

Foreign judicial activity under the loupe in criminal proceedings: the most acute manifestation of conflicts of jurisdiction between legal anomaly and judicial self-restraint.

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“A trial which concerns verdicts rendered by various courts calls for a study of the organization of these courts as well as their manner of functioning” Dr. Egon Kubuschok, *Opening statements for all defendants, “Justice Trial”, United States v. Altstötter.*

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1. Premise

This paper is aimed at addressing the provocative issue of possible limits under international law barring the trial of foreign judges and prosecutors for their activity abroad.

The idea to investigate such limits is the result of the surprising discovery of an ongoing court case in Lecce - Italy in which a Mexican judge is accused of having neglected its duties and finally concurred with a certain number of police officers in causing the death, due to the lack of medical care, of an Italian national while detained in Mexico where he was on vacation. Such a found is characterized by certain legal abnormalities¹ which suffice to dissuade from further dealing with it and label the proceeding as “legal ephemera”.

Nevertheless the discovery of its existence raised the intriguing question whether the rarity of such situation is a matter of fact – and judges are less often involved in

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⌋ Such anomalies range from “dual standard” with national situations, *in absentia* trial, “mismatch” between charges of murder and jurisdictional link related to the domestically not implemented crime of torture, neglecting supervening *bis in idem* in the *locus commissi delicti* (reasonably justifying the need for a subsequent ministerial request to remove a procedural impediment under articles 11 of the Italian penal code and 346.3 of the Italian criminal procedure code). There seems also to be an issue under the *nulla poena sine lege* under “predictability” paradigm developed by the European Court of Human Rights which additionally seems to require, in respect of crimes committed abroad, the accused provided with good travel advice (at least were prosecution cannot be expected worldwide) and the accused in the instant case did not travel to Italy. On the other side the Italian doctrine has never fully exploited in respect of offences committed abroad, the principle of the exculpatory “invincible ignorance of penal law” developed by the Constitutional court in its decision of the 5 of March 1988, n. 364.

wrongdoing than other State officials - or such proceedings are rather prevented by international law. Or under a different perspective: is it possible under international law to advocate that foreign judicial activity cannot be the reason for a prosecution and trial?

Being unable to conduct a comprehensive sociological and criminological investigation about the dimension of judicial involvement with the commission of crimes, this paper focuses rather on possible legal reasons for the rarity of “trialing foreign judges” situations.

2. Defining the question

Judicial involvement in human rights violations varies from situations in which courts have an almost exclusive responsibility – for example in situations where freedom of expression is involved and family life is endangered as a matter of political persecution - to situations in which responsibility is shared with the executive, at least as matter of denial of justice and failure to repress².

The International Criminal Tribunal for the former Yugoslavia (*ICTY*) in its opinion in the *Tadic* case³ while outlining the features of the crime against humanity of “persecution”, after having quoted the decision of the Jerusalem district court in the *Eichmann* case⁴ affirmed that “*the crime of persecution encompasses a variety of acts, including, inter alia, those of a physical, economic or judicial nature, that violate an individual’s right to the equal enjoyment of his basic rights*”.

Trialing a judge or a prosecutor extraterritorially because of its judicial activity abroad is to be distinguished from other forms of “reactions” or “remedies” in respect of foreign decisions deemed to be the result of violations of human rights, instrumental to such violations or representing directly a violation of such rights or even intrinsically criminal.

This happens on a daily basis in judicial cooperation issues whereas the requested assistance or enforcement of foreign decision is denied, unless humanitarian considerations otherwise suggest to have sentenced persons transferred rather than jailed abroad.

Similarly, in situations in which the foreign decision would otherwise be taken into account under domestic law upon dedicated domestic proceedings or directly by courts of records, for purposes like recidivism, disqualifications, losses of rights, forfeiture, security measures and surveillance and other measures, foreign decisions may be

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On the situation in South Africa, See , R. CONIGLIO, *Methods of Judicial Decision-making and the Rule of Law: the Case of Apartheid South Africa*, in *Boston University International Law Journal*, 2009, 30, p. 496 ff.; D. DYZENHAUS, *Judging the Judges, Judging ourselves: Truth, Reconciliation and the Apartheid Legal Order*, Hart Publishing, 2003. For Argentina, See National Commission on the Disappearance of Persons [CONADEP] Report 1983 on the role of the Judiciary.

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1 Attorney General of Israel v. Eichmann, 36, in *International Law Reports* 5, 239 (1968).

deprived of such effects and consequences or not considered as a requirements for the subsequent enforcement of domestic law.

Decisions aimed at shielding individuals from their responsibility under international and domestic law may be deprived of so called “negative effects” (*ne bis in idem*) otherwise preventing a criminal proceeding (if the principle is established under domestic law)⁵.

Whilst denial of requests based upon human rights obligations and constitutional requirements, are the ordinary reaction to a foreign proceeding violating fundamental principles, only exceptionally such proceedings and decisions are legally qualified under the laws of the requested State as legally “void”⁶.

Foreign decisions civilian matters sometimes, when not directly relevant due to conflicts of laws and foreign laws applicable to the subject matter, are to a wider extent than decisions in criminal matters considered under domestic law directly enforceable. In the above referred situations, decisions may be challenged in proceedings (if established under domestic law) aimed at enforcing foreign decisions (*exequatur* proceedings) or in proceedings established in order to provide a remedy against foreign decisions. Foreign corrupt judicial practices have on their own led episodically to a restrictive interpretation of the so called *forum non conveniens* doctrine, privileging the assertion of otherwise “improper” jurisdiction, instead of remitting the parties to foreign courts. Further, practice shows that court decisions in civilian matters (which may well be instrumental to racial discrimination and other grave breaches through denial of civil rights, denial of justice as such and among others to targeted decisions on losses of parental rights and adoptions) may be challenged at the normative level or through court decisions.

Specific legal remedies may be established through proper legislation in respect of widespread situations as in case of *debellatio* and cessation of military occupation, reunifications and also national reconciliations processes in which certain judgments determining unwanted (or also unacceptable) consequences are *per tabulas* deprived of its legal effects, subject to specific remedies to include reopening of the case and removal of the decision, amnesties and pardon. Accordingly all decisions and sentences of the “*special tribunal for the defense of the State*” established during the fascist regime in Italy have been deprived of legal effects by decree n. 159 adopted in 1944 by the

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┘ This happens under international criminal procedure, for example, as a matter of “complementary” under the Rome Statute of the International Criminal Court, or as a corollary of the “primacy” of the ICTR and the ICTY. In inter-State relations, denial of negative effects of foreign decisions (once such effect is ordinarily recognized under domestic law, as there are no prescriptive norms of international law), is still a matter to be addressed *de lege ferenda*.

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┘ One of such rare examples is represented by a *FRG* court decision about the *GDR* “*Walheimer Prozesse*” - *Landgericht Berlin* decision of the 15 of March 1954, in 1 RHE AR 7/54. The declaration of the radical nullity of judgment ordinarily requires an evaluation based upon rules or principles to be found in a homogenous legal system. The above decision was adopted in a moment in which the court and the *FRG* more generally still felt some kind of parental responsibility towards the legal drift of courts in the *GDR*. At this purpose, see the nullity declaration *zu den Waldheimer Prozesse*, dated September 4, 1950 of the Ministry of justice of the *FRG*.

Lieutenant of Reign. Special provisions can be found in the law about the removal of decisions adopted under the Nazi regime⁷ and in the laws adopted subsequently to the German reunification for the rehabilitation of those convicted⁸.

The above mentioned remedies are aimed at operating “on the decision” by taking into consideration, declaring and stigmatizing procedural and substantial lacks and eventually human rights violations without naming those responsible and with an otherwise unimaginable levity in asserting the guilt but not naming those guilty.

Criminal proceedings against judges and prosecutors focuses on those charged with an offence as a consequence of a decision (when the decision is in direct causal connection with the event constituting the offence, and the mean by which the offence is committed), as a consequence of a miscarriage or denial of justice. Conceptually close to such measures are those measures adopted in respect of certain foreign proceeding not in order to prevent their enforcement, but to apply certain (non criminal) sanctions to those responsible as in the recent so called “*Magnitsky rule of law accountability act*”⁹.

3. Practice's overview

International practice shows that prosecution of foreign judges and prosecutors, when occurred, was mainly in connection to *core crimes* or widespread violation of human rights. Jurisdiction was mostly exercised based upon territoriality principle, by occupying forces or by national courts after a situation of occupation had come to an end.

Similarly the German post-reunification trials - which despite being based upon a constitutional process show some “conflict of laws” profile approximating it to international practice¹⁰ - are based upon the territoriality principle. It remains nevertheless questionable to what extent such practice may contribute to the subject matter of judicial criminal liability under international law and the comments in this paragraph are not aimed at addressing the troubled issue of the nature of the German reunification¹¹.

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⌋ *NS-AufhG*.

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⌋ *Str-RehaG*.

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⌋ H.R. 6156, definitively signed by United States President on 14 of December 2012. Subsequently, eleven among judges and prosecutors have been black-listed.

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⌋ Many of the principles outlined since the reunification agreements in the relevant statutes show an attitude towards the *nulla poena sine lege* and the *lex mitior* principle we would like to notice in purely international issues, but are rather based upon a strong reliance on constitutional principles and consequently embodied in par. 315 of the introductory law to the penal code (*Einführungsgesetz zum Strafgesetzbuch, EGStGB*).

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⌋ *See*: Treaty between the Federal Republic of Germany and the German Democratic Republic on the establishment of the German Unity, signed on August 31, 1990.

3.1 Trials upon activity of Japanese martial courts.

The first “trial upon a foreign trial” is perhaps represented by the trial held by the United States Military Commission, Shanghai, in the case of *Lieutenant General Sawada and three others*, decided on 15 April 1946¹². In this very interesting case, both command responsibility and judicial responsibility are at issue.

Defendants of different ranks were charged as authority convening a court martial, judges sitting in the said court and jailer for having, in violation of the laws and customs of war, respectively denied the status of prisoners of war, tried and sentenced through a Japanese court martial eight named members of U.S. Forces and executed the said sentence. The Japanese trial was conducted based on *ex post facto* “enemy airmen law”. All the U.S. airmen were convicted and three were executed whilst a fourth died during captivity. In the subsequent U.S. trial the military commission found all four Japanese officers guilty, even if it felt compelled by “unusual strong mitigating consideration” applicable to each of the accused in various degree.

Whilst the role of the highest in rank was defined in accordance with ordinary pattern for “command responsibility”, in determining the extent to which two of the defendants sitting as judges in the Japanese court martial were accessories to the war crime, the U.S. military commission held that the judge with legal training (*Yusei Wako*) was guilty of having “*had before him purported confessions of the American fliers and other evidence obtained and furnished by the military police headquarters in Tokyo ... he ... accepted the evidence without question and tried and adjudged the prisoners on the evidence which was false and fraudulent*”. However in voting the death penalty, the military commission held that he was “*obeying special instructions from his superiors*”, mitigating but not excluding responsibility. Perhaps the legal cultural background of the components of the U.S. military commission could explain the sensibility towards fair trial issues¹³ and adjudging on statements obtained under duress on one side, and the less severe finding in respect of the, in our view not less, outrageous “directed” sentencing. The other accused sitting as a judge in the Japanese court martial (*Ryuhei Okada*) was found guilty as he “*enjoyed freedom of conscience as to the guilt or innocence of the prisoners*” but “*he adjudged them guilty*”. Also he was obeying special instructions in voting the death penalty. The single aspects the mentioned defendants were found guilty pertain to the very core of the merits of the trial and despite being framed as accessory to the war crime (denial of prisoners of war status and the denial of a fair trial not qualified by a violation of the applicable procedural law), and may be evidence of the fact that no “privileged judicial discretion” was recognized in the said case.

Similar charges were brought in the *United States v. Isayama and 7 others case*, tried by a U.S. Military Commission in Shanghai, from the 1st to the 25th July 1946 for

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⌋ *Law Reports of Trial of War Criminals selected by the United Nations War Crimes Commission*, London, 1948, vol. V, p. 1 ff..

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⌋ The airmen were tried without defense counsel and without interpretation of the proceedings into English and were not afforded with opportunity to defend themselves.

permitting and participating in a false trial against fourteen U.S. airmen which were sentenced to death¹⁴. The highest in rank permitted directed, authorized, according to the charges, an “illegal unwarranted and unfair trial” against American prisoners of war. Those defendants acting as judges (*Sogiura* and *Fujikama*) were additionally accused for their “willful failure to perform their duties and failure and neglect to provide a fair trial”. The reference to the duties of judges is perhaps the most relevant development since the previous *Sawada* trial.

The Australian military court in *Rabaul* the 20th – 23rd March 1946, tried Sergeant Major *Shigeru Ohashi* and six other, for the execution of civilians, upon summary trials held under authority delegated to unit commanders to proceed on the spot not convening a court martial¹⁵. In the given case in which, under exceptional circumstances, soldiers exercised or better invoked judicial functions, the Australian military court made of the fair trial issue a pivotal questions. Nevertheless the vague judicial character of extraordinary summary trials by low ranked lay soldiers, resembles more those situations in which executions took place without prior trial, like in the so called *Sandrock case*¹⁶.

3.2 French trial upon German judicial activity in occupied zones.

On 3rd May 1946, the (French) “Permanent Military Tribunal in Strasbourg” decided the case France against *Wagner* and other six defendants¹⁷ responsible for the civil administration under German occupation, charged *inter alia* for the systematic recruitment of French citizens from Alsace to serve against France and abuse of legal process resulting in judicial murder. Two of the defendants vested with prosecutorial functions (*Luger* and *Semar*) and the former president of the German special court established in Strasbourg (*Huber*) were specifically charged, together with others as accomplices in premeditated murder as an ordinary offence under the French penal code.

The former judge was specifically charged for having pronounced objectionable death sentences trialed *in absentia*. He was allegedly prone, through the prosecutor, to the orders of Chief of civil administration (*Wagner*) concerning the trials. Allegations referred also to “judicial murder” *strictu senso* and specifically to death penalty inflicted in two specific court cases.

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⌋ *Law Reports of Trial of War Criminals selected by the United Nations War Crimes Commission*, London, 1948, vol. V, p. 1 ff.

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⌋ *Law Reports of Trial of War Criminals selected by the United Nations War Crimes Commission*, London, 1948, vol. V, case n. 25.

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⌋ British military court for the trial of war criminals, held at the courthouse at Almelo, Holland, 24 to 26 November 1945, Case n. 3 *Law Reports of Trial of War Criminals selected by the United Nations War crimes Commission*, London, 1948, V, p. 35.

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⌋ *Law Reports of Trial of War Criminals selected by the United Nations War Crimes Commission*, London, 1948.

The first one was the so called “*Witz case*” concerning the possession of arms by a juvenile. In the case the prosecution refrained from asking the death penalty, which was “ordered” by the head of the civil administration. The second one is known as the “*Ballersdorf case*”¹⁸ and was a case of group attempt to leave France. Apparently during and adjournment of the trial the judge and the prosecutor met with the head of the civilian administration and soon after 13 out of the 14 defendants were convicted to death and executed by the SS the following day. The trial against the fourteenth defendant which was a mentally insane juvenile was discontinued and the defendant, as asserted in response to a German inquiry, allegedly died in a concentration camp. Nevertheless, it appeared that he had been executed together with other accused.

One of the defendants formerly carrying out prosecutorial functions (*Luger*) was held to have acted upon superior order and although not an absolute defense, acquitted, whereas the trial against the former prosecutor was spilt as he had fled in U.S. occupied zone, and we found no information about it. Perhaps the perceived role of the prosecutor within the French legal system may have influenced to some extent the outcome of the trial.

The accused formerly discharging judicial functions (*Huber*) was deemed not having acted under superior orders and convicted *in absentia*.

Whilst the “*Witz case*” was essentially a matter of interference in the judicial process resulting in a politically driven decision, the “*Ballersdorf case*” appears to be – at least in reference to the charges brought against those formerly vested with prosecutorial and judicial functions – a matter of ordinary offenses under criminal law. An abuse of legal process was consequently construed as a matter of denial of fair trial and violations of the applicable (foreign) procedural law, which happened to be the law of the German occupant.

Nevertheless, the France against *Wagner* case doesn’t show any specific criminal charge for judicial misconduct or perversion of the course of justice as a “pre-requisite” for a conviction for murder. This is perhaps also a result of the fact that the case did not involve any conflict of laws issue and also a result of dogmatic difficulties, under continental criminal law, to justify the punishment of the violations of foreign law pertaining to the exercise of foreign official functions, to include judicial functions.

3.3 The “Justice case”

In the so called “Justice case”, *United States v. Altstötter*, one of the descending Nurnberg trials, decided the 4 of December 1947¹⁹, certain German jurists were charged with conspiracy, war crimes, crimes against humanity and participation in a criminal

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⌈ Prosecution concerned a group attempt to leave France and to reach Switzerland, the defendants were able to read the indictment and to communicate with the defense counsel when the trial had already started in flagrant violation of applicable German law, whilst two juveniles were not examined prior to the trial in order to establish if they could be held liable for the offense.

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⌈ *Trials of War Criminals Before the Nurnberg Military Tribunals under Control Council Law n. 10*, Vol. III, “*The Justice case*”, United States Government Printing Office, Washington 1951.

association, for having enacted and enforces draconian laws, perverted the German judicial system and interfered with judicial activity.

Apart from those accused holding high level positions in the German Ministry of justice, 8 of them have at least for some time discharged prosecutorial and judicial functions 1947²⁰. Some of the defendants in charge of ministerial functions were responsible of the review of court decisions and had in certain cases the power to order a retrial (so called “nullity plea” and “extraordinary objection”) and, in specific circumstances, were responsible for the confirmation of sentences.

Nevertheless, for purpose of the present paper we will focus on those accused of having discharged strictly prosecutorial and judicial functions in order to verify which are the “criminal markers” of a judicial activity under international law. This requires the additional premise that in the *Altstötter* and others case, the tribunal didn't consider any specific judgment as a “charge”, but rather as a piece of evidence of the guilt of the accused having concurred to it even if certain German decisions are specifically dealt in the opinion of the Tribunal and have been produced by the accused as exhibits.

This said, we can move to those references to specific court cases quoted in those parts of the opinion of the tribunal concerning the accused formerly vested with prosecutorial and judicial functions.

According to the tribunal, defendant *Lautz*, former Chief Prosecutor at the People’s court (*Volksgerichtshof*) retained specific responsibility for carrying out prosecutions for undermining the German defensive strength, high treason and treason and attempted escape from the territory of the Reich²¹. The opinion of the tribunal quotes also cases involving Poles attempting to escape from the territory of the Reich. In one of such cases, the so called “*Ledwon case*” a Pole was tried the 10 August 1942 for having tried to flee from the territory of the Reich into Switzerland and struck a custom officer attempting to stop him. The indictment asserts he was attempting to join the “Polish legion” in Switzerland. The tribunal observed that the accused permitted the charge of high treason of ridiculous nature, and affirmed the case to lay down the “*sinister subtlety of the Nazi procedure*”²² consisting in the framing of the charges, by adding the charge of high treason, in order to assert the jurisdiction of the People’s court, otherwise non competent

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⌋ In detail, defendants *Bernickel* and *Lautz* were respectively senior and chief prosecutor at the People’s court (*Volksgerichtshof*). The first was acquitted, the later sentenced to 10 years of imprisonment. *Nebelung* and *Petersen*, both acquitted, were respectively Chief justice at the fourth senate and lay judge in the first and in the special senate of the People’s court. *Oeschey*, sentenced to lifetime imprisonment was judge and the Chief justice at the Special court (*Sondergerichtshof*) in Nurnberg, whilst his predecessor in the position *Rothaug*, equally sentenced to imprisonment for lifetime, had subsequently discharged the duties of Senior public prosecutor at the People’s court. Finally *Joel*, Chief public prosecutor at *Hamm* was sentenced to 10 years imprisonment and *Cuhorst*, acquitted due to the destruction upon an allied air raid of the archives of the Special court in Stuttgart was Chief justice at the said court.

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⌋ *Ibid.*, p. 1120.

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⌋ *Ibid.*, p. 1123.

to trial under the sole law against Poles and Jews. The accused *Ledwon* was sentenced to death. The tribunal held that this and other similar cases based on what appears to be a “prosecutorial scheme” in order to add through the “polish legion element” a shadow of high treason on ordinary attempts to leave the territory of the Reich²³, the former Chief prosecutor made himself guilty of “*participating in the national program of racial extermination of Poles by means of the perversion of the law of high treason*”²⁴.

The parts of the opinion concerning the accused *Lautz* also refer to the call for the application by analogy of § 91 of the German penal code and the provision of high treason against the Reich in a situations in which a Polish national had, before the war, exposed a “racial German” (not a “German national” at the time of the conduct) to a serious detriment²⁵.

Specific circumstances of judicial misconduct are listed in the parts of the opinion related to the accused *Rothaug* as presiding judge of the Special court in Nurnberg. References were made to the “*Durka and Struss*” case in which two Polish girls aged 17 were expeditiously put on trial for having allegedly started a fire and sentenced to death under the ordinance against Poles and Jews. The military tribunal held that the defendant could not have established the facts from available evidence²⁶ and further that, as the age of the two girls was not disputed, they would have been prosecuted under the German Juvenile Act and would neither be subject to trial before a Special court nor to capital punishment²⁷. Whilst the first remark pertains to the core of judicial discretion in judicial

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└ *Ibid.*: see the declarations by witness *Brem*, in Pros. Ex. 79.

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└ In two further similar case quoted in the opinion of the Tribunal, three Poles were sentenced to death and the opinion of the People’s court and the indictment were included as exhibit for the prosecution (Respectively *Pros. Ex. 129* and *136*) and also the so called “*Kalicki case*” tried on indictment although non personally signed by the former Chief prosecutor *Lautz*, led to the application of the death penalty. Another accused, *Rothenberger* decided not to exercise the right of pardon in the last case (*ibid.*, p. 1124). In all this cases the equally unsubstantiated intent of the victims to join the Polish legion in Switzerland was the key for a trial by the People’s court and a charge for treason.

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└ *Ibid.*, p. 1125. Prosecution exhibit no. 347 was represented by a letter of the accused *Lautz* quoting preliminary proceedings which had come to his hands include proceeding “11J 8/42 *g vs. Golek*”. In the said proceeding, “the defendant, a former Polish national, of the Polish ethnic group, in the years of 1938 and 1939 in Poland handed over to the Polish authorities his friend, the ethnic German *Leo Hardt*, of Polish nationality, by accusing him wrongly of treason in favor of the Reich and by concealing in the latter's house a Polish army regulation book for the purpose of incriminating him. As a result of this action of *Golek*, *Hardt* was condemned to 6 years of imprisonment for espionage in favor of Germany”.

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└ *Ibid.*, p. 1147.

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└ In our view the Tribunal’s intent was to stigmatize the violations of all rules, to include those established under German law. The issue of juveniles doesn’t seem to have been specifically addressed in the prosecution of German judges and prosecutors as, also allied courts prosecuted juveniles without specific safeguards like in the trials of *Oenning* and *Nix* by a British Military Court in *Borken*, Germany,

fact finding, but under circumstances in which there was no real intent to establish the truth of the facts, the second remark doesn't seem as to really express the tribunals concern with the rights of juveniles – as such rights were established solely under German domestic laws and violated in the specific circumstance.

The opinion also quoted the *Lopata case* in which a Polish farmhand²⁸ was sentenced the 29 October 1942 to death under the ordinance against Poles and Jews by the Special courts for having made indecent advances to the wife of his employer. The special courts got involved following a nullity plea filed before the *Reich's* supreme court²⁹ for the quashing of the first conviction to imprisonment by the district court³⁰. The tribunal stigmatized strongly the alleged violation of the “*fundamental principles of justice that no man should be tried twice for the same offence*” and the remark seems to be slightly out of focus³¹. Despite the general character of what was perceived as a violation of *double jeopardy* the infamous character of review mechanisms emerges from its discriminatory use against non German accused³² and the anomalous “secret hearings” held by the *Reich's* supreme court.

The enforcement of discriminatory laws has also been asserted by the tribunal in respect of the *Kaminska and Wdowen case*, dealt as presiding judge by the accused *Oeshey*. The same accused, presiding a civil court martial, was also responsible in the “*Count Montgelas case*” in which a German citizen was charged, tried and sentenced to death for his insulting remarks against Hitler³³. In this appalling case the defense counsel

where the 22 of December 1945 the 15 years old Emil Nix was sentenced to death for having killed a British airmen.

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⌋ *Ibid.*, p. 1147, Pros. Ex. no. 186.

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⌋ Proceeding I StS 26/42, dated 14 July 1942, holding the decision by the local court defective in law.

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⌋ Dated 6 May 1942.

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The remark perhaps is the very reason of a long lasting misunderstanding about the alleged acceptance by “international courts” of the *double jeopardy* principle. The remarks were referred to a national procedure and strictly it was not a matter of double jeopardy (charges were unfortunately different) and conviction was not definitive. The prosecution referred to the same case by observing that “*the protection against double jeopardy, keystone of criminal procedure the world over, was abrogated and used for the murder of civilians of occupied countries*” *ibid.*, p. 87.

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⌋ According to the Prosecution, *ibid.*, p. 88, “*in reliance upon the decrees "legalizing" nullification and re-trial of criminal cases at the prosecution's behest, defendants were deprived of any assurance that a sentence of less than death was their final fate. Ministry of Justice officials, working through the prosecution, joined in this infliction of double jeopardy*”.

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was notified of the trial after the accused was already convicted and shot. The tribunal, while observing that prosecution for remarks hostile to the Nazi regime may not constitute a violation of Control Council Law n. 10, taken into account the circumstances and the manner in which the victim was brought to trial and tried and the fact that the trial was “*a last vengeful act of political persecution*”, held that the case would fall under the mentioned Control Council Law.

The responsibilities of the accused Rothaug are further defined with reference to the Katzenberger case, in which the ancient head of the Jewish community in Nurnberg was sentenced to death for the offence or “racial pollution” due to an intimate relation with a German lady, allegedly committed under special aggravating circumstances set out in provisions about “crimes committed during air raids” and “exploitation of state of war”³⁴. The case initially dealt by the ordinary criminal divisional court was moved to the Special court and a new indictment was filed. In order to preclude the examination of a witness for the defendant the new indictment was joined against her for perjury “contrary to established practice”³⁵. Prior to the trial, Rothaug as a judge stated to the medical expert in the case that the Katzenberger “*would be beheaded anyhow*”. He further “*tried with all his powers to encourage the witnesses to make incriminating statements against the defendants*”. The prosecutor was told by the Presiding judge that he expected the prosecution to ask for a death sentence and a term of imprisonment for the co-defendant. The opinion of the Special court explain the consideration which guided the decision and refer to a “*grave attack on the purity of German blood*”. The tribunal affirmed to have “*gone to some extent into the evidence of this case to show the nature of the proceedings and the animus*” of the defendant Rothaug which was the presiding judge, and hold that the case was an “*act of furtherance of the Nazi program to prosecute and exterminate Jews*”³⁶ and further that the “*said trials lacked the essential elements of legality*” and “*in*

‡ *Ibid.*, p. 1163.

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‡ The decision in this case was listed as Pros. Ex. no. 152.

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‡ *Ibid.*, p. 1152.

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‡ *Ibid.*, Pros. Ex. no. 153. Interestingly, the two German associate judges sitting with the accused Rothaug in the Special court in the *Katzenberger case* were not subsequently prosecuted by German authorities. The prosecution office in Nurnberg decided the 18 July 1961 not to drop any charge against *Ferber* and *Hofman*. After several attempt by the Ministry of justice of the Land Bayern, the finally the district court sentenced both accused to a term of imprisonment of two years for manslaughter under mitigating circumstance, asserting a sexual relationship between *Katzenberger* and *Sailer* as possible and without acknowledging anti-Semitic motives. The conviction was quashed the by the *Bundesgerichtshof*, decision of 21.07.1970, in *Neue Juristische Wochenschrift*, 1971, c. 571. Once sent back to the district court, the *Landegericht* the proceeding was several times delayed until it was definitively stayed in 1976 due to the incapacity of the accused to attend trial. See, H. Kramer: *Richter vor Gericht*. In: *Nationalsozialistische Sondergerichtsbarkeit*, Vol. 15 *Schriftenreihe Juristische Zeitgeschichte Nordrhein-Westfalen*. 2007, p. 137 ff.

spite of legal sophistries which [were] employed [the special court] was merely an instrument in the program of the leaders of the Nazi State”.

3.4 Subsequent German proceedings

Without any intention to engage in the debate about how and to what extent Germany after the second world war reacted to crimes committed by judges and prosecutors under the former Nazi regime, in our view such practice is of international character exclusively as long as such proceedings were conducted under the applicability of the Control Council Law n. 10 which was in force until the 31st of August 1951, and unfortunately there is no practice.

An exception is perhaps represented by the decision of the *Landgericht Braunschweig* of the 21.08.1950 not to drop the trial against the components of a Special court responsible of the conviction and sentencing to death of a Jewish defendant. The court held that the ascertainment of decisional dynamics among the three judges which composed the Special courts and even the questioning in this sense “*would represent an inadmissible intrusion in the sphere of the professional secrecy protected by the law*”³⁷. Accordingly it would have been impossible to establish which of the judges had agree to the decision. The *Oberlandesgericht* rejected the motion for the review of the decision of 12 July 1951.

It is nevertheless worth observing that it was in this historic period that the famous case of the “grudge informant” – still agitating the infinite debate about the conflict between law and justice happened to be decided³⁸. As it is known the informant was convicted and sentenced for having set in motion a judicial proceeding in which judges, which were never punished for, under the absolute compulsion of a positivist *raptus* pulled the trigger of a deadly law.

All subsequent proceedings were based upon violations of German law and specifically the offence of “Perverting the course of justice” (*Rechtsbeugung*)³⁹ whose ascertainment needed to be preliminary or contextual to other offences (e.g. manslaughter rather than murder and deprivation of liberty) the accused was charged with.

3.5 Prosecution of GDR judges and Prosecutors

Almost 30 years before the German reunification, in 1960 the *Bundegerichtshof* confronted the so called *Oehler* case, with the issue of judicial independence of a former judge in the Soviet occupied zone (5 StR 473/59) fled in the Federal Republic of Germany (*FRG*) and accused of having sentenced a convicted person to a term of

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⌋ “*Diese Feststellung und schon eine Befragung der Beschuldigten in diese Richtung würde ein unzulässiges Eindringen in das gesetzlich geschützte Berufsgeheimnis bedeuten.*“

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⌋ *Oberlandesgericht Bamberg in Juristenzeitung 1950, 207 ff.*

39

⌋ In particular, § 339 of the German criminal code reads as follows: “*A judge, another public official or an arbitrator who in conducting or deciding a legal matter perverts the course of justice for the benefit or to the detriment of a party shall be liable to imprisonment from one to five years*”. On the issue, D. QUASTEN, *Die Judikatur des Bundesgerichtshofs zur Rechtsbeugung im NS-Staat und in der DDR*, Verlag Duncker & Humblot, Berlin 2003.

imprisonment which was considered to be “unacceptably disproportioned to the gravity of the offence”⁴⁰.

The subsequent German reunification appears us to be characterized - at least in respect of transitional provisions for the application of criminal law, more than in respect of other branches of law - by the adoption of those kinds of safeguards which are normally to be found in international processes. Whereas the above quoted pre-reunification cases were judged at a stage in which *FRG* substantive law had not yet differentiated too much from *GDR* laws, in judging later conduct, the courts had to confront with the issue of double criminal liability and subsequently to apply the *lex mitior*; but also to interpret the statutes of the *GDR* whose they were accused to have misapplied.

At this purpose it has been affirmed that, as *GDR* judgments were adopted within a different legal system, the underlying statutes were to be interpreted in accordance with the principles and the jurisprudence as well as taking into considerations instructions and directions eventually issued for the application of the said statutes, unless they were to be disregarded as gravely in breach un fundamental principles and values⁴¹.

Several criminal proceedings have been started and most of them discontinued without filing of charges by the prosecution. Pattern for criminal responsibility have been developed by the German federal court which has identified requirements for criminal liability in the violation, with knowledge, of statutes of the *GDR* (*Überdehnung des Straftatbestandes* in respect of penal law, otherwise defined as *Offensichtliches Unrecht*), and specifically in the exceeding the statutory framework, the intolerable disproportion between the gravity of the fact and the sentence, as well as in the arbitrary exploitation of legal lacunas and in the violation of universally recognized human rights, in such a gross way to fulfill the requirements of arbitrariness (*Willkür*). The Constitutional court (*Bundesverfassungsgericht*) adopted a slightly different definition which was no longer related with the arbitrariness, but with the intolerable nature of the Human rights violations⁴².

Subsequently the German Federal Court (*Bundesgerichtshof*) further restricted the punishment in respect of those cases in which judges and prosecutors had exceeded in the application of statutory provisions, excluding the "intent" to pervert the course of justice, in those cases in which the application of the relevant laws was not as such a

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┐ The lower court, had held that the former *Oberrichter* in the *GDR* lacked technically the quality of a judge as he was not afforded with judicial independence and was subject to directions of its superiors. On appeal the *Bundesgerichtshof* pointed out that the offence of *Rechtsbeugung* (perverting the course of justice) may well be committed by an official and does not require responsible for the enforcement of the law.

41

In the above sense, *see* the decisions of the *Bundesgerichtshof* in *BGHSt*, 40, 40ff., 40, 177ff., clarifying that in interpreting the statutes of the *GDR* the criteria to be followed are those of the *GDR* and not those *FRG*.

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┐ Decision of April 7th 1998, in *Neue Justiz*, 1998, p. 314 ff.

grotesque departure from the law. Even evidently wrong charges against accused have been justified as within the borders of possible interpretation of the law⁴³.

This further development closes the distances in respect of purely domestic proceedings in which a wrong application of the law does not fulfill as such the requirements of a punishable offence. Further the extent to which human rights violations have been taken into account has not shifted from an almost exclusive focus on the right to life, in order to include those cases in which the purpose of imprisonment was to be considered an arbitrary deprivation of liberty.

This patterns were used to distinguish criminal conduct from the otherwise non punishable application of political and “unjust” criminal laws” of the *GDR*. Accordingly, the sentencing to death penalty of political opponents in the absence of a statutory sentencing framework⁴⁴ was held to fulfill the above mentioned requirement for punishment, as the conduct took place after the 1948 Universal Human Rights Declaration⁴⁵.

At the opposite, the use of criminal laws in order to carry out economic reforms through the application of criminal sanctions (forfeiture) to an hotel owner found guilty of the possession of coal, foodstuff and so on in order to expropriate them of their belongings, in the framework of an spoliation plot vested as criminal inquiry named “*Aktion Rose*” was deemed as such not to violate formal *GDR* laws, whilst the sentencing to imprisonment jointly with the forfeiture was judged to fulfill the requirements for a criminal deprivation of liberty and a perverting of the course of justice as such punishment were disproportionate in respect of the conduct of the accused⁴⁶.

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⌈ Accordingly the judges having sentenced a citizen to imprisonment for one year and six months for having exposed a writing asserting that *GDR* borders had nothing to do with a contribution to peace, under the offence of having unduly influenced the activity of State of social bodies, were held not punishable by the *Bundesgerichtshof*, in *Neue Juristische Wochenschrift*, 1995, p.67, which denied the judges has internationally misapplied a criminal provisions in order to arbitrary deprive of his liberty the individual. In a further case the *Bundesgerichtshof* acquitted a former prosecutor which had charged a citizen with incitement against the State, as freedom of opinion and expression was ultimately protected in the *GDR* only in exceptional circumstances. *ibid.*, 1995, p. 3324.

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⌈ *Bundesgerichtshof (BGH)*, decision dated May 5th 1998, in *Juristenzeitung*, 1998, p. 910.

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⌈ At this purpose, *see* the decision of the *BVerfG* dated May 12, 1998, in *Neue Justiz*, 1998, p. 417ff., rejecting the individual claim for the violation of Constitutional rights (*Verfassungsklage*). The accused’s appeal against the conviction jointly for “manslaughter” and “perverting the course of justice” and the sentencing to 3 years and 6 months imprisonment, had been previously rejected by the *Bundesgerichtshof (BGH)*, in *Neue Justiz*, 1996, p. 154.

46

⌈ *Bundesgerichtshof*, decision of July, 9th 1998 (in *Juristische Rundschau*, 2000, p. 246 ff.), holding that the accused, which had at the time of the conduct prosecutorial functions, convicted in first instance was to be discharged as he had acted in accordance with laws enacted at the time in the *GDR*. The court also held that if such statutes from an actual viewpoint raise human rights concerns, in the context of a post war economy they did not contrast with a “supra - positive” law. Nevertheless the court held that he was guilty as co-author as the judges convicting hotel owner with the aim to expropriate them exceeded the

Similarly, the application of objectively unjust, and incompatible with the principle of a State based upon the rule of law, provisions on the protection of the State were not deemed to fulfill, if taken alone, the requirements of the offence of the perversion of the course of justice and a further requirements was to be found in the exceeding of such provisions⁴⁷.

The whole jurisprudence of German courts in respect of offences committed under a different legal system by GDR judges and prosecutors has undergone an early and deep critique as to the alleged application of "double standards" in respect of other categories of offences committed under the former "regime" in the GDR⁴⁸.

Last reference is mainly to "border guards" held liable for so called "wall shootings" as they were assumed to be obliged (and able) to evaluate, assess and disregard GDR which were grossly illegal and in breach of human rights obligations of the GDR, whilst judges in much more advantageous position (from a cultural view point and due to less time constraints) for a scrutiny of the statutes they were going to apply, apparently benefitted from a positivist approach which is evidently more rooted in judicial than in military and police activity. The restrictive interpretation was also argued with reference to the need to protect the trust judges had in the laws they were applying.⁴⁹

3.6 The French proceedings in the "Borrel Affaire".

Within the various proceedings in France about the circumstances of the death of judge Borrel, technical advisor detached to the ministry of justice of Djibouti⁵⁰, Mr.

legal framework for the sentencing. One of the underlying issues was represented by the difficulties to assert that a perversion of the course of justice can be committed by a prosecutor, as such offence requires that a "decision" has been taken. This makes it easier in respect of a prosecutorial choice to discontinue a proceeding rather than in respect of a dropping of charges and those request which are submitted to the judge. The above mentioned decision considers the dropping of charges as participation in the subsequent offence by the judges which is comprehensible in principle, but questionable when the perversion of the course of the justice is argued based upon an arbitrary and intolerable disproportion between the offence and the sentence. Accordingly, it has been asserted that the dropping of charges may eventually be considered an incitement to pervert the course of the justice, but not as "aiding" the judges in their offence. At this purpose, see the observations on the decision by D. Mütter, *ibid*, p. 249 ff.

47

┆ *Bundesgerichtshof*, decision of May 5th, 1998, in *Juristenzeitung*, 1998, p. 910 ff., with observations by F. C. Schroeder.

48

┆ Reference is to U. HOMAN, *Die Rechtsbeugungsprozesse gegen ehemalige DDR - Richter und Staatsanwälte vor dem Bundesgerichtshof*, in *Kritische Justiz*, 1996, p. 494 ff.

49

┆ *Bundesgerichtshof in Neue Juristische Wochenschrift*, 1995, p. 3326.

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┆ Judge Borrel was found dead in Djibouti on October 19, 1995. Djibouti authorities – the *Procureur de la République* – opened investigations the February 28, 1996. The investigations were closed December 7, 2003 concluding that it was suicide. The „first set“ of French proceedings into the circumstances of the death of Judge Borrel started in *Toulouse* on December 7, 1995. The widow and heirs of Judge Borrel enjoined as “civil parties” (*partie civile*). By judgment dated 21 June 2000, in which it was held that the reconstruction of events carried out in Djibouti had been unlawful in the absence of the civil

Djama Souleiman Ali, *Procureur de la Republique* at the material time and subsequently *Procureur général*, and the Head of the Intelligence of Djibouti, were summoned, accused and convicted *in absentia* by the *chambre correctionnelle* of the *Versailles Tribunal de grande instance* on 27 of March 2008⁵¹, for subornation of perjury for having executed various forms of pressure upon a witness in order to make him reconsider previous statements⁵². "European Arrest Warrants" had already been issued on 27th September 2006.

The question of the functional immunity of the defendant was raised by Djibouti within the contentious case instituted in front of the International Court of Justice in order to determine and declare that France had violated its obligations to provide mutual assistance in criminal matters and also the immunities and prerogatives of Heads of State⁵³. The contention that the accused was afforded with immunity, later defined as "functional immunity", was rejected by the ICJ as such immunity was part of the original application of Djibouti and the acceptance of the jurisdiction of the Court by France⁵⁴. Interestingly, the defendant vested with prosecutorial functions was among those representing Djibouti in front the International Court of Justice. The subornation took allegedly place in Brussels in 2002 and perhaps also at the end of the previous year⁵⁵ in a

parties, the *Chambre d'accusation* of the Paris Court of Appeal removed the case from the investigating judges and transferred it to another investigating judge at the Paris *Tribunal de grande instance*. The French authorities sent several requests for judicial assistance to the authorities of Djibouti and *vice versa*. Files on the Borrel case were classified in France. A comprehensive reconstruction of the case can be found in the International Court of Justice, judgment of the 4th of June 2008, *Certain questions of mutual assistance in criminal matters* (Djibouti v. France), §§21 ff.

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⌋ Retrieved from <http://www.syndicat-magistrature.org/Affaire-BORREL-subornation-de.html> the 18th of May 2013..

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⌋ Statements were apparently those made by a former officer in the Djiboutian presidential guard, according to which several Djiboutian nationals, including the later President of the Republic of Djibouti, at the time Principal Private Secretary to the then President, were implicated in the murder of judge Borrel. The above testimony was challenged by Mr. Ali Abdillahi Iftin, who in 1995 was the commander of the Djiboutian presidential guard, and who withdrew his statements in 2004.

53

⌋ International Court of Justice, judgment of the 4th of June 2008, *Certain questions of mutual assistance in criminal matters*.

54

⌋ In § 200 of its judgement the Court observed "*observes that Djibouti did not in its Application of 9 January 2006 ask the Court to find that France lacked jurisdiction as regards the acts alleged to have been engaged in by Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh in Brussels and Djibouti respectively. That being so, such a contention cannot fall within the scope of what France, in its letter to the Court dated 25 July 2006, has accepted shall be determined by the Court. Accordingly, the Court makes no observation on the contention of each of the Parties on this matter.*"

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timeframe in which investigations by the defendant in Djibouti were still ongoing. Jurisdiction was asserted in the French proceeding as the subornation was aimed at mislead, through the creation of a material document (a *project* of statements to be given), a criminal proceeding in France where the effects were to take place. Perhaps the most significant part of the detailed French judgment pertains to the ascertained lack of justification of the defendant's trip to Brussels with an "official mission"⁵⁶ and more specifically with the investigations which were still pending in Djibouti at the time; nor the official, if not judicial, character of the activity is any further detailed in the written and oral proceeds of the case in front of the International Court of Justice.

3.7 Current practice on non criminal sanctions

Even if not related with an assertion of criminal jurisdiction, the original list of the individuals targeted with sanctions under the "*Magnitsky rule of law accountability act*" provides some highlight on the extent of an international scrutiny over judicial activity. Among the reasons initially considered against the involved judges and prosecutors there are the upholding of arrest and detention without trial, the prolonging of detention upon falsified evidence, the acceptance as true of evidence submitted by security service clearly disproved by other evidence not taken into consideration, the rejection of evidence submitted by the defense counsel in relations to the absence of reasons for the committal to judicial custody, the denial of medical care while in prison, the denial of compliant about gross human rights violations, the harassment of lawyers and in respect o prosecutors, the opening of a "retaliatory prosecution".

The said U.S. Act, determined a Russia response - the *Yakovlev Act* - by which, besides U.S. officials involved in the detention in Guantanamo, certain judicial and law enforcement people allegedly involved in the violation of the rights of Russian citizens were targeted with sanctions.

4. Jurisdiction over foreign judges and prosecutors in relation to their judicial activity under general principles

The prohibition to interfere with another State's internal affairs defines in general terms, the external boundaries of the exercise of extraterritorial jurisdiction in respect of "official acts" adopted in another State. The said prohibition is increasingly questioned in respect of the eventually internationally illegal character of the said "affairs" and the exception is not linked to the executive or judicial character of the activity.

Judicial activity is essentially territorial, as judges sit and adjudicate almost exclusively within the territory of their State (event if the effects of their activity and decisions may well trespass State borders) and extraterritorial activity is only exceptionally allowed based upon consent of the territorial State. Examples may be found in situations of judicial cooperation when a foreign court is authorized to operate on such

⁷ Mr. Djama Souleiman Ali, *Procureur de la République* of Djibouti, and accused in the French proceeding apparently travelled to Brussels at the beginning of 2002 and possibly in December 2001, in order to persuade the former presidential guard, mentioned in *footnote* n. 49, in the presence of his lawyer, to withdraw the evidence he was to give.

territory under *Status of Forces Agreements (SOFAs)* or special arrangements for the holding of a trial abroad or when evidence is taken abroad or joint investigations team are set up and also when the activity was not authorized.

In respect of unauthorized activity within the territory of another State, the “quasi case” of the Italian Parliamentary inquiry about the “Telekom Serbia Affaire” may be quoted. Under article 82 of the Italian Constitution, Parliamentary inquiry commissions are afforded with the same powers and limits judicial authorities are. During a cross-border activity aimed at the taking of documentary evidence in Lugano, Switzerland, neglecting any request for judicial assistance to the Swiss authorities, a delegation composed by six individuals, among those two “Commissioners” and two escorting police officers, were temporarily taken into custody and subsequently a probe was opened for “prohibited activities at the benefit of a foreign State” under article 271 of the Swiss penal code⁵⁷. The politically embarrassing incident, apart from gossips about ingenuity and wrong legal advice received, didn’t have a real judicial follow up.

Situations in which mutual assistance in criminal matters may determine prosecution of those involved, vested with judicial activities in the requesting State are to a certain extent highlighted in an English “precursory” contempt of court case against Australian enforcement officers accused of having broken an undertaking not to transmit - pending an appeal against the warrant granted upon request for mutual assistance – the evidence gathered to the prosecuting authorities in Australia⁵⁸. As one of the enforcement officers happened to be granted with diplomatic immunity and accredited at the High Commission of Australia, the case is best known for its implications in respect of immunity of foreign officials. Nevertheless the case opens new scenarios about implications of undertakings about the use and limits to the use of evidence obtained upon mutual assistance in criminal matters.

Apart from the above situations, judicial activity may candidate for a privileged application of the prohibition of foreign interference, to include judicial proceedings. The international practice mentioned in the previous paragraph shows that most significant cases were judged “territorially” under military occupation regime or at the end of such occupation by the State previously occupied. Even the more recent case in the *Borrel Affaire*, whereas the conduct took place in a third State, jurisdiction was asserted based upon the territoriality principle and solely the Italian ongoing proceeding mentioned in the present article's premise is based upon the personality principle.

Under principles applicable to functional immunity of officials of a foreign State, perhaps conduct taking place while exercising judicial functions are less probable to be regarded as outside and beyond the breaking point of the said immunities when the conduct is no longer attributable to the State.

Court practice in respect of “judicial immunity” distinguishes for this purpose decisions “in excess of jurisdiction” and decision “in the absence of jurisdiction” whereas

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⌋ [Http://www.swissinfo.ch/ger/Verstimmung_vor_italienischem_Staatsbesuch.html?cid=3302854](http://www.swissinfo.ch/ger/Verstimmung_vor_italienischem_Staatsbesuch.html?cid=3302854) retrieved July 14, 2013.

58

⌋ *Propend Finance Pty and Others v. Sing and Others*, EWCA Civ. [1997] 1433.

a much more generous view is generally expressed in respect of superior courts taking into account implied powers often recognized to such courts. Criminal and civil procedures acknowledge mostly the existence of certain procedural pathologies which deprive certain acts of their attitude as judicial acts and which are far beyond codified irregularities and nullity. As it will be observed in respect of “judicial immunity”, restrictive approaches distinguish acts and judgments in excess and without jurisdiction. Nevertheless, it doesn't seem to us that in functional immunity should be metered on categories of procedural pathologies, to include the voidness theory, which are far from being uniformly expressed in different legal systems and further a response to the excessive rigidity of those systems (and only those) in which the *res iudicata* and the definitive character of judgments bar otherwise subsequent claims based upon the nullity of the decision.

If one accepts those theories restricting functional immunity to internationally lawful activities, then it must be admitted that judicial activity is assisted, to some extent, by a presumption of legitimacy.

From a different perspective, if the very purpose of functional immunity of foreign State's officials is to be found in the respect for the concerned State's internal or constitutional organization, then judicial activity is perhaps the most organized and “structured” official activity within each State.

It is nevertheless worth observing that in the *Djibouti v. France* case decided by the International Court of Justice⁵⁹, the functional immunity claim for the State official vested with prosecutorial function wasn't in any way distinguished from that of the other official discharging its functions in the *intelligence* and no special circumstances were argued by the applicant State.

4.1 Do judicial activities deserve more international comity?.

International comity which comprises, in the domestic systems, legally non-binding international practices based upon the principle of reciprocity according to which States act in a way not demeaning foreign States, acts and decisions, has nowadays a great importance in orienting court practice when foreign judicial decisions and judgments are at issue. Reference to international comity has been made for purpose of this paper, to the extent that despite emphasis on the non-binding nature of the practice, the “doctrine of international comity” has become an international law canon applied mainly by U.S. Courts in respect of transnational cases⁶⁰, encouraging deference towards foreign laws and decisions⁶¹.

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⌋ International Court of Justice, judgment of the 4th of June 2008, *Certain questions of mutual assistance in criminal matters*.

60

⌋ At this purpose, See J. STORY, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies: And Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments*, Volume 1, 1883, p. ,122, recently quoted by D.E. CHILDRESS, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, *UC Davis Law Review*, 2010, p. 11ff..

61

Accordingly, there were no reasons to refer to international comity within general principles except for the fact that it is under the said practice that a special gradient of deference towards foreign judicial activity is shown.

As stated in an ancient English opinion, recalled in respect of comity, natural laws (evidently intending the Law of Nations) requires the “*courts of this country to give credit to those of another for the inclination and power to do justice, but not if that presumption is proved to be ill founded in that transaction which is the subject of it*”⁶². Under the same doctrine a distinction has been drawn, between a suit on a foreign judgment in favor of the plaintiff against the defendant, and a suit to recover money which the plaintiff had been compelled to pay under a judgment abroad⁶³.

It can also be argued that application of what has been distinguished from international comity as “comity of courts” has a center-weight in the subject matter of recognition and reciprocal delimitation of jurisdiction *vis à vis* the jurisdiction of another State and that foreign judicial proceedings deserve ... more comity than foreign executive activities. Accordingly, patterns for international comity are sometimes expressed in reference to the status of the State in whose *forum* a claim is brought with reference to the duties of a “*Responsible participant in an international system of justice*”⁶⁴.

International comity is mainly invoked in civil matters and despite some recent attempt to exploit its implications in respect of foreign amnesty laws⁶⁵, doesn't *per se* represent a bar to the exercise of criminal jurisdiction in respect of conduct related with foreign judicial activity if such jurisdiction is established in statutes.

⌋ In the subject matter of *subpoenas* and foreign blocking statutes and decisions, see the U.S. Supreme Court's decision in *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 482 U.S. 522 (1987).

62

⌋ Lord Chancellor Eldon in *Wright v. Simpson* (1802), 6 Ves Jun 714, quoted in U.S. Supreme Court, *Hilton v. Guyot*, 159 U.S. 113 (1895), at 157.

63

⌋ Lord Ellenborough, in *Tarleton v. Tarleton* (1815), stating that: “*I thought that I did not sit at nisi prius to try a writ of error in this case upon the proceedings in the court abroad. The defendant had notice of the proceedings, and should have appeared and made his defense. The plaintiff, by this neglect, has been obliged to pay the money in order to avoid a sequestration*”.

64

⌋ At this purpose, see, U.S. Court of Appeal for the second Circuit, *Chevron v. Naranjo*, 11-1050L, asserting that a district court cannot issue an injunction that preserves its ability to determine whether a foreign judgment was procured through alleged fraud by U.S. lawyers, whose conduct occurred, at least in part, in this country following the dismissal of an earlier U.S. lawsuit.

65

⌋ C. BROECKER, *The Clash of Obligations: Exercising Extraterritorial Jurisdiction in Conformance with Transitional Justice*, in *Loyola of Los Angeles International and Comparative Law Review*, 2009, p. 435ff.

Considerations about “comity” apply fully to the “mutual recognition of decisions” within the European Union which – even if expressing a much higher degree of acceptance and assimilation of foreign decisions, isn’t a bar to prosecution.

4.2 International corruption as evidence of a “judges exception”?

International corruption is since the mid '90s of the last century a matter of major international concern, as an impediment to economic development, and judicial corruption represented a threat to the establishment of the rule of law and the weakening of safeguards against Human rights violations.

The so called "business clause" in the definition of what active and passive corruption may suggest that the provisions of certain Conventions do not cover "judicial corruption", creating some kind of “sanctuary” those vested with judicial activity could benefit from.

The OECD *Convention on combating bribery of Foreign Public Officials in International Business Transactions*⁶⁶, addresses - as made explicit by its title - solely corruption in order to obtain or retain business (art. 1). Similarly the *United Nations Convention against corruption, (UNCAC)*⁶⁷, defines active corruption as intended "to obtain or retain business or other undue advantage in relations to the conduct of business" despite the fact that the definition of public officials include holders of a judicial office⁶⁸. The Council of Europe's *Code of conduct for public officials* does not apply (art. 1, paragraph 4) to "representatives, members of the government and holders of judicial office"; the exclusion may nevertheless be explained taking into account the fact that judicial duties are not easily comparable with general duties of public officials.

Under a different perspective, cautions in jurisdictional matters, are expressed by the *UNCAC* establishing the duty of States to carry out their obligations under the Convention by respecting the “principle of sovereign equality and territorial integrity of States” (art. 4, paragraph 1). A similar obligation can be found in the Palermo Convention against transnational crime, referring expressively to the “principle of non-intervention in domestic affairs of another State”. The *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, states that actions in furtherance of the *Declaration* shall respect the sovereignty and territorial jurisdiction of the State concerned (n. 11) and further that "that actions taken by them to establish jurisdiction over acts of bribery of foreign public officials in international commercial transactions shall be consistent with the principles of international law regarding the extraterritorial application of a State's laws" (n. 12).

66

⌋ Adopted by the Organization for Economic Cooperation and Development (OECD) Negotiating Conference on 21 November 1997.

67

⌋ Adopted by the United Nations General Assembly with resolution 58/4.

68

⌋ UNCAC, art. 2, lett. b, Council of Europe Criminal Law Convention on Corruption, art. 1, lett. a, b; OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, art. 1, paragraph 4, lett. a.

Jurisdictional safeguards are to be found in terms of clear statements that the Conventions do not entitle any State to undertake in the territory of another State the exercise of jurisdiction and functions which are reserved exclusively to the authorities of that State under its domestic law (*UNCAC*, art. 4, paragraph 2). What is prevented is accordingly the "long arm of jurisdiction" and so called acts of direct jurisdiction on the territory of another State.

Under the provision of article 42, paragraph 2, of the *UNCAC* States, may besides their obligation to establish jurisdiction under the territoriality principle, to establish as criteria the commission of the offense by one of its nationals (lett. b), but also the active personality principle and also the commission of the offence against one of its nationals (lett. a) or the State party (lett. d).

The Council of Europe Criminal Law Convention against Corruption⁶⁹ and in the Council of the European Union Convention on the fight against Corruption involving officials of the European Community or officials of Member States of the European Union⁷⁰, both requiring Member States (respectively articles 17 and 7) to establish, besides the territoriality principle, the active personality principle in respect of conduct abroad of citizens reasonably engaged in active corruption and also in respect of conduct of its officials, granting organic jurisdiction in situations of "passive corruption" of public officials, but not exclusively and in any case in a way addressing jurisdiction in general terms and not specifically in reference to judges. The first of the above mentioned Conventions, as well as the African Union Convention tolerate extension of jurisdiction under domestic law (respectively articles 17 and 5).

Interestingly, broad jurisdictional links are established in an ambit in which immunity official immunities of foreign officials seems not to be a matter. Immunities are nevertheless recalled in the said context by *considerando* n. 7 of the *UNCAC* in respect of bribery of officials of international organizations, to include the United Nations. The *African Union Convention on Preventing and Combating Corruption*⁷¹ (which does not expressly include holders of judicial offices amongst public officials) seems to disjoin corruption and immunities by stating that immunities "*granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials*" (art. 7, paragraph 5). In the same perspective article 30, paragraph 2, of *UNCAC* requires each State party to make a balance between immunities and judicial privileges of their officials under domestic law, and the need to investigate and prosecute corruption.

69

⌈ Done at Strasbourg on January 27, 1999, ETS n. 173.

70

⌈ Adopted by the Council of the European Union, May 26 1997, in *Official Journal* C 195 , p. 2 ff.

71

⌈ Adopted by the 2nd Ordinary Session of the Assembly of the African Union, Maputo, 11 July 2003.

Finally, article 11, of the said Convention recalls "judicial independence" as a value to take in consideration in the adoption of measures strengthening integrity and preventing corruption.

In our knowledge there is not yet practice about exercise of criminal jurisdiction in respect of passive foreign judicial corruption. Nevertheless, the impressive legal framework about international corruption, once disjoined from the strict link to international business transactions, isn't evidence for any special treatment for judicial corruption. From a pragmatic point of view, States has shown reluctant to extend their criminal jurisdiction over "passive corruption" of foreign officials, even in specific legal cooperation contexts and only exceptionally criminal provisions extend to foreign officials taking bribes⁷². When this happens, jurisdiction is conditioned to territoriality of the conduct, or (subsequent) presence of the author of the offence in the territory, and further subject to coordination mechanisms.

Recently a investigation in the United States led to the arrest and extradition from Colombia of an administrative assistant within the Attorney General's Office in Bogota allegedly accepting bribes from a former prosecutor and then defense counsel in order to obtain access to classified U.S. Law Enforcement information, to include requests for extradition of narcotic traffickers⁷³. The investigations moved not from the perspective of an attempt to compromise the judicial process by "obstructing justice" in the United States and thus of substantial impact on investigations in the said Country⁷⁴.

5. Further predicates against prosecution specifically related to judicial activity?

In this paragraph we will briefly focus on specific aspects of international law and principles of criminal law which may justify what we perceive as a self-restraint by judges and prosecutors in adjudicating the criminal consequences of foreign judicial activities.

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⌋ An example can be found in the Swiss penal code, whose article 322 *septies*, paragraph 2, reads as follows: *any person who as a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces of a foreign state or of an international organization demands, secures the promise of, or accepts an advantage which is not due to him for himself or for a third party in order that he carries out or fails to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion ... shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.*

73

⌋ *Corrupt Colombian Government Employee and Criminal Defense Attorney Extradited in Obstruction to Justice Case*, May 23, 2013, retrieved June 6, 2013, from <http://justice.gov/dea/divisions/nyc/2013/nyc052313.shtml>. Due to lack of information we were unable to ascertain if and eventually why Colombian authorities didn't assert their jurisdiction under article 433 of the Colombian penal code.

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⌋ The indictment, retrieved June 6, 2013, from <http://www.nylj.com/nylawyer/adgifs/decisions/052313indictment.pdf> refer to 18 U.S.C. § 1512 ... and cautiously to the "extraterritorial jurisdiction of the Unites States" and 18 U.S.C. § 3228.

5.1 Do “judicial independence” and “judicial immunity” have an international reach beyond its constitutional purpose?

In each legal system there is at least the possibility to prosecute judges and prosecutors for criminal offences, eventually subject to special safeguards. Constitutional requirements, may vary from none to special leave to lift eventual judicial immunity by the executive, judicial councils or higher jurisdictions, to a reserve of jurisdiction in favor of higher jurisdictions and/or special judicial bodies. But what are the implications at the international level?

International principles on judicial independence have been developed on the consideration that an independent judiciary is an effective safeguard against human rights violations. The principle is recalled and invoked with a frequency and not objected as such which may represent an evidence for the universally acceptance of the principle.

The Draft Principles on the Independence of the Judiciary so called “Syracuse Principles”⁷⁵ state (art. 17), that “Judges should have immunity from civil suit for acts done in their official capacity” and the notes to the provision explain different views about the degree of immunity judges should be afforded, from absolute immunity to adequate procedures for the removal of immunity⁷⁶.

The *United Nations Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed subsequently by the General Assembly⁷⁷ reads as follows: “*Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions*” and further that “*only the court concerned may lift these immunities*” (principle n. 16).

Under the same principles, the “independence of the Judiciary requires that [...] the Judiciary has jurisdiction, directly or by way of review, over all issues of a justifiable nature” (principle n. 3). Principle n. 1 clearly states “the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country” and that “it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary”.

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⌋ The *Draft Principles* were submitted to the *UN Sub-Commission on the Protection of Minorities and the Prevention of Discrimination*, at its August 1981 meeting as an annex to his progress report (UN Doc. E/CN.4/Sub.2/48I/Add/).

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⌋ The *Montreal Universal Declaration on the Independence of Justice* of 1983 which in its part aimed at addressing the status of “international judges and arbitrators” (1.01 a) establishes that: “*Judges shall enjoy privileges and immunities, facilities and prerogatives, no less than those conferred on chiefs of diplomatic missions under and recognized by the Vienna Convention on Diplomatic Relations*” (1.15). Nevertheless, guarantees of national judges are expressed in a fairly more traditional way.

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⌋ UN Doc. A/RES/40/146 (13 December 1985).

The more recent Universal Charter of the Judge⁷⁸ states that “civil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced” (art. 10). The *Special Rapporteur* on the independence of judges and lawyers appointed by the (*olim*) U.N. Commission on Human Rights⁷⁹, recommended that in “*order to protect judges from unwarranted prosecution, [...] it is[...] “essential that judges also be granted some degree of criminal immunity”*”⁸⁰.

All the above references reflect in our view the aim to ensure, based upon a purely domestic perspective a balance between accountability of judges and independence of the judiciary and cannot be regarded as evidence of an alleged principle incardinating accountability mechanism exclusively in the State in which the decision has been adopted.

As to the degree of accountability, the Committee of Ministers of the Council of Europe⁸¹ held that “*the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in case of malice*”. Despite the essentially domestic target of the international standard interpreted by the Recommendation, perhaps a general acceptance may be deserved by standards on international accountability of judges, excluding that judges can be punished for *bona fide* errors of for disagreeing with a particular interpretation of the law⁸².

As mentioned above, a certain degree of immunity from suits and proper procedures for the lifting of such immunities are dealt within the independence of the judiciary⁸³. Traditionally the principle of “judicial immunity” was justified by the need to

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⌋ Adopted at Taipei the 17th of November 1999 by the “Central Council of the International Association of Judges”.

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⌋ Commission on Human Rights, Resolution 1994/41, Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, 4 March 1994 (E/CN.4/1994/132, chapter X).

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⌋ Human Rights Council, Resolution 8/6, Mandate of the Special Rapporteur on the independence of judges and lawyers, 18 June 2008.

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⌋ Recommendation CM/Rec(2010)12.

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⌋ Concluding Observations of the Human Rights Committee on Viet Nam, UN document CCPR/CO/75/VNM, § 10.

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⌋ In *Taaffe v. Downes* decided by the Court of Common Pleas of Ireland in 1813, given in a note in 3 *Moore's Privy Council* 41, and quoted in *Randall v. Brigham*, 74 U.S. 7 Wall. 523 523 (1868) with an action against the chief justice for assault and false imprisonment. Justice Mayne, held that the action didn't lie as “*to every man's action, for every judicial act a judge is called upon to do, is the degradation of the*

preserve the independence of the judge by protecting them from the displeasure of the crown and by preventing judicial interference from “rival courts”⁸⁴ under the control of the Crown and much impetus came also from the so called “sanctity of the records”, preventing writs of error in the King’s courts for errors of fact⁸⁵. On the other side, judicial immunity as known under English law⁸⁶ was the result of a progressive development of legal remedies in case of judicial errors, whereas the early attempts to bring accusations against judges were no longer accepted and limits were set once remedies against the decisions emerged. The doctrine moved from a position of general judicial liability to “eliminate collateral attacks on judgments and to confine procedures in error to the hierarchy of the king’s courts”⁸⁷.

Significantly the subsequent development and debate in the courts of the United States shifted following the 1871 *Civil Rights Act* to the question of immunity of judges from federal civil rights suits for having enforced illegal State laws and as to the kind of jurisdiction involved, from the jurisdiction to adjudicate, to the jurisdiction to issue injunctions⁸⁸. On the other side, immunity from prosecution was abolished in the United States since the 1866 *Civil Rights Act* prohibiting State sponsored violations of civil rights. The fact that judicial immunity means mainly immunity from civil suits is consistent with more restrictive provisions about judicial privileges, like the *Spruchrichterprivileg* whose limit is represented by the commission of a crime.

judge, and cannot be the object of any true patriot or honest subject. It is to render the judges slaves in every court that holds plea, to every sheriff, juror, attorney, and plaintiff. If you once break down the barrier of their dignity and subject them to an action, you let in upon the judicial authority a wide, wasting, and harassing persecution, and establish its weakness in a degrading responsibility”.

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┘ At this purpose, see *Shatter v. Friend*, 89 Eng. Rep. 510, K.B. 1691, in respect to a writ of prohibition issued to an ecclesiastical court.

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┘ But see the case of *Floyd and Barker* reported by Coke in 1608 and quoted by the U.S. Supreme Court, *Bradley v. Fisher*, 80 U.S. 13 Wall. 335 (1871), p. 348, according to which “*judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the King himself, and it was observed that if they were required to answer otherwise, it would tend to the scandal and subversion of all justice, and those who are the most sincere, would not be free from continual calumniations.*”

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┘ We would like to refer to J.R. BLOCK, *Stump v. Sparkman and the History of Judicial Immunity*, in *Duke Law Journal*, 1980, V, p. 879 ff.

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┘ J.R. Block, *ibid.*, p. 881.

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┘ On the topic we would like to refer to R.C. WATERS, *Judicial Immunity vs. Due Process: When Should a Judge be Subject to Suit?* in *Cato Journal*, 1987, p. 450 ff.

If the very concept of “rival courts” describes a highly articulated context of coexisting jurisdictions and may therefore apply in principle to the situation in which interference is due to the exercise of criminal jurisdiction by a foreign court, the application of the principle seems us to be necessarily restricted to “non-transnational issues”. Conclusion with appears us to be reinforced by the very rationale of judicial immunity which requires actionable remedies in a homogeneous legal system. Accordingly the role of judicial immunities doesn't differ from other domestic immunities under international law.

Nevertheless in the “justice case”, the Tribunal felt obliged to deal with judicial immunity and not as a matter of German Law eventually preventing punishment of judges. In its opinion about the degree of guilt of the defendant *Rothaug*, the tribunal observed that⁸⁹, “*the doctrine that judges are not personally liable for their judicial actions is based on the concept of an independent judiciary administering impartial justice. Furthermore, it has never prevented the prosecution of a judge for malfeasance in office*” and further that “*the function of the Nazi courts was judicial only in a limited sense*” and that they “*more closely resembled administrative tribunals acting under directives from above in a quasi-judicial manner*”. The Tribunal further stated that “*Under any civilized judicial system he could have been impeached and removed from office or convicted of malfeasance in office on account of the scheming malevolence with which he administered injustice*”⁹⁰. The said consideration seems to echo limits set for judicial immunity and the wording of the leading decisions⁹¹.

Even if the reference may be justified by legal and cultural background of the judges sitting in the Tribunal, the considerations remains a strong argument in favor of a certain degree of judicial immunity, whilst the further considerations about the “quasi-judicial” nature of Nazi courts seems to subvert the very aim of judicial immunity as such principles, which is a requirements “for” an independent judiciary, rather than a “benefit” of judges serving under such a judiciary.

5.3 About *res iudicata* prejudicial removal of decisions and exhaustion of domestic remedies.

As judicial immunity is also the result of the development of legal remedies against judicial decisions and such remedies once exhausted contribute to the legal certainty of judicial decisions – the principle of *res iudicata* - one could question if as a matter of coherence in an international system of justice may require the decision or judgment whose criminal character is questioned, to be removed prior to the prosecution of the

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⌋ *Ibid.*, p. 1055.

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⌋ *Ibid.*, p. 1156.

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⌋ See, U.S. Supreme Court, in *Randall v. Brigham*, 74 U.S. 7 Wall. 523 523 (1868); and *Bradley v. Fisher*, *ibid* p. 350, “but for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed”.

foreign judge. To this purpose, it should be mentioned that the prior removal of the decision appears to be, where established as such under domestic law, rather a condition for suing the State than a pre-condition for the prosecution of the judge.

Accordingly, the fact that a judgment may remain incontestable within the legal system in which it was adopted despite the fact that the judge or the prosecutor may have been convicted within another legal system for fact underlying the decision or because of the decision itself is an unavoidable inconsistency. By the way, such inconsistency is addressed, in certain domestic legal systems whereas the conviction of the judge for a criminal offence related with the proceeding and decision of a case is a requirement for the reopening of the case.

Significantly, in its opinion about the guilt of defendant *Rothaug* in the “Justice case” the Military Tribunal affirmed, when dealing with his involvement in the so called “*Katzenberger* case”, not to be concerned with its legal “incontestability” under German law of this as well the other cases and established beyond a reasonable doubt that the victims in the respective trials were executed in conformity with the policy of the Nazi State of persecution, torture and extermination⁹².

In respect of the *Lopata* and also the *Ledwon* case and the responsibilities of defendant *Lautz*, the military tribunal felt obliged to observe that it was “not going to retry the case” on the facts and the reserve was perhaps justified by the considerations on the merits of the case, rather than as a matter of certainty⁹³. Despite the fact that in all the other cases mentioned in paragraph 3, the issue of an eventual bar deriving from the legal certainty of the underlying judgment was not expressly addressed, no bar was effectively found and in the case of decisions adopted by Nazi courts and courts of the *GDR* specific remedies in order to remove convictions were established under domestic law⁹⁴.

To this purpose, it should be observed that the exhaustion of “domestic remedies” which reflect a principle of international law in respect of the exercise of diplomatic protection by a State⁹⁵ and has also its role in the context of State responsibility for internationally wrongful acts⁹⁶, doesn’t bar the prosecution of the individual for a

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γ *Ibid.*, p. 1155.

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γ *Ibid.*, p. 1122 and 1124.

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γ *NS-AufhG* and *Str-RehaG*.

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γ Article 14, *Draft articles on Diplomatic Protection with Commentaries*, 2006, in *Yearbook of the International Law Commission*, 2006, vol. II, part 2.

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γ Article 44, *Draft articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 2001, in *Yearbook of the International Law Commission*, 2001, vol. II, part two. The consideration in the text is without prejudice of the combined interpretation of articles 44 and 58, whose results does not directly affect the issue of immunities for judicial activities but rather the entire issue of immunities of State Officials.

criminal conduct. The principle is also established as an admissibility requirement for individual claims in front of international human rights bodies.

5.4 The foreign law defense and double criminality rule.

Domestic law was expressively excluded as a defense under article 6 *c* of the *Nuremberg Charter* – in respect of crimes against humanity - which could be punished whether or not in violation of domestic law of the Country where perpetrated and a similar provision was contained in *Control Council law n. 10*, article II, par. 1, *c*. The exclusion of the “domestic law defense” - which represents the “other side of the coin” of the “double criminality rule” or requirement – is nowadays an acknowledged achievement of the need to repress core crimes and put an end to impunity for such crimes. We feel exempted from further discussing the exception to the said principles also because it seems us a far more interesting and intriguing issue to establish to what extent such principles apply to crimes other than core crimes.

As mentioned above, the military tribunal in the “*Justice case*”, was not to consider the domestic law defense. Nevertheless the military tribunal as a matter of classification of the evidence⁹⁷ introduced by the prosecution about the Draconic character of Nazi laws and imposition of death penalty in large measure, classified cases in which extreme penalty was imposed into seven main categories⁹⁸.

In respect of the first four categories – to include cases against habitual criminals, looting, crimes against war economy and crimes undermining the defensive strength of the Nation - the tribunal held⁹⁹ that it was “*keenly aware of the danger of incorporating in the judgment as law its own moral convictions, or even those of the Anglo-American legal world ... This [it would] not do ... [it] may and do condemn the Draconic laws and express abhorrence at the limitations imposed by the Nazi regime upon freedom of speech and action, but the question still remains unanswered: Do those Draconic laws or the decisions rendered under them constitute war crimes or crimes against humanity?*”. The answer to the question the Tribunal gave was clearly in the negative for the first two categories, as “*many civilized States*” and “*America*” consider “*life imprisonment for habitual criminals a salutary practice even in peace time and every nation*” recognized

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┆ Opinion, *ibid.*, p. 1024.

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┆ Categories were the following:

1. *Cases against habitual criminals.*
2. *Cases of looting in the devastated areas of Germany; committed after air raids and under cover of black-out.*
3. *Crimes against the war economy-rationing, hoarding, and the like.*
4. *Crimes amounting to an undermining of the defensive strength of the nation; defeatist remarks, criticisms of Hitler, and the like.*
5. *Crimes of treason and high treason.*
6. *Crimes of various types committed by Poles, Jews, and other foreigners.*
7. *Crimes committed under the Nacht und Nebel program, and similar procedures.*

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┆ *Ibid.*, p. 1025.

the need for a more stringent criminal enforcement in times of great emergency. The same considerations were to apply, according to the Tribunal, even if to a lesser degree to crimes against the war economy.

The fourth category - crimes undermining war efforts to include “criticism” - according to the tribunal posed “questions of far greater difficulty” as “*even under the protection of the Constitution of the United States a citizen is not wholly free to attack the Government or to interfere with its military aims in time of war and further that in the face of a real and present danger, freedom of speech may be somewhat restricted even in America*”.

While recalling that “*Germany was waging a criminal war of aggression*” which “*colors all of these acts with the dye of criminality*”, the Tribunal held nonetheless that the accused were not charged with crimes against the peace. The Tribunal further considered that should it “*adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer*” and concluded “*that the domestic laws and judgments in Germany which limited free speech in the emergency of war cannot be condemned as crimes against humanity merely by invoking the doctrine of aggressive war*” solely without more because such laws were passed and enforced¹⁰⁰. The enforcement of laws against criticism was specifically mentioned in the opinion in respect of the accused *Oeshey* (*Count Montgelas* case) and *Lautz* (unquoted case). Treason cases posed difficult questions in relation to the occupied territories and although the Tribunal held that hostile activities could have been repressed by the German occupants, the prosecution of Poles attempting to detach from the territory of the *Reich* represented an unwarranted extension of the concept of high treason which constituted a war crime and a crime against humanity¹⁰¹. The wrong in such cases was not merely the misnaming of the offence of attempting to escape from the Reich but rather the act of “falsely naming” a minor offence and thereby invoking the death penalty for a minor offence.

Finally statutes and their enforcement against Jews and Poles and well as *Nacht und Nebel* justice clearly represented a war crime and a crime against humanity resulting in ill-treatment, torture and murder of thousands of victims.

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γ *Ibid.*, p. 1026.

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γ *Ibid.*, p. 1027. The Tribunal quotes the case of a defendant who said to a woman: “*Don't you know that a woman who takes on work sends another German soldier to death?*” This case was one of the above mentioned category the Tribunal didn't consider *per se* and without more criminal. In the circumstance the Tribunal pointed out that the office of the Chief Prosecutor was vested with vast discretion in connection with the assignment of cases and that if the case was sent for trial to the People's court, instead of to an ordinary court, death penalty became mandatory for an offence otherwise punishable with moderate imprisonment. Accordingly “*the fate of the victims depended merely on the opinion of the prosecutor as to the seriousness of the words spoken*” and arbitrary prosecutorial choices had direct influence on the sentencing.

If the premise of the Tribunal was not to incorporate its moral convictions in the judgment, the result in screening what category of draconic judicial proceeding meets *prima facie* the definition of a crime against humanity and/or a war crime, shows a significant reliance on U.S. national practice as a term of comparison. If the enforcement of the relevant laws didn't constitute a crime against humanity or a war crime, the exclusion of domestic law defense was not to apply. In the treason cases, nevertheless the focus was on the criminal character prosecutorial schemes adopted rather than on the mere enforcement of German laws. In the relevant case law mentioned in paragraph 3, to include those cases dealing with core crimes, foreign procedural laws applied in the incriminated proceedings were to some extent taken into consideration – it is given to know if as a matter of fact or as matter of law. An exception is perhaps represented by those cases against Japanese officers in which the denial of fair trials was part of the charges.

The eventual violations of such laws were taken into consideration as evidence of the attitude and degree of guilt of the defendant. Procedural laws appear to be pivotal in all those cases in which the criminal character of judicial activity isn't the direct consequence of the passing and subsequent enforcement of laws which are criminal. Procedural law is on the other side the meter for eventual defenses under foreign substantive criminal law like the fulfillment of duties.

This said, in the interpretation of foreign laws, regard - if not deference - is given to the interpretation of those laws foreign court cases as interpreting foreign laws differently from those courts ordinarily applying such laws, may result an acrobatic exercise.

The rationale has been attributed to the double criminal liability requirements in respect of offences committed abroad whereas the underlying idea is that punishing a crime committed in a foreign State whereas the same conduct is licit ... is a violation of the principle of natural justice. Exceptions were found in the need to grant the security of the State which could not be made conditional upon the circumstance that the foreign State punished the conduct or not.

The idea of natural justice has recently been reshaped, as the principle of legality (*nulla poena sine lege*) has developed, under human rights conventions, into a matter “predictability of the punishment” requirement, which has to be applied also to the circumstances determining the applicability of a different set of substantive criminal provisions. Patterns of predictability do not encompass expectations of impunity in violation of international law.

6. Conclusions

The prosecution of a foreign judge or prosecutor for a conduct related with his/her functions represents, to a certain extent, a “close encounter of the third kind” among conflicts of jurisdiction and is confined to rather rare situations. In the absence of reliable information on the recurrence of situations of judicial misconduct and offences of criminal nature committed within judicial proceedings in comparison with violations by political and military leaders, simple soldiers and policemen, it is not possible to establish if judges and prosecutors are really under-represented in such foreign prosecutions.

Nevertheless, even in the absence of a reliable monitoring process, clearly certain human rights violations can be committed essentially within or as a result of judicial proceedings (violations of fair trial, right of expression) and lack of redress may be

relevant in a significant part of the remaining situations. This leaves us with an unsubstantiated (and scientifically unacceptable) feeling that there could be more of such criminal proceedings. The analysis of the relevant practice doesn't show any specific compelling legal impediment the criminal prosecution of foreign judges and prosecutors, apart from their conduct being mostly territorial and or from a different viewpoint extraterritorial and therefore in need of clear jurisdictional links.

This does not necessarily mean that an explanation should be found in bizarre conspiracy theories about secret dominance of the world by judges.

Perhaps the influence of legal positivism may have placed judges in a privileged position – compared to soldiers and policemen - as culturally affected by a compulsive inclination to abide the law and enforce it.

Even the myth of judicial resistance in times of dictatorship may have induced a certain restraint in investigating judicial complicity as well as the perception of justice as a tender fruit of transition towards democracy, once dictatorship has gone. On the other side it is argued that in transitional and post-transitional phases from periods of authoritarian repression, prosecutions change and strengthen judicial institutions. May be is not the best guess, but it seems that the exercise is more proficient if conducted with activism on those having served the repression under other institutions. Once the judiciary becomes a cornerstone of transition, this may determine at international level a tendency to avoid investigation unearthing its complicity with authoritarian regimes.

As mentioned in the premise, the inability to conduct a comprehensive sociological and criminological investigation about the dimension of judicial involvement with the commission of crimes addressed us to research rather legal reasons for the rarity of “trialing foreign judges” situations.