Thereto, *inter alia*. From the analysis of these definitions, we can establish the following characteristics.

A. The Multiplicity of Criminal Acts

Unlike classic crimes whose definitions are generally reduced to a typical verb, such as homicide defined by the verb "to kill" or larceny through the action of "to wrongfully take", the crimes defined in international conventions present a multiplicity of criminal actions. An example of this is the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention), which stipulates that:

> Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally: (a) (i) The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;[18]

In this definition alone, we find 15 different actions that cover the entire drug trafficking circuit. Another example is the definition of trafficking in persons stipulated in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking in Persons Protocol 2000) complementary to the UNTOC. It states that:

> "trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[19]

[18] Vienna Convention (1988), art. 3(1)(a)(i).
[19] Trafficking in Persons Protocol (2000), art. 3(1).

The definition provided has six different criminal actions, with some of them, such as "transportation" and "transfer", being almost identical, which makes the use of both redundant.

The typical descriptions that are the product of consensus among States, based on the idea of avoiding "punishability gaps" (*Strafbarkeitslüken*), are excessively detailed so that the fear that their implementation would harm the principle of "maximum certainty" would not apply to these cases, but rather the opposite: it is most likely that when applied in legalistic systems, the excessive detail would lead to punishability gaps.[20]

B. The Predominance of Offences of Risk Prevention

In the treaty crimes, it is possible to glimpse a criminal policy of risk, as opposed to a criminal policy of harm, carried out with techniques of anticipating criminal intervention, typical of the criminal law of risk. Most of the criminal definitions contained in the international instruments describe a large number of criminal actions but do not identify a harmful result[21], thus constituting classic offences of risk prevention[22].

In other cases, the presumed harmful result does not appear as such but as a mere mental element. Thus, the UNTOC, when defining the offence of laundering the proceeds of crime (money laundering), it establishes that:

> Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;[23]

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[20] KAI AMBOS, INTERNATIONALES STRAFRECHT, STRAFANWENDUNGSRECHT, VÖLKERSTRAFRECHT, EUROPÄISCHES STRAFRECHT, RECHTSHILFE, at 86-88 (2018).

[21] There are few exceptions, such as the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents art. 2(1((1973), which stipulates specific crimes of direct result, namely: The intentional commission of: (a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person; (b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty.

[22] CLAUS ROXIN, STRAFRECHT: ALLGEMEINER TEIL. BAND I. GRUNDLAGEN DER AUFBAU DER VERBRECHENSLEHRE (4th ed. 2006), at 431: "Among them, there is an abundance of offences of 'abstract' risk […] offences of abstract risk are ones in which a typically dangerous conduct is punished as such without a result of endangerment having to be produced in the specific case […] This category is similar to Duff's definition of implicit risk"; R. Anthony Duff, *Criminalizing Endangerment*, 65(3) LOUISIANA LAW REVIEW 942 (2005), at 943, 959: "Offences to prevent risks are implicit are implicit 'if their definition does not specify the relevant risk (the risk that grounds their criminalization), so that they can be committed without creating the risk'".

[23] UNTOC (2000), art. 6(1).

As we can see, for the offence to be committed, the actual concealment or disguise of the assets of illicit origin is not required; it is sufficient to carry out one of the criminal acts with the aim of achieving this purpose. The UN International Convention for the Suppression of the Financing of Terrorism states in a similar sense that:

> Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[24]

If we analyze the definition, for the offence to be committed, it is sufficient to provide or collect funds with the intention that they are used or in the knowledge that they will be used in an act of terrorism and not their actual use (financing), which makes it a classic offence of risk prevention.

The same is true of the criminal definition of trafficking in persons (*see* above), according to which, for the consummation of the crime, the actual exploitation of the victim is not required, but is achieved by fulfilling any of the criminal actions carried out for exploitation. In this case, the purpose of exploitation constitutes a mental element of the offence other than malice and not an objective element of the offence, as would be the case in which the result of exploitation is required.

In addition to the practically non-existent requirement of achieving the result, there are no rules of attribution in the sense of causal link or nexus, which is justified insofar as the legal theory applicable to these offences will be that of the domestic law of the respective signatory state.

C. Equating Attempt and Consummation and Bringing Forward the Beginning of Punishment

The treaty crimes are characterized by broad criminal frameworks with severe penalties and, in addition to the fact that they are not normally configured as crimes of result, they lead to equating consummation with acts of attempt. Thus, the Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking Convention) (The Hague, 1970) establishes that

[24] UN International Convention for the Suppression of the Financing of Terrorism (1999), art. 2(1).

> Any person who on board an aircraft in flight (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, the aircraft, or attempts to perform any such act […] commits an offence (hereinafter referred to as "the offence").[25]

and that "Each Contracting State undertakes to make the offence punishable by severe penalties".[26] On the other hand, there are also cases in which the punishment of preparation, although not compulsory, is called for, acts which according to our system of criminal law, would be exceptional.[27] In this regard, the UNCAC stipulates that:

> Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.[28]

D. Equating the Various Forms of Involvement in the Offence

Another constant feature of the offences arising from international conventions is the equalization of the different forms of involvement in the crime, leading to a concept of a single perpetrator, typical of the US criminal system, which is imbued with the principle that all perpetrators should be punished equally, since "Anglo-American […] law [is] committed to the principle that accessories and perpetrators should be punished alike".[29] This idea clashes with our criminal tradition inherited from German

[25] UN Hijacking Convention (1970), arts. 1 and 2.
[26] *Id.*, art. 2.
[27] HANS-HEINRICH JESCHECK, THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS. ALLGEMEINER TEIL (5th ed. 1996), at 423: "It is often admitted that exceptionally the legislator punishes the preparation. In reality, preparation and execution are relative concepts that vary according to the moment at which the legislator establishes the beginning of the protection of the substantial legal interest. Thus, the possession of materials or instruments known to be intended for counterfeiting, as an offence, constitutes a genuine act of execution and not an 'exceptionally punishable preparation'. The problem then shifts to how far the legislator can bring forward the beginning of the protection of the legal interest without affecting the principle of harm".
[28] UNCAC (2003), art. 27.3.
[29] GEORGE FLETCHER, RETHINKING CRIMINAL LAW (2000), at 651: "This has been the path followed by the Model Penal Code (MPC) and the United States Code (U.S. Code). 18 U.S. Code § 2 Principals: (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. MPC Section 2.06. Liability for Conduct of Another; Complicity. (1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both. (2) A person is legally accountable for the conduct of another person when: a. Acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or b. He is made accountable for the conduct of such other person by the Code or by the law defining the offense; or c. He is an accomplice of such other person in the commission of the offense. (3) A person is an accomplice of another person in the commission of an offense if; a. With the purpose of promoting or facilitating the commission of the offense, he (i). solicits such other

criminal law, which differentiates between different degrees of involvement (participation) in the crime by attributing different degrees of blame to each of the different parties implicated. An example of this comparison can be found in the UNTOC which stipulates that:

> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally: (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity: (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group; (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in: a. Criminal activities of the organized criminal group; b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.[30]

In sub-para. (a) it urges states to criminalize either conspiracy (i) or participation in an organized criminal group (ii) and then in subparagraph (b), it extends criminalization to other forms of participation. According to the UNODC, the purpose of art. 5 is to extend criminal liability for the various ways in which a person may participate in the commission of a serious crime involving an organized criminal group whose members act, *inter alia*, as organizers or principals, or who are engaged in aiding, abetting, facilitating and counselling the commission of a serious crime. It is important that States Parties implementing the offence of illicit association, referred to in art. 5(1)(b), can hold accountable those who plan, conceive, establish, finance or actively support the criminal activities of an organized criminal group even if they do not commit, or have not yet committed, a specific offence.[31]

To apprehend every possible mode of collaborative conduct within an organized criminal group, art. 5(b) of the UNTOC obliges States Parties to criminalize the activities of organizing, directing, aiding, abetting, inciting, facilitating or counselling to commit an offence to the extent that it involves the participation of an organized

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person to commit it, or (ii). aids or agrees or attempts to aid such other person in planning or committing it, or iii. having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or b. his conduct is expressly declared by law to establish his complicity. (4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense".

[30] UNTOC (2000), art. 5(1).

[31] UNODC, Legislative Guide for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (2004), para. 31, www.unodc.org/documents/treaties/Legislative_Guide_2017/Legislative_Guide_E.pdf

criminal group.[32] With this provision, the UNTOC seeks to criminalize forms of involvement in the activities of an organized criminal group that exceed leadership (direction), given that only the first two modes of collaboration specified in the provision, namely organizing and directing, are aimed at criminalizing the acts of individuals who give orders or exercise control over the members of the organization or its activities, while the remaining modes of involvement are aimed at criminalizing mere complicity. "Aiding, abetting, facilitating and counselling", although mentioned by the UNTOC as distinct forms of involvement, become redundant. All these modes of involvement amount to contribute to the commission of a crime perpetrated by another. In other words, persons who carry out activities qualified as aiding, abetting and facilitating or counselling are accessories (instigators or accomplices). Following the principle of accessory (typical of German criminal law), any form of adding and abetting presupposes that the principal (the perpetrator) has already begun to perpetrate the offence. Sub-para. (b) is superfluous, it is only a clarification, specifying the modes of participation in section 5(1)(a)(ii).[33]

Also, the laundering of proceeds of crime (*see* above) calls on states to criminalize different ways of intervention in the crime:

> Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.[34]

In other crimes, such as the case of trafficking in persons (see definition above), by establishing a multiplicity of criminal acts and being configured as an offence of risk prevention (given that the effective exploitation of the victim is not required), it leads to equating the various accomplices as perpetrators, since according to the definition, the perpetrator is the one who captures the victim as well as the one who transports or harbors them.

E. Intentionally as the Mental Element

In practically all treaty crimes, the existence of the mental element "willful" is required, which would lead to them being considered intentional crimes. Thus, in the 1988 Vienna Convention, the duty to criminalize is limited to cases in which the conduct described is committed intentionally, and there is no duty to criminalize reckless acts.[35] The UNTOC takes the same position concerning the offences

[32] Nicolás Cordini, *Delitos de organización: los modelos de "conspiracy" y "asociación criminal" en el derecho interno y en el Derecho internacional*, 38(104) DERECHO PENAL Y CRIMINOLOGÍA 75 (2017), at 76, 111.
[33] *Id*.
[34] UNTOC (2000), art. 6(b)(ii).
[35] Vienna Convention (1988), art. 3; KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL I: FOUNDATIONS AND GENERAL PART (2013), at 266: "The drug conventions do not define the term

contained in the convention and its protocols. Thus, participation in an organized criminal group,[36] laundering of proceeds of crime,[37] or trafficking in persons,[38] *inter alia*, require that they be "committed intentionally".

Taking into account that intent is distinct from mental elements other than malice, many conventional definitions also require "acting for the purpose of" as in the case of laundering of proceeds of crime where it is required to act "for the purpose of" concealing or disguising the illicit origin of the property.[39] In other cases, it is required to act "knowingly" as in the case of terrorist financing where it is required to act intentionally or "in the knowledge that they are [the funds] to be used, in full or in part, in order to carry out" an act of terrorism (see definition above). The offence of laundering the proceeds of crime also requires the perpetrator to act "in the knowledge" that the property is of illicit origin.[40]

Given the difficulty of proving the mental element, international conventions often enshrine the *formula* "the knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances".[41] Indeed, in some legal systems, intentional (as a mental element) is interpreted to mean that it is only necessary for the perpetrator to have the intention to act for it to be intentional. In others, however, intentionally implies knowing that the act is wrongful. The question of the content of the intentional element must therefore be elucidated according to local legal traditions.[42] On the other hand, nothing prevents states from providing in their domestic law for the punishment of reckless conduct or even strict liability without requiring proof of the mental element.

F. Severe Penalties

The nature of the sanctions established for these offences revolves around imprisonment, pecuniary sanctions (fines) and confiscation. On the other hand, given the nature of certain offences, special sanctions are also established, such as disqualification "for a period of time" from "holding public office" and "holding office in an enterprise owned in whole or in part by the State".[43]

Penalties must be proportionate to the gravity of the offence. While the penal scales vary from State to State, the conventions provide for penalties to be "severe" or

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intent, nor do they indicate how it is to be interpreted. States therefore have a margin of freedom to give it content".

[36] *Id.*, art. 5.

[37] *Id.*, art. 6.

[38] UNTOC, Protocol against Trafficking in Persons (2000), art. 5.

[39] UNTOC (2000), art. 6.

[40] *Id.*

[41] *Id.*, art. 5(2).

[42] UNODC, Legislative Guide for the Implementation of the United Nations Convention Against Corruption (2012), para. 36.

[43] UNCAC (2003), art. 30.

"serious" in the case of the UNTOC.[44] The latter Convention defines "serious crime" shall mean a "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty".[45]

V. Guidelines for Harmonization

Although the conventions are the product of international consensus and summarize the punitive intentions of the signatory states, we should not lose sight of the preponderant role that US diplomacy has played in the proliferation of treaty crimes, especially through the UN Conventions on drug trafficking, organized crime and corruption. These conventions have embodied US criminal policy, and it is enough to analyze the typical descriptions to realize that they bear strong similarities with existing crimes in US domestic law, which has been identified as an "Americanisation of criminal law".[46]

On the other hand, the fact that states commit themselves to harmonize their legislation does not mean that the process is free of tensions, given that the measures agreed in conventions often clash with the interests of the signatory states or with their own national legal cultures; or the signatory states may have internal resistance to harmonizing their legislation following what has been agreed in the international convention.

Intending to achieve greater consensus, conventions reach various levels of agreement, and their provisions can be grouped, following UNODC Legislative Guide (2004), into the following three categories: (i) measures that are mandatory, either absolutely or when certain conditions have been met; (ii) measures that signatory states should consider or endeavor to implement; and (iii) measures that are optional. Whenever expressions such as 'states shall" or "each State Party shall adopt" are used, reference is made to a mandatory provision of type (i), which cannot be breached by the State Party. Conversely, where the purpose of the Convention is for States to adopt its provisions through appropriate measures in accordance with general principles and the particular application and interpretation of the State Party (type ii measures),

[44] UN Convention for the Suppression of Unlawful Seizure of Aircraft (1970), art. 2.
[45] UNTOC (2000), art. 2(b).
[46] Gunther Artz, *Wissenschaftsbedarf nach dem 6,* 111(4) ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTWISSENSCHAFT 757 (1999), at 758, 768-770; Vogel, *supra* note 3 , at 25-26: "If current German criminal law can be regarded as international and European, especially as a model and influential, it can rightly be called into question. The German criminal code in its current essential from dates back to the criminal reforms of the 1960s and 1970s and can no longer serve as a model to be followed. In the European and international criminal policy arenas, Germany is not a major player; the decisive decisions, are taken by other states"; Jesús-María Silva Sánchez, *Prólogo 2012*, in EL SISTEMA MODERNO DEL DERECHO PENAL. CUESTIONES FUNDAMENTALES. ESTUDIOS EN HONOR DEL CLAUS ROXIN EN SU 50º ANIVERSARIO (Bernd Schünemann ed., 2012): "I must confess that I harbour the fear that, for dogmatics (the science of criminal law), "any time in the past was better". Indeed, the great German masters have retired or are about to retire, and many of their successors – at any rate, some of the most influential and brilliant – seem more inclined to worship the golden calf in Brussels (or perhaps Washington) than to follow their predecessors. *O tempora, o mores*!".

expressions such as "in accordance with" or "if required by the fundamental principles of a State Party's domestic law" are used.[47] For purely optional measures (type iii), expressions such as "may wish to consider" are used.[48]

Concerning obligations to criminalize certain conduct, the conventions tend to stipulate mandatory provisions. An example of such criminalization obligations can be found in the 1988 Vienna Convention. Here it is necessary to clarify that the duty to criminalize possession for personal consumption is not one of the obligations discussed here (type i), but is subject to constitutional principles and fundamental concepts of the domestic legal system (type ii).[49]

The UNTOC sets out four specific offences that States Parties are required to establish in their domestic law: participation in an organized criminal group,[50] money laundering "in accordance with fundamental principles of its domestic law" (type ii),[51] corruption,[52] and obstruction of justice,[53]; whereas, in the Protocols the offence of trafficking in persons,[54] smuggling of migrants,[55] and trafficking in arms.[56] The UNCAC contains the obligation to criminalize in domestic law bribery of national public officials,[57] active bribery of foreign public officials and officials of international organizations,[58] the offence of embezzlement, misappropriation or diversion of property by a public official,[59] illicit enrichment "[s]ubject to its constitution and the fundamental principles of its legal system" (type ii),[60] laundering of proceeds of crime subject to "conformity with the fundamental principles of its domestic law" (type ii),[61] and obstruction of justice.[62]

In certain offences where there are substantial differences between the various legal systems, such as in the case of associative offences, the obligation to criminalize occurs alternatively and/or jointly. Thus, the 1988 Vienna Convention subordinates the obligation of States Parties to criminalize participation, association or conspiracy in offences related to drug production and trafficking as long as they do not contravene

[47] UNODC, *supra* note 42, at. 4: "The terms 'consistent with` or 'subject to the legal principles of the State Party' are safeguard clauses that limit or subject relevant provisions to compliance with the State Party's legal principles. Similarly, the phrases 'if permitted by its domestic legal system's basic principles' and 'conditions prescribed by its domestic law' limit the application of certain mandatory requirements under the Convention".
[48] *Id.*, at 6-7.
[49] Vienna Convention (1988), art. 3(2).
[50] UNTOC (2000), art. 5.
[51] *Id.*, art. 6.
[52] *Id.*, art. 8.
[53] *Id.*, art. 23.
[54] UNTOC, Protocol against Trafficking in Persons (2000), art. 5.
[55] UNTOC, Protocol against the Smuggling of Migrants (2000), art. 6.
[56] UNTOC, Protocol against Trafficking in Arms (2001), art. 5.
[57] UNCAC (2003), art. 15.
[58] *Id.*, art. 16(1).
[59] *Id.*, art. 17.
[60] *Id.*, art. 20.
[61] *Id.*, art. 23.
[62] *Id.*, art. 25.

constitutional principles and fundamental concepts of domestic law.[63] This safeguard clause limits the relevant provisions to compatibility with the legal principles of the respective state party. This is due to the resistance that the conspiracy model generates in legal systems that are not in line with common law. States are therefore obliged to adopt a form of conspiracy offence, although this obligation is subject to the fundamental principles of the respective domestic legal system.[64]

Art. 5 UNTOC (see above), by contrast, proposes two alternative approaches to criminalizing participation in an organized criminal group. The first alternative is participation in a conspiracy,[65] which is characteristic of the common law. The second alternative is "participation in an organized criminal group"[66] characteristic of the civil law system.[67] States may choose one or both of these partnership models.[68] The aim of combining the two systems was to promote international cooperation within the framework of the UNTOC and to ensure the compatibility of the two concepts without seeking exhaustive harmonization.[69]

Another example of type (ii) measures is found in the UNCAC, which makes the punishment of preparation to commit offences established by the Convention subject to the conformity of domestic law (see above).[70]

The offences of passive bribery of foreign public officials and officials of international organizations,[71] and the offences of trading in influence,[72] abuse of functions,[73] illicit enrichment,[74] bribery in the private sector,[75] embezzlement in the private sector,[76] and concealment of the UNCAC are type (iii) measures.[77] Thus, about passive bribery, the Convention prescribes:

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[63] Vienna Convention (1988), Offences and Sanctions, art. 3(1): "Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally: […] c) Subject to its constitutional principles and the basic concepts of its legal system: iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article".

[64] Unlike the 1988 Vienna Convention, the duty to criminalize certain conduct in the 1961 Single Convention on Narcotic Drugs (amended by the 1972 Protocol) and the Convention on Psychotropic Substances (1971) is of a "weak" nature, as both Article 36.1.a of the 1961 Convention and art. 22.1.a of the 1971 Convention make the obligation to criminalize "subject to its constitutional limitations".

[65] UNTOC (2000)., art. 5(1)(a)(i).

[66] UNTOC (2000), art. 5(1)(a)(ii).

[67] Jousten, *supra* note at 422. DAVID MCLEAN, TRANSNATIONAL ORGANIZED CRIME: A COMMENTARY ON THE UN CONVENTION AND ITS PROTOCOLS (2007), at 62.

[68] UNODC, *supra* note 42, at 26.

[69] Dimitri Vlassis, *The United Nations Convention Against Transnational Organized Crime and Its Protocols: A New Era in International Cooperation*, in THE CHANGING FACE OF INTERNATIONAL CRIMINAL LAW: SELECTED PAPERS (2002), at 75, 92.

[70] UNCAC (2003), art. 27.

[71] *Id.*, art. 16(2).

[72] *Id.*, art. 18.

[73] *Id.*, art. 19.

[74] *Id.*, art. 20.

[75] *Id.*, art. 21.

[76] *Id.*, art. 22.

[77] *Id.*, art. 24.

> each State Party shall consider adopting such legislative and other measures as may 21 be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.[78]

The UNCAC includes a series of non-mandatory criminalization offences that states must consider to cover as much misconduct as possible. Active bribery of foreign public officials and public officials of international organizations is forbidden.[79] In contrast, concerning passive bribery only advises that states "shall consider" criminalizing the solicitation or acceptance of bribes by foreign public officials in such circumstances, implying that this is an optional measure.[80]

But how is the obligation to criminalize the offences described in the international conventions fulfilled? Do states have to reproduce the content of the typical description verbatim? Or, on the contrary, is it sufficient for the criminalization in domestic law to recognize the fundamental aspects of the definition contained in the convention?

The literal reproduction of the crime's definition contained in international instruments is not the purpose of these conventions. We are dealing here with processes of harmonization and not the integration of criminal law, the aim of which is to avoid criminal law havens, *i.e.*, that the conduct described in the conventions remains lawful in certain states. Thus, in the legislative guide for the application of the UNTOC drawn up by the UNODC, it has clearly stated that it is recommended that legislators check for consistency with other offences, definitions and legislative uses before using the formulations or terminology of the Convention. The Convention was drafted for general purposes and is addressed to national governments. Therefore, its level of abstraction is higher than that required for domestic legislation. Hence, national legislators should be careful not to incorporate parts of the text verbatim. Instead, they are encouraged to capture the spirit and meaning of individual articles.[81] Compliance with the treaty obligation can be achieved in different ways, either through new legislation or through amendments to existing offences in domestic law. According to the UNODC, it is also not essential that the offences in domestic law correspond in name and terms to those used in the Convention, although it recommends that States Parties should ensure that domestic laws conform as closely as possible to the provisions of the Convention.[82]

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[78] *Id.*, art. 16(2).
[79] *Id.*, art. 16(1).
[80] UNODC (2014), *supra* note 422, at 67.
[81] *Id.*, at 249.
[82] *Id.*, at 250: "the description of offences is reserved to the domestic law of a state party, according to article 11.6 of the UNTOC. It's possible that countries define offences with different scopes, such as

In practice, states often reproduce in their domestic law the typical descriptions enshrined in international conventions. This practice is not without problems, as the importation of criminal rules can lead to increased dysfunctionalities (mostly in terms of unconstitutionality) when criminal rules outlined in international conventions are mechanically introduced into domestic law and these are used in other normative contexts, resulting in them failing the test of constitutionality in several cases.[83] This legislative practice has been defined as "legal colonization", i.e.,

> the process by which a given state incorporates its international commitments into its legal system in a mechanical way, without bothering to achieve their adequate integration into its own particular constitutional and ordinary legal configuration.[84]

It will therefore be the task of the respective states to adopt international obligations following their constitutional rules and general principles in force in their respective territories to make the rules arising from international treaties compatible with those of domestic law.

VI. Analysis of Treaty Crimes in Argentine Legislation

If we examine treaty crimes and how they have been criminalized in Argentine law, except for corruption-related offences, we may see one constant: the replication of the definitions included in international conventions in domestic law, except for offences related to corruption.

Argentina, in compliance with its international obligation to punish the trafficking of drugs prohibited by the international drug treaties, passed the Narcotics Act (NA) in 1989,[85] even before the formal ratification of the 1988 Vienna Convention. This law reproduces the obligations assumed in art. 3 of this Convention, thus punishing anyone who "Produces, manufactures, extracts or prepares narcotic drugs".[86]. It also punishes the "sowing and cultivation of plants for the production or manufacture of narcotic drugs"[87]; for its part, the obligation to criminalize "offering for sale, distribution, sale" was made more extensive by threatening with punishment anyone who 'trades in narcotic drugs·.[88] The prohibition of "delivery under any conditions" did so by criminalizing anyone who "delivers, supplies, applies or makes available to others narcotic drugs for consideration". The NA, on the other hand,

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two or more domestic law offences that encompass one covered by the Convention, especially if this reflects pre-existing legislation and jurisprudence".

[83] Cordini, *supra* note 3, at 59.

[84] José Luis Díez Ripollés, *El blanqueo de capitales procedentes del tráfico de drogas. La recepción de la legislación internacional en el ordenamiento penal español*, 32 ACTUALIDAD PENAL 583 (1994), at 584, 602.

[85] Narcotics Act, Pub. L. No. 23 (1989), at 737.

[86] Narcotics Act, Pub. L. No. 23,737 (2016), art. 5.b.

[87] *Id.*, art. 5(a).

[88] *Id.*, art. 5(c).

provides for a lighter penalty if it is "for free". It also punishes transportation,[89] as required by the Convention. Regarding the prohibition to import and export, the NA punishes anyone who

> introduces into the country manufactured drugs or drugs at any stage of their manufacture, chemical precursors or any other raw material destined for their manufacture or production, having made a correct presentation to customs and subsequently illegitimately alters their intended use.[90]

On the other hand, the Customs Code punishes the illicit import or export (smuggling) of narcotic drugs and psychotropic substances.[91]

Regarding possession (also cultivation and acquisition) for personal consumption, the 1988 Vienna Convention conditions the obligation to criminalize as long as it is in accordance with "its constitutional principles and (...) the fundamental concepts of its legal system".[92] Argentina, following the prohibitionist paradigm, criminalized possession for consumption,[93] even though before the Convention there had already been jurisprudence to the contrary from the Argentine Supreme Court of Justice (CSJN).[94] On the other hand, in the case of sowing and cultivation intended for personal consumption, lighter penalties are foreseen.[95]

Argentina introduced the concept of conspiracy in conformity with international rules into the NA,[96] criminalizing simple agreements between two or more people in drug trafficking offences. This offence contains the characteristics of conspiracy, needing neither permanency nor organization, as does illicit association,[97] reducing the offence in question to a mere planning offence.[98] The conspiracy is complete when two or more parties agree to commit any of the crimes listed in the NA or the crime of drug smuggling; however, for it to be punishable, an overt act must be met, which is "any of its members carrying out acts that manifestly reveal the common decision to

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[89] *Id.*, arts. 5(c) and 5(d).
[90] *Id.*, art. 6.
[91] Custom Code (2005), art. 866: "A prison term of three (3) to twelve (12) years shall be imposed in any of the cases provided for in Articles 863 and 864 [offence of smuggling] when dealing with narcotic drugs at any stage of their processing or chemical precursors".
[92] Vienna Convention (1988), art. 3(2).
[93] Narcotics Act, Pub. L. No. 23,737 (1989), art. 14.
[94] Corte Suprema de Justicia de la Nación, Bazterrica, Gustavo Mario s/ Tenencia de Estupefacientes (1986), para. 308:1392.
[95] Narcotics Act, Pub. L. No. 23,737 (2016), art. 5(3).
[96] Narcotics Act, Pub L. No. 24.424 (1995), art. 29-*bis*: "Anyone who takes part in a conspiracy of two or more persons to commit any of the offences provided for in arts. 5, 6, 7, 8, 10 and 25 of the present Act, and in Article 866 of the Customs Code, shall be punished with imprisonment or imprisonment for a term of one to six years. The conspiracy is punishable as soon as one of its members performs acts that manifestly reveal a common decision to carry out the offence for which they have conspired. Any person who discloses the conspiracy to the authorities before the commission of the offence for which it was formed is exempted from punishment, as is any person who spontaneously prevents the plan from being carried out".
[97] Arg. Crim. Code (1984), art. 210.
[98] Cordini, *supra* note 3, at 106.

commit the crime for which they had agreed".[99] This criterion was devised to make conspiracy consistent with an act-based criminal law and, in doing so, avoid violating the "harm principle", which prevents the punishment of mere ideas.[100]

We must ask ourselves whether such an advance is justified or whether, on the contrary, it would not imply a "criminalization of dangers of dangers",[101] given that it implies an advance to stages before the attempt of classic dangerous crimes, as is the case of the offences provided for in the NA.

The 1988 Vienna Convention makes the obligation to criminalize the crime of conspiracy 'subject to its constitutional principles and the fundamental concepts of its legal system" (art. 3(c)).[102] Taking into account the principles that underpin the Argentine criminal system, there are no criminal reasons to justify such an advanced punishment, and its application results in an affectation of the principle of harm,[103] whereas conspiracy works by ignoring the various degrees of involvement in the crime, by encompassing co-perpetration, complicity and instigation (accessories) under the concept of "conspirator" just as it does in common law criminal law where conspiracy is typical. Attempting to import conspiracy, which has the characteristics of an "inchoate crime" into our system of criminal attribution raises additional concerns, such as a violation of the *ne bis in idem* principle, which would result in the simultaneous attribution of conspiracy and the substantive crime for which it was established.[104]

Regarding the crime of trafficking in persons, Argentina has introduced this offence in Art. 145-*bis* and art. 145-*ter* of the Argentine Criminal Code (Arg. Crim. Code).[105] These articles replicated the definition provided for in the Palermo Protocol. The legislation in question distinguished between victims who minors and over 18 years of age those were.[106] Thus, in the case of adult victims, it was required that

> deception, fraud, violence, threat or any means of intimidation or coercion, abuse of authority or a position of vulnerability, giving or receiving payments or benefits to obtain the consent of a person having authority over the victim, even if the victim consents.[107]

This requirement, on the other hand, was not necessary in the case of minor victims, for whom higher penalties were also assigned.

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[99] Narcotics Act (1995), art. 29-*bis*, 3.
[100] Arg. Const. (1853), art. 19
[101] Nuria Pastor Muñoz, *imputables peligrosos: reflexiones sobre la legitimidad de la reacción jurídico-penal a sujetos peligrosos autorresponsables*, in LIBRO HOMENAJE AL PROFESOR DR. AGUSTÍN JORGE BARREIRO (Gonzalo Basso ed., 2019), at 1477.
[102] Vienna Convention (1988), art. 3(1)(c).
[103] Gehrard Mueller, *Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory*, 34(2) INDIANA LAW JOURNAL 206 (1959), at 207, 220.
[104] PATRICIA ZIFFER, EL DELITO DE ASOCIACIÓN ILÍCITA (2005), at 204-205
[105] UNTOC, Pub. L. No. 26, Prevention And Punishment of Trafficking in Persons and Assistance to its Victims Act (2008), para. 364.
[106] Arg. Crim. Code (2008), arts. 145-*bis* and 145-*ter*.
[107] Arg. Crim. Code (2008), art. 145-*bis*.

The Argentine legislator made amendments to the offence of trafficking in persons, eliminating the distinction between trafficking in adults and minors, as well as the conduct of 'transporting" which was deemed overabundant, and consent as a cause of non-criminality. Under the current definition 'trafficking in persons is considered to be the offering, recruiting, transfer, receipt, or harboring of persons for the purpose of exploitation, whether inside the national territory or from or to other countries".[108] The basic infraction is located in art. 145-*bis* of the Arg. Crim. Code, while the aggravated forms are found in art. 145-*ter*, according to the current wording. As a result, the current phrasing of the trafficking in person offence has put an end to the debate about the value to be ascribed to the consent of adult victims. Currently, the consent of the victim is not required, resulting in an irrebuttable presumption (*iure et de iure*).[109]

Also, in the case of the offence of financing terrorism, there is a strong similarity between the international definition (see definition above) and the one adopted by the offence of the Arg. Crim. Code, which punishes anyone who

> directly or indirectly collects or provides goods or money with the intention that they are used or in the knowledge that they will be used, in whole or in part: a) to finance the commission of an offence with the purpose established in article 41-*quinquies*.[110]

The criminal acts of "collecting and "providing", as well as the mental element of acting "with the intention that they should be used or in the knowledge that they will be used" to commit a terrorist act, are all taken directly from the Convention, except for the definition of terrorism. Argentina did not identify a specific offence in this regard, instead, the legislator established terrorism as a generic aggravating condition applicable to any offence.[111]

Concerning UNCAC treaty crimes, Argentina has shown differences with international definitions. Firstly, it should be borne in mind that there are several overlapping international obligations in this area. There are three conventions to which Argentina is a signatory, namely: Inter-American Convention against Corruption

[108] UNTOC, Pub. L. No. 26,842, Prevention And Punishment of Trafficking in Persons and Assistance to its Victims Act (2012), art. 2; Pub. L. No. 26,842 (2012), art. 25: "Replace Article 145 bis of the Criminal Code with the following: Article 145 bis: Whoever offers, recruits, captures, transfers, receives or harbors persons for the purpose of exploitation, whether within the national territory or from or to other countries, even with the consent of the victim, shall be sentenced to four (4) to eight (8) years of imprisonment".

[109] Cordini, *supra* note 3, at 64.

[110] Arg. Crim. Code (2011), art. 306.

[111] Arg. Crim. Code (2011), art. 41-*quinquies*: "When any of the offences provided for in this Code has been committed with the aim of terrorizing the population or forcing national public authorities or foreign governments or agents of an international organization to carry out an act or refrain from doing so, the scale [of the punishment] shall be increased by double the minimum and the maximum. The aggravating circumstances provided for in this article shall not apply when the act or acts in question take place on the occasion of the exercise of human and/or social rights or any other constitutional right".

(OAS, Organization of American States) (1996),[112] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD, Organization for Economic Co-operation and Development) (Paris 1997),[113] and the UNCAC.[114] Second, Argentine is organized by a federal system in which the provinces that make up the state reserve powers are not explicitly assigned to the national government.[115] The National Congress has the authority to create criminal offences, which are then applied by provincial authorities through procedural codes;[116] each province must determine how prosecution and trial for the offences established following Chapter III of the UNCAC will be carried out.

Concerning the offences of bribery and trading in influence outlined by the UNCAC,[117] the Crim. Code criminalizes the active bribery of national public officials.[118] The difference between arts. 258 and 259 is that in the former, the person who gives or offers money, gifts, or other promises expects the public official to perform, delay, or refrain from performing an act related to his or her duties. In the latter, the person who gives or offers money, gifts, or other promises expects the public official to perform, delay, or refrain from performing an act related to his or her duties. In the latter, gifts or considerations are being offered that go beyond ordinary courtesy, taking into account the public agent's function or position, but there is no expectation of concrete action or omission. It is necessary to clarify the meaning of the term "promise", in general, doctrine and jurisprudence relate the concept of "offering" — one of the common actions in the art. 258 bribery offence — to the action of "promise". It should be noted that the referred articles have not been amended after the entry into force of the UNCAC, however an amendment to the concepts of "public official" and "public functions" is evaluated as part of a broader Criminal Code reform.[119]

The Arg. Crim. Code establishes the taking of bribes (passive bribery) by national public officials as an offence.[120] The distinction between arts. 259, 256 and 257 of Arg. Crim. Code is that the latter two require a corrupt commitment from a public official or magistrate to perform, delay, or refrain from executing an act related to their duties. The commitment or agreement does not need to be fulfilled for the offence to exist; simply accepting the promise or receiving the money or gifts is enough. Art. 259 Arg. Crim. Code, on the other hand, does not mandate any action in exchange for the gift, which is merely being offered due to the sheer public official's

[112] Pub. L. No. 24,759 (1997): "Approve the Inter-American Convention against Corruption signed at the third plenary session of the Organization of American States".
[113] Pub. L. No. 25,319 (2000): "Approve the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed in Paris, France".
[114] Pub. L. No. 26,097 (2006): "Approve the UNCAC".
[115] Arg. Const (1994), art. 121.
[116] Arg Const. (1994), art. 75(12).
[117] UNCAC (2003), arts. 15, 16, 18 and 21.
[118] Arg. Crim. Code, Pub L. No. 25,188 (1999), arts. 258 and 259.
[119] Arg. Crim. Code (1994), art. 77.
[120] Arg. Crim. Code (2017), arts. 256, 257, 259, 266 and 268.

position. The offence specified in UNCAC art. 15 is considered to be covered by the Arg. Crim. Code.

Concerning active bribery of foreign public officials and officials of international organizations he Arg. Crim. Code criminalizes it.[121] It must be noted that the offence of transnational bribery is based on the recommendations of the Working Group on Transnational Bribery of Foreign Public Officials in International Business Transactions,[122] which operates within the OECD framework. Argentina has the status of observer country within the general scope of the OECD, but is a full member of the Working Group on Bribery in International Business Transactions, having ratified the aforementioned Convention. There was no legislative definition of the concept of foreign public official, the Arg. Crim Code only defined national public officials.[123] After an amendment in 2017 now it states that:

> A public official of another State, or of any territorial entity recognized by the Argentine Nation, shall mean any person who has been appointed or elected to perform a public function, at any of its levels or territorial divisions of government, or in any kind of public body, agency or enterprise in which that State exercises direct or indirect influence.[124]

We consider that Arg. Crim. Code complies with UNCAC art. 16(1) and that the description of criminal acts corresponds to the definition adopted by the UNCAC.

Passive bribery of foreign public officials and international organizations is a distinct subject; Argentina has no specific legislation forbidding the conduct described in UNCAC art. 16(2). However, it is argued that the term is covered internally by the offence of passive bribery, as defined in art. 256 and related provisions of the Arg. Crim. Code. It is important to keep in mind that art. 16(2) of the UNCAC is not a mandatory measure, but rather an invitation to signatory states to criminalize such an offence.

The Arg. Crim. Code criminalizes not only active trading in influence but even the passive form.[125] Argentina complies with art. 18 of the UNCAC, even if it has not amended its criminal legislation following the ratification of this convention because, notwithstanding the absence of mandatory rule under the UNCAC, domestic law criminalizes both active and passive trading in influence.

Bribery in the private sector is not regulated in Argentina as a particular offence, as defined by art. 21 of the UNCAC. Such action may be prosecuted as a case of fraud.[126] In the cases described in art. 174(4)(5)(6) Arg. Crim. Code, the convicted person, if a public official or employee, will face a special perpetual disqualification in

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[121] Arg. Crim Code (2017), art. 258-*bis*.
[122] Pub. L. No. 25 (2000), para. 319.
[123] Arg. Crim. Code, art. 77(4) (The terms "public official" and "public employee", as used in this Code, refer to anyone who participates accidentally or permanently in the exercise of public functions, whether by popular election or by appointment by a competent authority).
[124] Arg. Crim. Code, Pub. L. No. 27,401 (2017), arts. 30 and 258-*bis*(2).
[125] Arg. Crim. Code (1999), arts. 258, 256 and 256-*bis* (1), where art. 256 describes the passive form.
[126] Arg. Crim. Code (1995), arts. 172 and 174.

addition to the general sanction. Furthermore, passive bribery in financial institutions is punishable under art. 312 Arg. Crim. Code.[127]

Argentina made the money laundering offence consistent with the requirements of art. 23 of the UNCAC and art. 6 of the UNTOC. The offence is drawn in art. 303 Arg. Crim. Code.[128] This article criminalizes any operation in which:

> a person converts, transfers, manages, sells, encumbers, disguises or otherwise brings into market circulation any assets obtained from criminal activity, with the possible consequence of giving the origin of the original or substituted assets the appearance of a legal origin, whenever their value exceeds the amount of three hundred thousand pesos ($300,000), whether in a single operation or through various interrelated operations.

It is worth emphasizing that the purpose of the "conversion" or 'transfer" is irrelevant under art. 303 of the Arg. Crim. Code. The relevant act must be performed "with the possible consequence" that the property acquires a legal appearance for an offence to exist. As explained above, the offence analyzed here is a crime of endangerment and does not require the effective conversion or transfer of the property. Additionally, this article includes criminal "self-laundering". The second element of the "conversion or transfer" is covered by the offence of concealment (to evade investigations or legal consequences of acts).[129] This offence also relates to the offence of "concealment or disguising" as described in the UNCAC.[130]

Concerning the offence of embezzlement,[131] the Arg. Crim. Code identify it as a specific offence.[132] It also makes it illegal for a public authority to divert property in other ways.[133] In terms of the benefit to other persons or entities, Argentine law ignores the subsequent use that the embezzled property may be given to, and Arg. Crim. Code punishes the mere separation, severance, and extraction of the said property from the custody of the public official to avoid evidentiary problems and to achieve greater safeguarding of the legally protected interest.[134] Argentine law includes provisions on the abuse of functions in various articles of the Crim. Code, such as on negotiations incompatible with the exercise of public functions,[135] on scams and fraudulent administration,[136] on illegal exactions,[137] on abuse of authority and violation of the duties of public officials,[138] and also on Ethics in the Exercise of Public Service Act (EEPSA). This regulation establishes the responsibilities of any

[127] Arg. Crim. Code, Pub. L. No. 26 (2011), para. 733.
[128] Arg. Crim. Code, Pub. L. No. 26 (2011), para. 683.
[129] Arg. Crim. Code (2011), art. 277.
[130] UNCAC (2003), art. 23.1 (a)(ii).
[131] UNCAC (2003), art. 17.
[132] Arg. Crim Code (1984), arts. 260, 262 and 263.
[133] Arg. Crim Code (1995), arts. 172 and 174.
[134] Arg. Crim. Code (1983), art. 261.
[135] Arg. Crim. Code (2017) art. 265.
[136] Arg. Crim Code (2002), arts. 172-174.
[137] Arg. Crim Code (1999), arts. 266-268.
[138] Arg. Crim Code (2008) arts. 248-251.

person who performs a public function, whether permanently or temporarily, at any level or rank, whether by popular election, direct appointment, competition, or any other legal means, and it applies to all State magistrates, officials, and employees.[139] In the case of illicit enrichment, the potential of prosecution is not limited to the person who performs a public function, but also includes anybody who, after ceasing to perform such a function, has lately displayed his or her wealth within two years of leaving the public service.[140]

Meanwhile, the offences of "unfaithful administration", [141] "fraud in commerce and industry",[142] and the "offences against the economic and financial order" of the Arg. Crim. Code are identified concerning embezzlement in the private sector.[143] It is worth noting that the UNCAC only recognizes this offence as an optional measure of criminalization.[144]

Concerning the offence of obstruction of justice,[145] several articles of the Arg. Crim. Code have the effect of complying with this provision by making it an offence to use intimidation or force against a public official or to use threats, including aggravation of such criminal conduct when the purpose of the threats is to obtain any concession from the public authorities.

In terms of criminal liability of legal persons,[146] the "General Part" of the Arg. Crim. Code does not contain any rules for attribution of liability to legal persons. As a consequence, save for the laundering of proceeds of crime, there were no criminal punishments for legal persons who participate in the offences specified by the UNCAC.[147] In 2011, Act No. 26,683 recognized the criminal liability of legal persons concerning the laundering of assets of criminal origin.[148] The same year Act No. 26,733 extended the criminal liability of legal persons to the offences of misuse of privileged information or securities manipulation in the negotiation, pricing, purchase, sale or liquidation of securities.[149] In 2017, the Argentine parliament passed the Criminal Liability of Legal Persons Act (CLLPA),[150] this law establishes the criminal liability regime applicable to private legal persons, whether of national or foreign capital, with or without state participation, for the following offences: (a) bribery and influence peddling, national and transnational;[151] (b) negotiations incompatible with the exercise of public functions; (c) extortion;[152] (d) illicit enrichment of officials and

[139] Ethics in the Exercise of Public Service Act, Pub. L. No. 25 (1999), para. 118; Pub. L. No. 26,857 (2013), arts. 1 and 2.
[140] Arg. Crim. Code (1999), art. 268(2).
[141] Arg. Crim. Code (1984), art. 173(7).
[142] Arg. Crim. Code (2011), art. 301.
[143] Arg. Crim. Code, Pub. L. No. 26,733 (2011), arts. 307-311.
[144] UNCAC (2003), art. 27(2).
[145] *Id.*, art. 25.
[146] UNCAC (2003), art. 26.
[147] UNCAC (2003), art. 23.
[148] Arg. Crim. Code (2011), arts. 303 and 304.
[149] Arg. Crim. Code (2011) arts. 307 and 311.
[150] Arg. Crim. Code, Pub. L. No. 27 (2017), para. 401.
[151] *Id.,* arts. 258 and 258-*bis*.
[152] *Id.*, art. 265.

employees;[153] (e) aggravated false balance sheets and reports.[154] This last regulation also incorporated in Argentine law the institution of "compliance" under the denomination of "Integrity Programs" (*Programas de Integridad*), its implementation, together with other legal requirements, operates as a cause of non-criminality.[155]

It is important to clarify that the conventions analyzed oblige the signatory States to criminalize participation and attempt, in the case of Argentine law both are rules of the general part applicable to all offences.[156] In the case of preparation, as a general rule, they are not punishable under Argentine law.

VII. Conclusion

Criminal harmonization can be thought of as a process for removing inconsistencies between different laws to prevent criminal law havens. International conventions that define new criminal offences, known as treaty crimes, are a part of the harmonization process.

We can see a series of constants (multiplicity of criminal actions, intentionality as a mental element, a predominance of offences of risk prevention, equalization between attempt and consummation, equalization between the different forms of intervention in the crime, and severity of penalties) that are characteristic features of these offences in the criminal definitions contained in international conventions. Even though these offences are the result of an international agreement, there is a clear preference for the common law system, particularly the US model, in the formulation of the offences.

States are required to criminalize particular conducts after signing the convention, which can be accomplished by the creation of new offences or the modification of existing ones. The conventions, on the other hand, provide for several degrees of commitments, ranging from mandatory measures to measures states must consider imposing to optional measures, to establish a greater degree of consensus.

As far as the content of treaty crimes is concerned, there is no obligation in domestic law to reproduce verbatim the definitions reached in the conventions. It is the task of each state to reconcile the obligation to criminalize with the constitutional provisions and fundamental principles guiding domestic law. Nothing prevents states

[153] *Id.*, arts. 268(1) and 268(2).
[154] *Id.*, art. 300-*bis*.
[155] Criminal Liability of Legal Persons Act, arts. 9 and art. 22, where the latter establishes: "the legal persons included in this regime may implement integrity programs consisting of a set of actions, mechanisms and internal procedures for the promotion of integrity, supervision and control, aimed at preventing, detecting and correcting irregularities and illegal acts covered by this law [...] As can be seen, the legislator has adopted the models of prevention adopted in comparative law, with the purpose that the company incorporates self-regulation mechanisms, tending to prevent the commission of crimes". The second part of the art. 22 states: "The Integrity Program required shall be related to the risks inherent to the activity that the legal entity carries out, its size and economic capacity, in accordance with the provisions of the regulations", which means that each company must adopt a program appropriate to its circumstances.
[156] Arg. Crim Code (1984), arts. 42-49.

from departing from the strict definition provided by the convention and, in line with their system of criminal-law imputation, redefining these concepts based on "result crimes" if this is following their system of criminal attribution.

There is no obligation in domestic law to duplicate verbatim the definitions achieved in the conventions when it comes to the subject of treaty crimes. Each state must balance the responsibility to criminalize with the constitutional guarantees and fundamental ideas that guide domestic law. Nothing prohibits states from departing from the convention's precise definition and, following their criminal system, redefining these elements as crimes of results if this is consistent with their system of criminal attribution.

Having analyzed Argentine criminal law, it is possible to see that the national legislator hardly departs from the definitions provided by the conventions. In some cases, it goes so far as to constitute a "copy & paste" of the international text. This type of activity entails several problems because the norm as it is conceived in the international text can become dysfunctional in domestic law if it is not compatible with its fundamental principles. A typical example of this type of situation occurs in the case of the crime of conspiracy of the NA, which, given its characteristics of advancing the punitive stages, is not in accordance with the constitutional postulates that guide the Argentine criminal system. In the case of corruption-related offences, two main factors explain the relative congruence between the criminal definitions provided by the UNCAC and Argentine legislation. First, there are multiple international conventions signed by Argentina on this matter. Second, many of the treaty crimes established in the UNCAC are not mandatory criminalization, but merely optional.