THE USE OF FOREIGN LAW IN DOMESTIC ADJUDICATION

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1. Introduction

Today most legal systems provide that the criminal court judge must always and exclusively apply the domestic penal code.

This rule is in no way self-evident as regards criminal acts committed abroad. Thus, in German legal history the application of foreign penal law to extraterritorial crimes was one of the firm principles of criminal theory and case law[1] and it remained embodied in the German penal code until 1940.

The application of foreign penal law to extraterritorial offences – at least when it is more lenient – has been repeatedly recommended at international conferences[2] on criminal law. This has been suggested on the grounds that the law of the place where an act was committed, that is, the law being directly involved, is the best suited to take into account the specific circumstances of the act.[3] There exist only a few nations to date

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[1] See *Staubach*, Die Anwendung ausländischen Strafrechts durch den inländischen Richter (Bonn 1964), pp. 43–86 with numerous annotations.

[2] Seminar of Institut de Droit International 1883, Resolution Art. 5 and 10, Der Gerichtssaal 35, pp. 564 ff.; II International Criminal Law Congress 1929 in Bucarest, Resolution Point 1, Revue internationale de droit pénal 1930, pp. 12 ff.; VIII International Criminal Law Congress 1961 in Lissabon, Resolution I 3, II 1–3, Zeitschrift für die gesamte Strafrechtswissenschaft 74 (1962), pp. 189 ff.

[3] So also *Jescheck*, Lehrbuch des Strafrechts, Allgemeiner Teil, 3rd ed. (Berlin 1978) p. 129; *Schultz*, Compétence des juridictions pénales pour les infractions commises à l'étranger. In: Revue de science criminelle et de droit pénal comparé 1967, pp. 305 ff. (329) with lit. ref.; Dissenting with ref. to practical difficulties: *Oehler*, Internationales Strafrecht, 2nd ed. (Köln/Berlin/Bonn/München 1983) pp. 145 f. (ann. 144), p. 462 (ann. 744).

that have followed these recommendations, such as Uruguay[4] and Switzerland,[5] where the penal codes expressly provide for the application of the more lenient *locus criminis* law to extraterritorial crimes committed by their own citizens.

In contrast thereto, the majority of countries apply exclusively their own domestic penal codes to acts committed abroad. This does not mean, however, that in these countries, criminal court judges can ignore foreign statutory provisions. In applying the domestic criminal code to an act committed abroad it is often necessary for the judge to refer to the legal system of the *locus criminis*.

The foreign provisions he might have to consider are:

- extra-penal statutory rules;
- penal law standards;
- rules on penalties and sentencing.

2. Extra-penal statutory rules of the locus criminis

The first occasion for the judge to open the foreign statute-book can arise before he even comes to the question of double criminality, that is when he first examines the issue of the punishability of the act under his own penal law. After he has verified that a certain provision does in fact extend its protection to extraterritorial commitment, respectively to foreign interests, he must then examine whether the definition of the offence contains legal terms or other elements which need to be completed and can or must be specified with the aid of foreign legal statutes.[6]

The domestic law in question could be a *blanket provision* which expressly refers to other statutory rules. An example of this is Section 315a Par. 1 No. 2 Criminal Code of the FRG which refers to "legal provisions to safeguard rail, monorail, ship and air traffic". It was relevant in the well-known case of the young German sports pilot who landed on the

[4] Capitulo II, Art. 10 No. 5 Codigo Penal 1933 (in force since 1.7.1934).

[5] Art. 6 Par. 1 Sen. 2 Swiss Penal Code 1937 (in force since 1.1.1942). The application of the more lenient *lex loci* is, independently of the perpetrator's citizenship, valid for acts committed abroad against Swiss citizens (Art. 5 Par. 1 Sen. 2) as well as under international treaties (Art. 6bis Par. 1 Sen. 2).

[6] For a thorough discussion see *Liebelt*, Zum deutschen internationalen Strafrecht und seiner Bedeutung für den Einfluß außerstrafrechtlicher Rechtssätze des Auslands auf die Anwendung inländischen Strafrechts. (Diss. Münster 1978); *Cornils*, Die Fremdrechtsanwendung im Strafrecht (Berlin/New York 1978).

Red Square in Moscow. In that case the German legal definition was to be specified by Soviet air traffic rules.

Other penal provisions contain *legal standard concepts*, which are, in their substantive meaning, dependent upon civil or administrative law. For example the definitional elements "marriage" (§ 171 FRG Criminal Code; Chap. 7 § 1 Swedish Criminal Code), "property" (Chap. 10 § 1; Chap. 11 § 1 Swedish Criminal Code), "guardian"/"curator" (§§ 235 Par. 1, 236 FRG Criminal Code), "estate" (Chap. 8 § 3 Swedish Criminal Code) and "unlawful" (Chap. 8 §§ 1, 10 Swedish Criminal Code).

Finally, provisions existing outside the criminal code can be employed for the determination of the concepts of *necessary diligence* with regard to offences committed by negligence, and of the *guarantor's obligations* with regard to crimes by omission, as well as for the determination of some of the *grounds for justification* and *exemption from punishment*.

Objective duties of diligence (aktsamhetsstandarder) are settled, for instance, in labour safety regulations as well as in traffic rules. Legally founded guarantor's obligations (garantskyldighet) can arise from the relationship between marriage partners, between legal guardian and ward or from the position of superior, animal keeper, or ship's captain.

The three above-mentioned categories of provisions are alike in so far as they all embody definitional elements which need to be specified and which expressly or indirectly refer to extra-penal regulations. The legislator intentionally refrains from a more detailed shaping of certain paradigms or from an own definition of certain legal concepts in the criminal code and leaves it to other areas of the legal system which are more in line with the subject matter at hand. The definition of the crime can thus be tailored to the greatest possible extent to the conduct which it is desired to prohibit.

The best understanding of the facts and circumstances of certain extraterritorial crimes can thus be reached when *preliminary questions of civil or administrative law are answered in the light of the rules which are in force at the locus criminis*. Accordingly, a broad section of opinion in international criminal law nowadays holds that a criminal court judge, when dealing with certain offences committed in a foreign country, should apply that country's civil or administrative law in order to interpret his own domestic penal code.[7]

[7] See *Jareborg*, Brotten I, 2nd ed., (Stockholm 1984), p. 86; *Andenæs*, Alminnelig strafferett, 2nd ed. (Oslo/Bergen/Tromsö 1974) p. 495; *Jescheck* (n. 3), p. 130; *Oehler*

The present paper will not examine this first issue in any greater depth but will instead, in accordance with the theme of the symposium, deal with the use of foreign *criminal law* where the domestic criminal code is applicable for acts committed abroad only if the act is also an offence under the law at the *locus criminis*.

The special questions of double criminality which arise under extradition law and within the framework of international treaties and mutual judicial assistance agreements will be examined by Michal Plachta (SEE BELOW PP. 78 FF.) and consequently will not be discussed here.

3. Penal law standards of locus criminis

In order to find out if an extraterritorial act is punishable according to the law of the *locus criminis* – as a requirement for the application of his own domestic criminal code – the judge first of all verifies whether the foreign penal law includes a provision concerning the perpetrator's act.

It is not necessary that the foreign definition of the offence corresponds exactly with that of the relevant domestic definition or that the act is legally qualified in the same manner.[8] Thus, for example the same action can be classified in one country as receiving of stolen goods and in the other as embezzlement. It also does not matter whether the reasons for the criminalization of the act correspond in both nations.[9] However, the offence must be considered a criminal wrong in both countries and be punishable with a criminal sanction. Thus, for instance, mere administrative wrongs or regulatory offences, as known under German law, are excluded.[10] There is a large measure of consensus on these points.

(n. 3), p. 153 f. (ann. 151a); *Nowakowski*, Anwendungen des inländischen Strafrechts und außerstrafrechtliche Rechtssätze, Juristenzeitung 1971, pp. 633 ff.; *Eser*, in: Schönke- Schröder, Strafgesetzbuch. Kommentar. 22nd ed. (München 1985), ann. 23–24 Introduction to §§ 3–7; *Samson*, in: Systematischer Kommentar zum Strafgesetzbuch, Vol. I, Allgemeiner Teil, 5th ed. (Frankfurt 1987) ann. 17–20 to § 9. For occasional objections with reference to the question of practical difficulties, see *Cornils* (n. 6), pp. 109–113.

[8] See *Träskman*, Den finska straffrättens tillämpningsområde (Helsingfors 1977) p. 305 ff.; *Eser* (n. 7), ann. 8 to § 7; *Oehler* (n. 3), p. 151 (ann. 151a).

[9] See *Eser* (n. 7), ann. 8 to § 7.

[10] The same opinion is found in: *Träskman* (n. 8), p. 313; *Lindegaard*, in: Kommenteret straffelov. Almindelig del. 2nd ed. (Copenhagen 1981) p. 130; *Samson* (n. 7), ann. 2 to § 7; BGHSt 27, 5; dissenting: *Tröndle*, in: Leipziger Kommentar. Strafgesetzbuch. 10th ed. (Berlin/New York 1985), ann. 4 to § 7. Under Poland's

On the other hand, it is disputed to what extent the domestic judge must apply foreign law in order to test the punishability of an act at the *locus criminis* within the meaning of double criminality.

Opinion is divided on this question, especially in the Federal Republic of Germany. While a minority[11] holds that it is sufficient to subsume the facts of the case under a *prohibitory standard* of the foreign law, the prevailing legal opinion[12] is that all substantive requirements of punishability must be fulfilled. That is, in addition to the prohibitory standard, foreign *grounds of justification, grounds of excuse* and other *grounds of exemption from punishment* must be applied. The question that still remains to be answered is whether, and if so, to what extent, impediments to prosecution under the *locus criminis* law, such as limitation periods, amnesty or the absence of a denunciation by the victim can rule out the application of the domestic criminal code.[13]

The Nordic countries appear to have fewer difficulties in determining the extent to which the punishability, according to foreign law, is to be analysed. Criminal theory and case law aggree on the view that grounds of exemption from punishment under a foreign legal system must be taken into consideration.[14]

In Norway the criminal court judge can even rely upon the penal code's wording: With regard to extraterritorial crimes committed by foreigners it is a requirement (§ 13 Par. 2 Sen. 1 in conjunction with § 12 Par. 1 Nr. 4b) that the act must not only be *punishable* abroad but that the perpetrator *actually can be punished* according to the *locus criminis* law. This means

criminal theory there is no precise answer because even according to national law the distinction between criminal acts and infractions is theoretically unclear and often has a purely quantitative character.

[11] *Woesner*, Deutsch-deutsche Strafrechtskonflikte, in: Zeitschrift für Rechtspolitik 1976, pp. 248 ff. (250); similar for the double criminality under extradition law: *Nybergh*, Tradition och dynamik inom utlämninsrätten, in: Ars boni et aequi. Juhlajulkaisu Y.J. Hakulisen 70-vuotispäivänä 21.1.1972 (Helsinki 1972), pp. 193 f.

[12] *Oehler* (n. 3), p. 152 (ann. 151b); *Samson* (n. 7), ann. 2 to § 7; expressing doubts: *Tröndle* (n. 10), ann. 5 to § 7 (in ref. to practical difficulties); in conclusion agreeing: *Eser* (n. 7), ann. 9 to § 7.

[13] Dissenting: *Tröndle* (n. 10), ann. 6 to § 7; in partial agreement: *Eser* (n. 7), ann. 11 to § 7; *Oehler* (n. 3), p. 154 (ann. 151e).

[14] See *Hurwitz*, Den danske kriminalret. Almindelig del, 4th ed.; (ved Waaben) Copenhagen 1971), p. 107; *Lindegaard* (n. 10), p. 129 ("må inddrages") with ref. to adjudication; *Träskman* (n. 8), pp. 300 ff. with further ref.; *Hult*, in: Brottsbalken jämte förklaringar, Vol. I, 4th ed. (Stockholm 1974), pp. 87 ff.

that foreign impediments to prosecution are to be respected in these cases.[15]

Such clear indications for the judge regarding the extent to which he should have recourse to foreign law in dealing with double criminality are, however, very rare. Some light could be shed on this point, perhaps, if we ask what motive leads a penal legislator to declare the application of domestic law dependent upon the precondition of double criminality, and what function is fulfilled by this requirement in the international criminal law of different countries.

What matters here is whether a state by threatening punishment for the commission of extraterritorial offences is predominantly pursuing its own interests or those of a foreign state.

The first alternative, i.e. exercise of penal authority for domestic interests, lies – apart from other rules of jurisdiction over extraterritorial crime which will not be discussed here – particularly behind the *active personality principle*. This principle provides for jurisdiction to be exercised over acts committed abroad by nationals or permanent residents of the country concerned.

The second alternative – exercise of penal authority in foreign interests – constitutes, on the other hand, the fundamental idea of the *representation principle*. This serves, where other rules of jurisdiction such as the principle of protection or the universality principle do not apply, as a rule of jurisdiction over extraterritorial crimes committed by foreigners.

3.1. The active personality principle

A state which according to this principle threatens its citizens with punishment for acts committed abroad, stresses their allegiance to domestic law. Nationals of a state always remain under their state's sovereignty and this has two different consequences; on the one hand, they are safe from extradition, and on the other hand they have to observe their own nation's criminal law, even though staying abroad. The state's jurisdiction over extraterritorial offences of its citizens is its own concern. Accordingly, international law does not require that, within this framework, the law of the *locus criminis* is considered in any way. Thus some countries, like Finland and Poland for example, do not require double criminality in

[15] See *Andenæs* (n. 7), pp. 498 f., 500.

cases of extraterritorial crimes committed by their national citizens.[16] Other legal systems, such as the Swedish and the Norwegian, make an exception to the requirement of double criminality in cases of especially serious or expressly enumerated offences.[17]

Although the active personality principle is universally recognized under international law, its unconditional application is regarded today in many countries as an improper use of domestic jurisdiction in the face of foreign sovereign interests.[18] For this reason the Finnish and the Polish criminal codes provide that charges concerning extraterritorial offences shall only be brought by order of the Chancellor of Justice.[19] Even if a state in relation to its citizens establishes an explicit legal requirement of double criminality for offences committed abroad, this is a matter of voluntary self-restraint. The national penal authority shall exceptionally not be exercised if the committed action at the *locus criminis* does not constitute a punishable wrong. The requirement of double criminality has, in this instance, merely a *limiting function* vis-à-vis the given jurisdiction and the extent of the influence to be given to foreign law lies within the discretion of the legislator.

The legislator could, for example, declare the state's own criminal code to be already applicable if the foreign law recognizes in any way a prohibitory standard for such kind of behaviour as performed by the perpetrator; that is, if the perpetrator cannot plead that his behaviour was generally allowed abroad. The domestic judge could then content himself with the finding of the foreign prohibitory rule and any deeper examination of the foreign legal system would not be necessary.[20]

[16] Chap. 1 § 2 Finnish Criminal Code; Art. 113 Polish Criminal Code.

[17] Chap. 2 § 3 Nr. 7 Swedish Criminal Code (since 1972); § 12 Par. 1 Nr. 3a Norwegian Criminal Code.

[18] See *Träskman* (n. 8), pp. 263 ff., 269. *Honkasalo*, Suomen rikosoikeus. Yleiset opit. I. 2nd ed. (Helsinki 1965), pp. 66 ff. The faculties of law and philosophy in Uppsala had voiced such objections already in 1833, see *Falk*, Straffrätt och territorium, Stockholm 1976, pp. 111 ff. For the change of opinion in the German criminal law doctrine, see *Liebelt* (n. 6), pp. 87 ff.; see especially also *Schröder*, Grundlagen und Grenzen des Personalitätsprinzips im internationalen Strafrecht, Juristenzeitung 1968, pp. 241 ff.

[19] Chap. 1 § 6 Finnish Criminal Code; Art. 116 Polish Criminal Code.

[20] For such a summary examination of foreign law: *Nybergh* (n. 11), pp. 193 ff.; *Woesner* (n. 11), p. 250. For a discussion of the problem of practical difficulties, see *Oehler* (n. 3), pp. 462 f. (ann. 745).

However, such a restrictive (abstract) understanding of double criminality is not to be assumed in a criminal law system in which the wording of the legal text explicitly focuses on the fact that *the act*[21] is punishable according to the laws which are effective for the *locus criminis*. This formulation tells very strongly for a concrete approach. The judge not only has to verify if the foreign law contains a prohibition of the general kind of behaviour performed by the perpetrator but, in addition, he must find out whether *the act actually committed* is a punishable offence under foreign law. In this case all substantive conditions of punishability are to be taken into account.[22] A distinction between the grounds of justification and excuse, as in German criminal systematics, or between objective and subjective grounds for exemption from punishment according to the traditional Swedish criminal theory, would appear to be of little use as other legal systems, in so far as they even if they acknowledge similar distinctions, very often classify comparable grounds for exemption from punishment quite differently.[23]

The judge, who has to determine if *the act* is punishable under the foreign law, will fulfill his task only if he tries to discover how the actual facts and circumstances of the offence would be assessed under the penal law of the *locus criminis*.

In doing so, it may turn out that an action which is a punishable offence at home is allowed or even mandatory in the country where the act was committed. A sovereign state which has voluntarily restricted the application of the active personality principle by requiring double criminality, must consequently accept that its "criminal" citizens may plead, for example, a particularly far-reaching justification ground or a particularly

[21] "handlingen" (§ 12 Par. 1 Nr. 3c Norwegian Criminal Code; § 7 Par. 1 Nr. 2 Danish Criminal Code); "gärningen" (Chap. 2, § 2 Par. 2 Swedish Criminal Code); "die Tat" (§ 7 FRG Criminal Code).

[22] See *Samson* (n. 7), ann. 2 to § 7; *Eser* (n. 7), ann. 8 to § 8; *Tröndle* (n. 10), ann. 4b to § 7; *Träskman* (n. 8), pp. 301 ff., pp. 306 ff.; *Hurwitz* (n. 14), p. 107; *Oehler* (n. 3), p. 152 (ann. 151b); in disagreement with the above as regards the law of extradition: *Falk* (n. 18), pp. 94 f.

[23] Under Swedish law necessity is recognized only as ground of justification and not, as under German law, as ground of excuse; voluntary retreat and correction, however, are grounds of excuse (under German law personal grounds for exemption of punishment); insanity (which excludes, according to German law, culpability) is taken into account only with regard to the appropriate sanction. For a critical account of the above, see *Jareborg*, Rechtfertigung und Entschuldigung im schwedischen Strafrecht. In: Eser/Fletcher (editors), Rechtfertigung und Entschuldigung. Justification and Excuse (Freiburg 1987), pp. 411 ff. (416, 421, 423).

high age of criminal responsibility under the law of the *locus criminis* and may therefore remain exempt from punishment at home.[24]

According to wide-spread opinion among legal writers in the Federal Republic of Germany[25] an exception should be made to such a rule where foreign grounds of exemption from punishment contradict constitutional or universally recognized principles, as for instance, assassination on political order. These cannot influence domestic adjudication.

After all, the legislator under the active personality principle can limit the self-imposed dependence on foreign legal views by excluding from the requirement of double criminality certain offences that should be judged only according to domestic standards.[26] In this way the legislator also prevents his national citizens from circumventing the strict domestic standards by shifting their criminal activity abroad where the legal situation is more advantageous.[27]

In the same way the perpetrator's national state is free to allow the influence of legal *impediments to prosecution* found under the law of the *locus criminis*, such as limitation periods, amnesty or the absence of a denunciation by the victim, against its own criminal procedure, or to ig-

[24] A Swedish judge would have to respect, for example, if the act was committed in the Federal Republic of Germany, that self-defence under the FRG Criminal Code does not require a balance of interests (försvarlighetsbedömning) or that insanity under the FRG Criminal Code excludes, as a ground of excuse, punishability (see n. 23).

[25] *Eser* (n. 7), ann. 9 to § 7; *Tröndle* (n. 10), ann. 5 to § 7; *Oehler* (n. 3), p. 152 (ann. 151b); OLG Düsseldorf, Neue Juristische Wochenschrift 1979, 59 ff. (63); 1983, 1277 f. (1278).

[26] For example, since 1972, the Swedish criminal code has excluded cases of major criminality which are punishable by a minimum sentence of four or more years imprisonment (Chap. 2 § 3 Nr. 7 Swedish Criminal Code).

[27] The FRG Criminal Code provides an example of this in its special treatment of abortion crimes. Unlimited jurisdiction is provided for these, independent of the legal situation in the *locus criminis* (§ 5 Nr. 9 FRG Criminal Code). Employing this provision, trips to Denmark or the Netherlands undertaken to circumvent the stricter abortion laws at home, can be penalised, see *Eser* (n. 7), ann. 35 before § 218; *Samson* (n. 7), ann. 18 to § 5. When faced with the same situation in the 1960's the Swedish legislator reacted in the opposite manner to the numerous abortions that were being performed in Poland on Swedish women, namely with an abolition act, see *Cornils*, Landesbericht Schweden. In: Eser/Koch (editors), Schwangerschaftsabbruch im internationalen Vergleich, Teil I, (Baden-Baden 1988), pp. 1383 ff. (1408). The so-called "Trips to Poland Affair" was not only a factor in the liberalization of the Swedish abortion law but also led to discussions to adopt the requirement of double criminality for acts committed abroad by nationals. This then led in 1972 to an amendment of the law, see *Hult* (n. 14), p. 87.

nore them. In the Nordic countries, with the partial exception of Norway, as we have seen, the consideration of such legal impediments to prosecution is generally acknowledged by criminal theory and by case law.[28] The German Federal Supreme Court, on the other hand, fundamentally rejects the consideration of foreign legal impediments to prosecution.[29] This attitude is all the more remarkable since in the Federal Republic of Germany jurisdiction over national citizens for acts committed abroad is today no longer exclusively attributed to the active personality principle but is rather, in ever increasing measure, being attributed to the principle of representation.[30]

3.2. The principle of representation

The principle of representation typically serves as rule of jurisdiction over extraterritorial offences committed by *foreign* citizens, to the extent that the acts are not covered by the universality principle or the principle of protection or that of passive personality.[31] The representation principle is founded on the idea of international solidarity. The state of jurisdiction does not seek to intervene to secure its own interests here but rather to assist the application of foreign criminal justice in so far as the foreign state is prevented from exercising its own penal authority, for example, because the perpetrator has left the country where the act was committed and is not extradited. The domestic jurisdiction is mainly based on the violation of the foreign legal system that has occurred so that the punishability of the action at the *locus criminis* constitutes a necessary condition to jurisdiction. Thus here, the requirement of double criminality does not have a *limiting function* as under the active personality principle but

[28] See *Lindegaard* (n. 10), p. 129; *Falk* (n. 18), pp. 155 ff. with reference to the legislative materials; *Hult* (n. 14), p. 89.

[29] BGHSt 2, 160 ff. (161); BGH Goltdammer's Archiv für Strafrecht 1976, 242 ff. (243).

[30] See *Samson* (n. 7), ann. 1 to § 7; *Schröder* (n. 18), p. 244; *Vogler*, Entwicklungstendenzen im internationalen Strafrecht und die Berücksichtigung der Konvention des Europarates, in: Festschrift für Maurach (Karlsruhe 1972), pp. 595 ff. (604); *Eser* (n. 7), ann. 1 to § 7; similar also *Falk* (n. 18), pp. 160 ff.; dissenting opinion: *Tröndle* (n. 10), ann. 1 to § 7; *Oehler* (n. 3), p. 146 (ann. 145), 443 f. (ann. 702–705). The same principle is also to be found under the terms of vicarious competence or vicarious jurisdiction (German: stellvertretende Strafrechtspflege).

[31] See *Träskman* (n. 8), pp. 142 f., 290 f.; *Oehler* (n. 3), p. 146 (ann. 145).

rather a *constituting function* for the domestic jurisdiction and the application of the domestic criminal code.

It thus follows that the domestic legislator cannot decide as freely, as under the active personality principle, to what extent foreign law will influence domestic adjudication. On the contrary: if one takes the principle of representation seriously the domestic jurisdiction cannot go further than the claim for punishment made by the state where the act was committed, because the domestic jurisdiction is only derived from the foreign penal authority. This means that the domestic judge cannot be excused from considering *all substantive requirements of punishability* under the foreign law when verifying the double criminality of the act.[32]

In addition, it is quite clear that he must also respect any legal *impediments to prosecution* that might exist abroad, because if a foreign claim for punishment does not exist, there is certainly no room for intervention by representation.[33] The Norwegian criminal code states with exemplary clearness this stipulation for the application of its own provisions by making the additional requirement for extraterritorial offences committed by foreigners that the crime can actually be punished under the law of the *locus criminis*.[34] The Swedish legislator, in his preliminary work for the amendment of the law in 1972, stated unequivocably that in favour of the perpetrator the decisive moment for the requirement of double criminality is the *date of sentencing*, not the date of commitment and that therefore impediments to prosecution such as limitation or amnesty that have become effective in the meantime must be taken into consideration.[35]

In the Federal Republic of Germany the prevailing legal opinion also holds, in opposition to the the case law of the Supreme Court, that foreign impediments to prosecution are to be respected within the framework of the representation principle.[36] Thus, to the extent that here domestic jurisdiction over extraterritorial crimes committed by national citizens is also based upon this principle, they should consequently also be

32 See *Samson* (n. 7), ann. 2 to § 7; *Oehler* (n. 3), p. 152 (ann. 151b).

33 Of the same opinion is *Eser* (n. 7), ann. 11 and 17 to § 7; dissenting opinion: *Tröndle* (n. 10), ann. 14 before § 3.

34 See *Andenæs* (n. 7), p. 495.

35 See *Hult* (n. 14), pp. 89 f.; *Falk* (n. 18), pp. 145 ff.; expressly dissenting opinion: *Tröndle* (n. 10), ann. 3 to § 7.

36 See *Oehler* (n. 3), p. 154 (ann. 151e); *Eser* (n. 7), ann. 11 to § 7; dissenting opinion: *Tröndle* (n. 10), ann. 60 to § 7.

allowed to plead impediments to prosecution which exist in the *locus criminis* law.

3.3. Consequences

For the domestic judge who must verify double criminality before he can apply his own criminal code, the following situation generally arises:

- if the act has been committed by a foreigner, the violation of the foreign legal system functions as a *constituting condition* for the domestic jurisdiction under the principle of representation. The judge has to undertake a complete criminal assessment of the facts and circumstances under the standards of the *locus criminis* law and along with this must observe substantive grounds for exemption from punishment as well as impediments to prosecution.
- if, on the other hand, the perpetrator is a national, the domestic jurisdiction is already grounded on this personal relationship. The violation of foreign statutes has merely a *limiting function* in this case. The judge must only take the *locus criminis* law into account to the extent that his own legislator deems appropriate. If, however, jurisdiction over extraterritorial crimes committed by national citizens is also founded on the principle of representation, as in the Federal Republic of Germany, it then follows that the judge has the task of comprehensively analysing the punishability and the impediments to prosecution under the *locus criminis* laws, in the same way as against foreign perpetrators.

4. The penalty under the locus criminis law

Finally, in connection with *sentencing* it can once again become necessary for the judge to consider the laws that are in force in the foreign *locus criminis*.

Some legal systems, for example the Swedish, combine along with the requirement of double criminality the provision that, in the case of domestic conviction for an extraterritorial offence, a penalty no more severe than the maximum penalty provided under the law of the *locus criminis* may be imposed.[37] The Danish criminal code grants this privilege only to

[37] Chap. 2 § 2 Par. 3 Swedish Criminal Code.

nationals and to citizens of another Nordic country.[38] The Norwegian criminal code, on the contrary, reserves it only for *foreigners*.[39] Similarly, under the Polish penal code, differences between domestic law and the *locus criminis* law can only be taken into consideration in favour of a *foreign* perpetrator.[40] Whatever their scope, provisions of this kind contain a clear directive to the judge that he is not to overstep the maximum penalty under the *locus criminis* law.

There is also consensus that these provisions not only apply to the *degree of penalty* but also to the *type of sanctions*.[41] In concrete cases, the adherence to the foreign maximum penalty can result in the sentence falling short of the domestic minimum penalty, for example, the application of fines where under domestic laws, imprisonment is the sole applicable sentence.[42]

In contrast to their Nordic neighbours, the Finnish and West German legislators have not supplemented the requirement of double criminality within their criminal codes with a rule concerning sentencing. Finnish and West German criminal court judges in certain cases must indeed verify if an act committed abroad is punishable under the *locus criminis* laws. They are not, however, required by law to consider the nature and extent of threatened sanctions under foreign law in their own sentencing. Such a separation between punishability and penalty, two concepts which should really be unified, is open to criticism.

If the fact that the foreign legal system does not provide any penalty for a given act is taken into account when applying the domestic criminal code, then surely it follows that the fact that the foreign law provides for a more lenient penalty should also be respected. In relation to a threat of severe punishment under domestic law, one can also regard the threat of

[38] § 10 Par. 2 in conjunction with § 7 Danish Criminal Code. The Danish legislator has not yet expanded this provision to foreign perpetrators who, since 1986, come under § 8 Par. 1 Nr. 6 Danish Criminal Code.

[39] § 13 Par. 2 Norwegian Criminal Code. In Norwegian criminal theory, however, this restriction is not approved: *Bratholm*, Strafferett og samfunn. (Oslo 1980) p. 379; Straffelovgivningens stedlige virkeområde, NOU 1984:31, p. 12.

[40] Art. 114 § 2 Polish Criminal Code.

[41] See *Lindegaard* (n. 10), pp. 129 f.; *Hult* (n. 14), p. 91.

[42] See *Hult* (n. 14), p. 90.

more lenient punishment under foreign law as a form of immunity from punishment, namely as partial immunity.[43]

A sovereign state which directs its judges not to overstep the maximum penalty provided for the offence under the *locus criminis* law does not need to fear that by doing so its sovereignty will be violated. If the influence of the foreign law on the application of national law is compatible with sovereignty in the case of a *strong deviation* (immunity abroad as opposed to punishability under domestic law) sovereignty certainly cannot be violated by the consideration of a *minor deviation* (a more lenient penalty abroad than under domestic law).[44]

So far as the principle of representation is concerned, it follows that the law of the *locus criminis* must not only be taken into consideration as regards the *punishability* of an act, but also as regards the *penalty*. Like their Nordic colleagues, criminal court judges in Finland and in the Federal Republic of Germany should therefore feel obliged, by virtue simply of the requirement of double criminality, and even without the express directive of the legislator, to refrain from imposing a more severe penalty for the act than that of the maximum penalty under foreign law.

[43] This argument was formerly used in the FRG Criminal Code to establish the application of the more lenient locus criminis law, see *Staubach* (n. 1), p. 154.

[44] In detail: *Staubach* (n. 1), pp. 162 ff. with numerous further references.