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The Role of Comparative Law in Transnational Criminal Justice

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Abstract

The chapter explores the different paths and levels on which domestic and international criminal law may influence each other, what purpose might be served by such a conversation, and which methods are appropriate. In order to study these issues, two different epistemological categories appear useful. As far as the aim is concerned, recourse to foreign law is advisable, and potentially necessary, for two reasons: For the application of domestic or international criminal law in the context of judicial, or for the advancement of national or international law by means of legislative, comparative research. As far as the transnational context is concerned, foreign criminal law may play a role on three different levels: In the mutual dependence between national and foreign law and the administration of criminal justice, in international legal cooperation in criminal matters and, lastly, on the level of supranational criminal justice.

If one wanted to find out to what degree references to national criminal law play a role in the reasoning of international criminal tribunals, appropriate guidance may be found by looking for proceedings in which Wolfgang Schomburg served as a judge at the international tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY). Even without a thorough search simply relying on impressions received from browsing judgments of these courts, I dare to guess that Judge Schomburg, in whose honour this paper is prepared, is in the upper class of the judges who do not shy away from supporting their reasoning through comparisons with national criminal law. Beside other instances later be referred to, as particularly significant examples two comparative expert opinions obtained from the Max Planck Institute for Foreign and International Criminal Law may be mentioned here: one requested by an ICTY

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Trial Chamber, presided by Schomburg, regarding information on the range of sentences the crimes concerned may be punished with according to penal laws of the former Yugoslavian States, of member States of the Council of Europe and of other major legal systems, as well as according to the jurisprudence of international criminal courts; and the other expert report introduced by Schomburg in a dissenting opinion to an Appeals Chamber judgment, regarding the modes of participation in crime.

So, when invited to make a contribution to his 70th birthday, I felt inspired – assuming that he also will find it worthwhile – to describe the various ways and levels on which national and international criminal law and practice can interact and influence each other, for what purpose such comparisons can serve and what methods they would require. This inquiry is best approached by making use of two categorical distinctions. First, with regard to purpose, taking foreign law into consideration may be advisable, if not even necessary, in two respects: for the application of domestic or international law in terms of judicative comparative criminal law or for the further development of national or international criminal law in terms of legislative comparative criminal law.

Second, with regard to its transnational scope, foreign law and justice may play a role in three areas and levels: in the interdependence of national criminal justice and foreign law (1), in international co-operation (2) and in supranational criminal justice (3). Some of this will be considered in more detail in the following discussion.

1 Cf. Prosecutor v Dragan Nikolić, ICTY-IT-94-2-S, Trial Chamber II, Sentencing Judgement of 18 December 2003, paras. 38, 149 ss. Cf. also below 3.2.1 to n 57.
2 Cf. Prosecutor v Blagoje Simić, IT-95-9-A, Appeals Chamber, Judgment of 28 November 2006, Dissenting opinion of Judge Schomburg, paras. 19 ss. Cf. also below 3.2.1 to n 47.
3 For details of this differentiation between two – judicative and legislative – types of comparative criminal law, apart from the theoretical and evaluative-competitive categories within the foursome "tetradec" of comparative law, see Albin Eser, Comparative Criminal Law. Development – Aims – Methods (C.H. Beck/Hart/Nomos 2017), margin numbers 32 f., 50 ff.
On the Horizontal Transnational Level

On this level, there are mainly three – partly overlapping – forms in which a comparative view beyond national borders can be required or at least helpful: when domestic criminal justice is dependent on foreign law (1.1), when advice from, or even import of, foreign law can enhance the administration of criminal justice (1.2), or when foreign criminal law can serve as a benchmark for the further development of national criminal law (1.3).

1.1 Dependence of Domestic Criminal Justice on Foreign Law

1.1.1 The Requirement of “dual criminality” for the Domestic Prosecution of Extraterritorial Crimes

This is nowadays probably the strongest case of dependence on foreign law: when domestic criminal law shall be applied to offences committed abroad. While for a long time on the European continent it was thought possible to extend one’s own criminal law without reservation to extraterritorial crimes – despite the risk of transnational overlapping and international conflicts over interference –, one now tries to respect the sovereignty of the foreign country through the requirement of usually so-called “dual criminality”. According to this – and with the exception of crimes governed by the principle of universality – the alleged offence must be criminally prohibited both at the domestic place where it is prosecuted and at the place of its commission.\(^5\) Taking Germany as an example, there an “identical norm at the place of crime” is in particular required for the application of German criminal law to offences committed abroad under § 7 German Penal Code (StGB) for cases of the principles of “active” and “passive personality” (by which the extraterritorial application of domestic criminal law is based on the citizenship of the perpetrator or victim respectively, also known as “active” and “passive nationality” principles) as well as of the principle of “representative administration of criminal justice” (by acting on behalf of the jurisdiction of the place of commission, also known as “principle of complementary jurisdiction”). In all these cases it would not suffice simply to identify superficially similar criminal provisions,

rather their identical substance would have to be proven.\textsuperscript{6} This, however, can hardly be investigated other than by way of comparison\textsuperscript{7} – regardless whether the requirement of “dual criminality” is considered an element of substantive criminal law\textsuperscript{8} or a procedural issue of jurisdiction.\textsuperscript{9}

\subsection*{1.1.2 Filling of a Penal Provision with a Foreign Norm}
In a similar way, the administration of criminal justice can also depend on the existence of a foreign provision. This in particular concerns the “blanket-type” application of foreign law as it can be observed especially at the European level.\textsuperscript{10} As is characteristic for criminal laws of the blanket-type, the national criminal norm only establishes the sanctions and connects these to the elements of an offence, which is defined further by another act of law – usually called the “completing norm”.\textsuperscript{11} If this legal act is issued by an extra- or supra-national authority, its consequence for the performance of domestic criminal justice is that foreign law has to be applied. This, however, can hardly be accomplished without a view beyond national borders.

\subsection*{1.2 Import of Foreign Law into Domestic Criminal Law}
\subsubsection*{1.2.1 Incorporation of Foreign Criminal Provisions}
This is probably the most intensive form of foreign law import. An example thereof can already be seen in the aforementioned filling of a “blanket” penal provision by a foreign “completing norm”, particularly so when the foreign

\begin{footnotesize}
\begin{enumerate}
\item As to the method to be used for this comparison cf. Albin Eser, \textit{Comparative Criminal Law Development – Aims – Methods} (C.H. Beck/Hart/Nomos 2017), margin numbers 295 ff.
\item As in German doctrine: cf. Karin Cornils, \textit{Die Fremdrechtsanwendung im Strafrecht} (De Gruyter 1978), p. 213.
\end{enumerate}
\end{footnotesize}
norm has been transformed into national law. This applies even more to the so-called “incorporated international crimes” that in various ways have been implemented into national penal codes along the Rome Statute. Whether this is done in a more or less direct or indirect way, such as by adoption, reference or creation of an equivalent national code, in any case comparative expertise can be a helpful in finding the appropriate way for such an import of foreign law and its adjustment to national peculiarities.

1.2.2 Implementing, Complementing and Limiting Functions of Foreign Law

Although less integratively than in the cases before, foreign law can also find the way into the domestic law by implementing, complementing or limiting it.

A classic and frequently cited example of the implementing function could be found in the Swiss Penal Code of 1937; according to its Art. 6 para. 1 sentence 2, if a Swiss citizen committed an offence outside Switzerland, then “the law of the place where the crime had been committed, was to be applied if it was the more lenient one”.

Of more topical importance are cases in which the application of the offence description (in terms if the German “Straftatbestand”) – or possible grounds for excluding criminal responsibility – may depend on so-called “incidental questions” of private or administrative law as, for instance, in the case of theft where the question of ownership of the chattel taken away from another has

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12 For details to the various ways in which the provisions of the Rome Statute have been implemented into national codes see the findings of a comparative project concerning the national criminal prosecution of violations of international law, conducted by the Max Planck Institute for Foreign and International Criminal Law, summarized by Helmut Kreicker in Albin Eser, Ulrich Sieber and Helmut Kreicker (eds.), Völkerstrafrecht im Ländervergleich vol. 7 (Duncker & Humblot 2006), pp. 24 ff.


14 Even in view of this explicit obligation to implement foreign law, however, there was argument as to whether the judge was applying the more lenient foreign law as such (as assumed by the Swiss Federal Court: cf. BGE 104 IV 77, 87 (1978), 118 IV 305, 308 (1992)), or whether the foreign law was turned into domestic law as “remitted federal criminal law” (“verwiesenes Bundesstrafrecht”; thus the prevailing opinion in the literature): cf. Peter Popp, 'Vor Art. 3', in Marcel Alexander Niggli and Hans Wiprächtiger (eds.), Basler Kommentar Strafgesetzbuch vol. I (Helbing & Lichtenhahn 2003), nn. 31.

to be decided according to private (and not criminal) law. When offences of this sort have been committed abroad but are to be prosecuted domestically, the question may arise whether and to what extent open elements of wrongdoing (such as the duty of care in the case of negligence or the obligation to avert a prohibited result in the case of an omission) or extra-criminal elements of the offence description (such as rules of proper accounting in insolvency crimes) should be determined according to the law of the domestic place of jurisdiction or the foreign place where the crime was committed. Even this decision requires a comparative look beyond national borders, and this even more, when the elements of an offence description are to be complemented according to foreign law. This applies respectively in the case where foreign grounds for excluding criminal responsibility are to be considered, or when for determining the punishment cultural differences are to be taken into account, as it has recently been the subject of intense discussion, especially under the key word of "cultural defence".

In contrast to these complementary functions, foreign law can also have a limiting effect. Here again the Swiss Penal Code with its reformed Art. 6 para. 2 of 2007 provides an example with regard to the sentencing of a crime committed abroad and prosecuted in the context of "representative administration of justice". In this case, "the court has to decide on sanctions that, overall, do not weigh more heavily on the perpetrator than those that would be applied according to the law of the place where the crime was committed". Although according to this rule – which is known in similar forms as transnational lex mitior from other legal systems as well – both the evaluation of alleviating factors and the power of determining the sentence remain in the hands of the domestic judiciary, this task cannot be accomplished without transnational comparison of the relevant penal provisions.

1.3 Improvement of the Criminal Law through Comparative Law

Foreign law as a benchmark for the evaluation and further development of the domestic criminal law can play a role both on the judicative and the legislative

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16 For more to such "incidental questions" cf. Albin Eser, 'Vorbemerkungen vor § 3; in Adolfo Schönke and Horst Schröder, Strafgesetzbuch Kommentar (29th edn, C.H. Beck 2014), margin number 41.

17 For details see Albin Eser, ibidem, and fundamentally to such accessorial issues Karin Cornils, Die Fremdrechtssanwendung im Strafrecht (De Gruyter 1978), espec. pp. 16 ff.

18 Cf. – inter alia – the expert report to the 70th Deutsche Juristentag (German Lawyers Day) of 2014 by Tatjana Hörnle, Kultur, Religion, Strafrecht – Neue Herausforderungen in einer pluralistischen Gesellschaft (C.H. Beck 2014).

level as well as it works in two directions: By learning from good as well as bad experiences made by other criminal jurisdictions, one can avoid the worse and adopt the the better ones.

1.3.1 Comparative Criminal Law as an “interpretation aid”

Even if – at least with regard to criminal law because of its especially distinct national character – it might be over the top to speak of comparative law as the “fifth” or even a “universal method of interpretation”\textsuperscript{20}, one cannot ignore that judges can learn a better understanding of their own law when they consult and take into account the jurisdiction and doctrine of another legal system – particularly within the same language and legal family.\textsuperscript{21} Thus, when considering terms or elements of similar meaning, such as intent or negligence, commission of the offence or participation in it, a judge can hope to gain insights for the interpretation from their meaning in a related foreign legal system.\textsuperscript{22}

This is even more obvious when – for the interpretation of one’s own law – one can go back to its roots in a foreign “parent law”.\textsuperscript{23} For example, this can be

\begin{itemize}
\item \textsuperscript{22} As to the even more important interpretive function of comparative law on the supranational level cf. 2. 3. below.
\end{itemize}
the case when prohibitions or the rights of the accused are at issue in a type of criminal procedure that was taken over from another legal system – as, for example, the Turkish procedure was adopted from the German Code of Criminal Procedure. In such a case, the judge, when in doubt about the interpretation of taken-over law, may be well-advised to get clarification from the criminal jurisprudence of the country from which the rule in question originates.

1.3.2 Judge-made Development of the Law

More than mere interpretation is asked for when references to foreign law are made for adjusting current criminal law to new social developments. This borderline to legal policy might not yet have been transgressed when the German Federal Supreme Court (Bundesgerichtshof) – in the context of narrowing the meaning of the homosexual "committing an act of indecency" (according to the former § 175 German Penal Code) – found support in the foreign development of law. In contrast, the step towards filling gaps for the further development of the law ("rechtsfortbildende Lückenfüllung") is certainly done when – by taking foreign legal development into account – the violation of a policeman's duty to inform a suspect about his right of silence is developed to an exclusionary rule with regard to the evidence illegally obtained. In the same sense, it meant more than mere interpretation when the US Supreme Court excluded juvenile offenders from the death penalty – in a controversial majority decision – and, thus, brought domestic backward law closer to more humane developments in foreign legal systems.

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24 BGH (German Federal Supreme Court), No. 2 StR 275/51, in BGHSt ("Entscheidungen des Bundesgerichtshofs in Strafsachen") 1, pp. 293–298, 297 (13 July 1951). For further references to foreign criminal law in German court decisions cf. Albin Eser, Comparative Criminal Law. Development – Aims – Methods (C.H. Beck 2017), margin number 118.


1.3.3 Comparative Criminal Law as Aid for Legislative Law Reforms

If “law develops mainly by borrowing”, then – even more than by selective judicial ad-hoc amendments – further developments of the law will usually take place on the legislative way. This can be done for optimizing and modernizing the domestic criminal law by drawing attention to possibly better rules in foreign legal systems and – in search for the best possible standard of law in international “benchmarking” – to set reform processes in motion. While this may still be voluntary, in certain cases national lawmakers can be even bound by transnational agreements to adapt their law, as it is in particular the case with assimilations and harmonizations on the European level. As – due to space limitations here – described in more detail elsewhere, it may be sufficient to note that – according to my experience in this field – there is almost no major criminal reform any more without making use of comparative law.

2 With Regard to International Cooperation

While on the transnational level dealt with before the employment of comparative law was one-sided in that a national jurisdiction would take notice of foreign law without necessarily getting in touch with the country concerned, on the international level of cooperation in criminal matters it is a sort of mutual affair in which both countries are more or less involved. On this truly international level between different criminal jurisdictions, there are mainly two instances where comparative law plays a role: in cases of extradition (2.1) and when multiple prosecution is at stake (2.2).

2.1 The Requirement of “mutual criminality”

In a certain parallel to the substantive-legal requirement of “dual criminality”, according to which extraterritorial crimes can be prosecuted only if they are punishable both at the domestic place of the court and the foreign place of the crime, a similar “mutual criminality” is also required at the level of international cooperation in criminal matters. According to this principle which plays an important role in international legal assistance, above all in the context

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28 As is claimed in a frequently quoted dictum by Alan Watson, The Making of the Civil Law (Harvard University Press 1981), p. 18: though looking at the development of civil law, this may also apply to criminal law.


30 Cf. 1.1.1 above.
of extradition, the conduct of the person concerned must be criminal under both the law of the country requesting extradition and the law of the country requested.\textsuperscript{31} Whether this is the case in an individual instance, is – in a two-phase procedure of legal assistance sub-divided into a judicial admissibility and an executive approval procedure – usually to be examined during the first phase.\textsuperscript{32} In order to do this, legal comparative work is necessary.

However, the comparison of norms which has to be made for the determination of "mutual criminality" is not exactly the same as that necessary for "dual criminality": while for the latter the greatest possible "identity" of the norm of the place of the commission is important, for the extradition out of Germany, for example, the focus in the relevant § 3 para 1 International Legal Assistance Act (IRG) is in principle merely on the fulfilment of the definitional elements of the offence (Tatbestandsmäßigkeit) according to German law; for that, however, a mere "adjustment in the general sense of the facts" is sufficient.\textsuperscript{33}

\subsection*{2.2 Transnational Prohibition of Multiple Prosecutions}

In a certain contrast to the need of cooperation in the case of extradition dealt with before, the issue of a transnational "ne bis in idem" at stake here is directed against possible international conflicts that can result from prosecutions of the same offense by different national jurisdictions. This can easily occur when, for example, a crime is committed in country A by a citizen of country B against a citizen of country C: in such a case each of the countries concerned may claim jurisdiction based on the principle(s) of territoriality, active personality or passive personality, respectively.\textsuperscript{34} Whereas so far within

\begin{itemize}
\item \textsuperscript{31} As, for instance, regarding the German extradition law, cf. § 3 International Legal Assistance Act (IRG); as to other proceedings of international legal assistance, in which mutual criminality can play a role, cf. the numerous references in Wolfgang Schomburg, Otto Lagodny et al. (eds.), \textit{Internationale Rechtshilfe in Strafsachen} (5th edn, C.H. Beck 2012), p. 3205.

\item \textsuperscript{32} For details see Thomas Hackner, 'Einleitung', in Wolfgang Schomburg, Otto Lagodny et al. (eds.), \textit{Internationale Rechtshilfe in Strafsachen} (5th edn, C.H. Beck 2012), margin numbers 58 ff.

\item \textsuperscript{33} The only really important aspect is that the conduct as such is punishable according to German law without necessarily requiring full punitive power of the German authorities. For details see Otto Lagodny, "§ 3", in Wolfgang Schomburg, Otto Lagodny et al. (eds.), \textit{Internationale Rechtshilfe in Strafsachen} (5th edn, C.H. Beck 2012), margin numbers 3, 5 ff.

\item \textsuperscript{34} In addition to these links already referred to above at 1.1.1 as to further reasons why overlappings of various national criminal jurisdictions can occur at all, and why they should be avoided as much as possible, cf. Albin Eser, 'Konkurrierende nationale und transnationale Strafverfolgung – Zur Sicherung von "ne bis in idem" und zur Vermeidung von positiven
\end{itemize}
the same national jurisdiction a second prosecution would be barred by the internal “prohibition of double jeopardy”; on the transnational level such a bar is not yet – or, at the most, only partly – recognized. On this area, countries could so far mostly only bring themselves to agree on a “principle of accounting” (“Anrechnungsprinzip”). This means that, when a crime has been adjudicated abroad, further prosecution and punishment domestically is not totally blocked, but rather the punishment imposed abroad must be credited against the new domestic punishment. However, because the national jurisdiction is only limited in this way, and not totally excluded, the domestic justice system is not spared further efforts of investigation and trial, nor is the already sentenced person – be he or she convicted or even acquitted – spared from further proceedings.

Meanwhile one tries to fend off such disadvantages with the “principle of recognition” (“Erledigungsprinzip”) by which a sentence abroad is meant to stand in the way of a further domestic prosecution right from the start.\(^\text{35}\) Even if the future lies with this principle – with the hoped-for increase in interstate trust in the rule of law within foreign criminal justice systems –,\(^\text{36}\) so far it has only been able to prevail as transnational *ne bis in idem* in regions that are politically on an equal wave length, particularly in the European Union.\(^\text{37}\)

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However, whichever principle and procedure one may follow, without judicative criminal law one cannot get by: be it, to find out if, and to what extent, an offence tried abroad is identical to the offence under suspicion domestically, or be it, that – in the case of a simple crediting – the type and extent of the foreign sentence has to be balanced out against the domestic law.

3 In Relation to the Supranational Level

On this level, comparisons of law can – with fluid transitions – be helpful in three respects: in so far as the exercise of supranational criminal justice can depend on national law or jurisdiction (3.1), with regard to mutual inferences between national and supranational law (3.2), or in connection with the development of universal principles and supranational criminal law (3.3).

3.1 Dependence of Supranational on National Criminal Justice

3.1.1 The Principle of "complementarity"

This probably constitutes the strongest case in which the exercise of supranational criminal jurisdiction depends on national law and justice. According to this principle – first introduced by the Rome Statute in Art. 17 para 1 (a) and (b) regarding the relationship between national and supranational jurisdictions38 – the International Criminal Court (ICC) is, amongst other things, authorized to prosecute when the primarily responsible national criminal justice system is either "unwilling or unable genuinely to carry out the investigation or prosecution".

For comparative criminal law this is important in two ways: On the one hand, for the ICC which could take on a suspected international crime when the primarily responsible national justice system cannot prosecute because there are – domestically – no corresponding crime descriptions; this requires the ICC both to determine the primarily responsible national jurisdictions and the examination of the relevant elements constituting an offence. On the other hand, a state affected by this – if it wants to ward off the politically embarrassing finding of its incompetence – would be well advised to incorporate

international crimes into its national criminal law system\(^{39}\) – by way of the above mentioned "import of foreign law".\(^{40}\)

3.1.2 Subsidiary Application of National Criminal Law
An even explicit dependence of supranational criminal justice on national criminal law – and thus requiring comparison – can result from provisions according to which national law has to be taken into consideration. Regarding such "subsidiary" application of national criminal law, the Rome Statute of the \(\text{ICC}\) has gone furthest so far with its step-by-step approach to "applicable law". Although according to Art. 21 para 1 national law is not first in line but to be considered only after the law of prior ranks – namely the Statute itself, treatise and principles of customary international law – provides no solution, the criminal law of certain individual countries (that would normally have jurisdiction) may come into play as part of the principles of law that are to be established by way of comparative law.

In a similar way, in Art. 24 para.1 s. 2 of the Statute of the \(\text{ICTY}\) it is envisaged that the Trial Chamber "shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia". This does not mean that the national statutory provisions would be declared to be directly applicable. At least, however, if not reaching further, through this reference to the legal practice there is the expectation that the court should give more intensive attention to the national law.\(^{41}\)

3.2 Mutual Influences between National and Supranational Criminal Law
As is apparent already in the previous instances, when in the exercise of supranational justice national law has to be taken into account, if not even applied, this is a kind of foreign law import. This, however, is not the only way in

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40 Cf. 1.2.1 above.

41 Another question is to what degree these demands are in fact made use of. Apart from the Nikolić Case (n 1), presided by Judge Schomburg, in which the court availed itself of a comparative expert opinion on the range of sentences in the former Yugoslavia, information of this sort seems to be scarcely collected, as may be concluded from a thorough case analysis by Silvia D'Ascoli, \textit{Sentencing in International Criminal Law. The un ad hoc Tribunals and Future Perspectives for the ICC} (Hart 2011), espec. pp. 111 ff.
which elements of national criminal law can find entrance into the administration of supranational justice. Not less important are inferences by way of interpretation or recourse to general principles of law. This is not a one-way street though, but can run both bottom-up and top down between national and supranational law and justice in criminal matters.

3.2.1 National Law as Interpretation and Decision Aid for Supranational Criminal Law

In a similar way as domestic criminal law can draw support from other national law, supranational criminal law can also look for interpretation aid in national law for words and terms that are not definitely unequivocal, or it may find support there for its reasoning. And this is indeed the main field in which – apart from recourses to international instruments – comparisons with national criminal law play a major role in the judicial application of supranational criminal law. To illustrate this with some examples, particular attention may be given to judgements in ICTY-proceedings in which Wolfgang Schomburg, this contribution is devoted to, served as a judge.

One of his main comparative battlefields concerned questions of perpetration and participation. Although the concept of "joint criminal enterprise", introduced as a mode of criminal responsibility already in the early Tadić appeals judgement, was already well established in the ICTY case law when he entered the court, as presiding judge in the Stakić trial Schomburg dared to challenge this concept by giving the modes of (direct or indirect) "co-perpetration", as it was particularly developed in German law, priority in the interpretation of the term "commission" of a crime. After this alternative had been rejected in harshly – and anything but convincing – words by the appeals chamber, Judge Schomburg – to the extent evident – did not miss any opportunity to demonstrate the various forms of co-perpetration as preferable over joint criminal enterprise: so first on a broad scale in a separate opinion to the appeals judgement in Gacumbitsi and, additionally based on a comparative

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42 Cf. 1.3.1 above.
expert report on "Participation in Crime" by the Max Planck Institute for Foreign and International Criminal Law, in a dissenting opinion to the appeals judgement in Simić, and further on reiterated in separate opinions to the appeals judgements in Limaj and Martić—without forgetting to emphasize that meanwhile the concepts of co-perpetratorship and control over the act have been recognized— with comparative references—by the ICC in the cases Lubanga and Katanga.

There are, of course, also decisions on other areas in which Judge Schomburg was involved and where recourse to national criminal law as well as to public international law has proven helpful. Regarding general elements of criminal responsibility, mention may be made of psychological assistance as sufficient for aiding and abetting in Kamuhanda, of the principal requirements of mens rea in Blaškic and with special regard to aiding and abetting in Krstit. Further comparative instances of more general nature are the penalization of prohibitions in customary international law (concerning terror against the civilian population) in Galic or the application of the principle of lex mitior in former Yugoslavia in Deronjić. Since sentencing is also a rewarding field of comparison, it was probably on the initiative of the presiding judge Schomburg that in the Nikolić case the Max

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49 Prosecutor v. Milan Martić, IT-95-11-A, Appeals Judgement of 8 October 2008, Separate Opinion of Judge Schomburg, paras. 2 ff.; as to the sentencing in this case also referring (in para. 1) to the comparative expert report of the Max Planck Institute in the Nikolić case (n 1, 57).
51 Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/ Decision on the confirmation of charges of 30 September 2008, especially concerning indirect perpetration by virtue of an organisational power apparatus, paras. 480 ff.
Planck Institute for Foreign and International Criminal Law was requested to submit an almost worldwide comparative survey on the ranges of sentences.\textsuperscript{57} By frequently being referred to, this also proved as informative in Deronjić with regard to the determination of the punishment in the case of a guilty plea.\textsuperscript{58} The same applies to taking into account the impact of a crime on a victim’s relatives when determining the appropriate punishment in Knojelac.\textsuperscript{59}

Regarding special crimes, references to national law played a role for the interpretation of “deportation” concerning the disputed “cross-border” transfer requirement in Knojelac\textsuperscript{60} and Naletilić,\textsuperscript{61} as well as for the definition of “rape” in Kunarac.\textsuperscript{62}

In the range of procedural law, national criminal law found attention with regard to the accused’s right to appear as witness in his own defense in Galić,\textsuperscript{63} to the point at which a person’s status changes to being a suspect in Halilović,\textsuperscript{64} to the principle of \textit{in dubio pro reo} in terms of only relating to the establishment of facts and not the questions of law in Limaj,\textsuperscript{65} and to the requirements for presenting an appeal in Kunarac.\textsuperscript{66}

Apart from the ICTY-judgements in which Judge Schomburg was involved, merely some of those decisions in which national criminal law and/or public international law is paid special attention may be mentioned. This applies already to the establishment of the international tribunal in Tadić\textsuperscript{67} and the

\textsuperscript{57} As to the broad scope to be covered by this “Sentencing Report” see the Nikolić decision (n 1) para. 38, presented by Ulrich Sieber (ed.), \textit{The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice} (Max-Planck-Institut 2004) vol 1 (Expert Report) and vol 2 (Country Reports).

\textsuperscript{58} Deronjić (n 56), Dissenting Opinion of Judge Schomburg, para. 14.


\textsuperscript{60} Knojelac (n 59), where Judge Schomburg in his Dissenting Opinion went even back to the Roman law: para. 13.

\textsuperscript{61} Prosecutor v. Miladen Naletilić and Vinko Marinović, IT-98-34-A, Appeals Judgement of 3 May 2006, Dissenting Opinion of Judge Schomburg, with particular attention to customary international law and international principles of interpretation: paras. 10 ff.


\textsuperscript{63} Galić (n 55), paras. 19 ff.


\textsuperscript{65} Limaj (n 48), Separate Declaration of Judge Schomburg, paras. 15 ff.

\textsuperscript{66} Kunarac (n 62), paras. 42 ff.

\textsuperscript{67} Prosecutor v. Duško Tadić, IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995, espec. paras. 54 ff.
highly disputed rejection of “duress” as not affording complete defense to a soldier in Erdenomić.\textsuperscript{68} Broad comparative discussions can also be found to the already cited introduction of “joint criminal enterprise” in Tadić\textsuperscript{69}, as well as there to the motives required for crimes against humanity\textsuperscript{70} and, in procedural respect, to the necessary “equality of arms”.\textsuperscript{71}

3.2.2 Supranational Influences on National Criminal Law

In the reverse direction to the bottom-up grounding of supranational on national criminal law, there can also be top-down influences from supra- or international law on domestic criminal law. This can result from the fact that, as described by Heinz Neumayer, “comparative law (delivers) valuable indications for the interpretation of laws which are around in ever increasing numbers, have grown on supranational legal soil and rise above the doctrinal structures of individual legal systems.”\textsuperscript{72} In this way influenced from above will become the more compelling, the more judges in the exercise of criminal justice are bound by concrete supranational prescriptions.

This is of growing importance, especially in the European area where national criminal law can be subjected to primary and secondary Union Law of the EU: primarily, by the fact that there might be upper and lower limits concerning the offence descriptions, or that sanctions that are adverse to Union Law may even be forbidden;\textsuperscript{73} and secondarily, by the way that certain preconditions are set for the national criminal law, as particularly through directives according to Art. 83 of the Treaty on the Functioning of the European Union (TFEU).\textsuperscript{74}

But even where there are no binding directives, the supranational influence on national criminal law – because of the rule of interpretation in conformity

\textsuperscript{68} Dražen Erdenomić, IT-96-22-A, Appeals Judgment of 7 October 1997, with controversial separate and dissenting opinions by all judges.

\textsuperscript{69} Tadić (n 43).

\textsuperscript{70} Tadić (n 43), paras. 253 ff.

\textsuperscript{71} Tadić (n 43), paras. 43 ff, with special attention to this to the jurisprudence of the European Court of Human Rights.

\textsuperscript{72} This supply of components, emphasized by Heinz Neumayer, ‘Grundriß der Rechtsvergleichung’, in Rene David and Günther Grasmann, \textit{Einführung in die großen Rechtssysteme der Gegenwart} (2nd German edn, C.H. Beck 1988), pp. 1–77, 31 as essential for the development of public international law, is no less significant for criminal law.

\textsuperscript{73} For details to the case law of the various European courts see André Klip (ed.), \textit{Materials on European Criminal Law} (2nd edn, Intersentia Publishers 2014).

with Union Law ('unionsrechtskonforme Auslegung') – should not be underestimated. According to this, the court – similar to domestic interpretation in conformity with the constitution ('verfassungskonforme Auslegung') – has to favour, out of a group of several variants of interpretation of a criminal norm all tenable according to national understanding, the one that best complies with Union Law, or at least does not contradict it. In doing this, not only directives but also decrees and framework decisions of European institutions and bodies are to be taken into account.

Going further than this, according to the rule of interpretation favourable to international law ('völkerrechtsfreundliche Auslegung'), supranational criminal law might find entry into national criminal law not only by incorporating international crimes via the importation of foreign law, but also through the demand that, for example, the borderline of the wording of the (former) § 220a German Penal Code for genocide was to be "determined in the light of the international normative directive". In the sense of the idea of interpretation in conformity with international law, even solely national crime definitions are to be interpreted and applied in accord with the development of international criminal law and the judicature of supranational courts.

3.3 Development of Supranational and Universal Criminal Law
While the previous instances take place mainly in the area of judicative comparative law, the following ones have essentially to do with legislative comparative law, with the focus on the creation of universal criminal law and the furtherance of supranational criminal justice.

3.3.1 Identification of the Highest Legal Principles and Preparation of International Conventions
First steps can be made through the identification of topmost legal principles through comparative law, that is to say, principles which have found extensive acceptance on a national level and thus can deliver national as well as transnational standards for further legal development. This model function is of importance both on the substantive-legal level – for example, for the recognition

77 As described above 1.2.1.
79 This supply of components, emphasized by Heinz Neumayer, 'Grundriß der Rechtsvergleichung', in Rene David and Günther Grasmann, Einführung in die großen Rechtssysteme
of the principles of legality and personal guilt – and in the procedural area – for instance, for the development of rules of fairness established in general declarations of human rights.\textsuperscript{80}

Such an establishment of topmost principles of law can at the same time serve as important preliminary work for the expansion and strengthening of international conventions and agreements. Renowned examples for this are the prohibition of genocide,\textsuperscript{81} and the prohibition of cruel, inhumane and degrading punishment.\textsuperscript{82} Not only do such world-wide elevations of more humane criminal justice need concrete comparative law based coordination with respect to the already achieved legal level, as well as some encouragement to progress together, but there is also the need to find – with regard to terminology and legal-technical matters – a transnationally operational set of instruments. In this sense, although not without pathos, the special responsibility of comparative law has been particularly invoked for the development of international criminal law.\textsuperscript{83}

3.3.2 Optimizing International Criminal Justice

Such efforts may find their crowning conclusion in the establishment and promotion of international criminal justice. After this had happened initially in

\textit{der Gegenwart} (2nd German edn, C.H. Beck 1988), pp. 1–77, 31 as essential for the development of public international law, is no less significant for criminal law.


\textsuperscript{82} As worldwide proclaimed in the prohibition of torture in Art. 5 of the Universal Declaration of Human Rights of 1948 and expanded by Art. 7 of the International Covenant on Civil and Political Rights of 1966 and supplemented in Arts. 3 and 5 of the European Convention on Human Rights of 1950 for the European area. With regard to these and other international agreements, designed to provide both improved legal protection and humanization of those inhumane punishments still existing in some places, cf. the comprehensive documentation by Christine Van den Wyngaert (ed.), \textit{International Criminal Law. A Collection of International and European Instruments} (3rd edn, Martinus Nijhoff Publishers 2005).

\textsuperscript{83} Thus Hans-Heinrich Jescheck, \textit{Entwicklung, Aufgaben und Methoden der Strafrechtsvergleichung} (Mohr 1955), p. 31, who, possibly remembering the outrageous abuses of criminal law in war time Germany, sees comparative law "as the objective conscience of mankind, called upon to secure justice through its great postulates of impartiality of the courts, equality of perpetrators before the law and proportionality of guilt and punishment, against the repercussions of "unconditional hatred" [with reference to Russell Grenfell] during the time of war: partisanship, unilateralism and excessiveness".
the form of geographically limited, temporary international Ad hoc tribunals for the prosecution and sentencing of crimes against international law in the former Yugoslavia (ICTY) and Rwanda (ICTR) – to which were added other similarly limited, nationally-internationally mixed courts for other regions also marked by the most horrendous violations of international law –, the establishment of a permanent international criminal court, as was achieved by the Rome Statute for the ICC, was basically only a question of time.⁸⁴

What important role comparative law can play here, could hardly be demonstrated better than by having a look at the different conditions of emergence of the Ad hoc ICTY and ICTR compared with the ICC. While the urgency with which the Yugoslavia and Rwanda Tribunals had to be established left little time for sound preparation, the ICC could afford a longer lead-in time. Accordingly, the Statute that is authoritative for the work of the ICTY – and is almost the same in content for the ICTR – is, with 34 articles, extremely short; it contains – over and above jurisdictional provisions – very little in regard to the general requirements of criminal liability and not much more in regard to procedure. In contrast, the Rome Statute with its 129 articles has a lot more to say, both substantive-legally and procedurally. In this context, the comparative law coaching would have to be pointed out; without it, Part 3 of the Rome Statute, which is devoted to the “General Principles of Criminal Law”, would probably have remained even more rudimentary: After the ICC-draft by the International Law Commission had essentially been limited to more formal aspects of jurisdiction, the preparation of essential elements of criminal liability – for example, as related to intent and error, attempt and participation, self-defence and other grounds for excluding criminal responsibility – only got underway when academic circles took the initiative and put forward alternative drafts.⁸⁵

These different starting conditions became apparent in the content of the procedural rules. While the predominantly, if not even one-sidedly common-law origin is widely assumed in the articles for the ICTY and ICTR, few as there

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are, stronger influences from the continental-European criminal law tradition become apparent in the Rome Statute. Similar shifts of emphasis can also be observed in the Rules of Procedure and Evidence (RPE) that complement the Statute. This can already be seen in the different role of the judiciary. After the ICTY and the ICTR had to get to work virtually without procedural directives, the judges were obliged to establish the necessary procedural rules for themselves. In this law-creating task and opportunity, which had to be undertaken in regular plenary sessions, it was inevitable that the rules were initially dominated by the legal ideas of that group of judges which, in using this opportunity, could put the most complete and quickly usable compendium on the negotiating table: and that was, after all, achieved by the then mainly common law-based group of judges – above all in the person of the later ICTY president Gabrielle Kirk McDonald. However, later on things changed: The more unsuitable the adversarial procedural structure of the common law turned out to be in its practical application in the ICTY – at least for complex international criminal procedures –, the more instructional elements from modern continental-European procedural law – often polemically discredited as “inquisitorial” – gained entry into the judicial-legal Rules of Procedure and Evidence.

The RPE for the ICC did not have to go through such a process of change. On the one hand, not in a formal sense, because they did not come about through judicial plenary decisions, but were created by the competent bodies of the Rome Statute in a procedure resembling a legislative process, and on the other hand, because the experiences gained from ICTY practice could be taken into consideration when the ICC-RPE were drawn up. This happened on a comparative law basis and with the participation of commission members from different legal circles. In doing so, the participants had to familiarize themselves


with the possibly divergent legal ideas and different styles of thinking of the respective negotiation partners – and put themselves in the others’ position as well, because “only the person who knows the cultural preconditions of the other side can negotiate sensibly”. 89 This sensitivity, however, cannot be reached without comparative law.

4 Conclusion

There are certainly more instances in which a comparative view beyond borders, on the transnational level between different domestic jurisdictions as well as bottom-up from national to supranational law and vice-versa top-down, can be advisable, if not even necessary. But as can already be concluded from the survey presented before, the important and multi-faceted role of comparative law for transnational criminal justice can hardly be overestimated, both in terms of adjudicative and legislative comparative law.

Regarding Wolfgang Schomburg, this contribution is devoted to as a longtime friend and judges colleague at the ICTY, in his capacity as judge in international criminal justice he has distinguished himself as one of the most prominent comparatists in criminal law. For this, amongst his many other achievements, he deserves greatest gratitude and best wishes to his 70th birthday.

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