

International Colloquium

**'The dagger of the assassin ... concealed
beneath the robe ...'¹: Judicial Murder, Torture,
and Unlawful Detention**

Comparative Perspectives on the Intervention
in Crimes of Dictatorships Through the Exercise of Judicial Roles

June 14-15, 2023

Universidad Diego Portales – Universidad de Chile

Scientific Committee

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¹ T. Taylor in United States v. Josef Altstötter et al. (1947).

I. Concept and Goal

The establishment of criminal liability for murder, torture and unlawful detention committed or aided through the exercise of a judicial role – or the failure to exercise it – poses highly complex legal and political questions, which surface often enough in the context of transitional or post conflict criminal prosecutions. The most prominent precedent dates back to the ‘Judges’ Trial’ (*Juristenprozess*) before a US Military Tribunal in Nuremberg after WW II, where the expression *judicial murder* was used by the prosecution as a rationale for charging some defendants for the killings that resulted from the death sentences they handed down in application of aberrant criminal provisions or in the context of blatantly unfair trials.

Since the Judges’ Trial there have been some other cases of criminal prosecutions and convictions for *judicial murder* and for what in the same vein might be called *judicial torture* and *judicial unlawful detention*, perpetrated in the contexts of dictatorships. A feature common to all of them is that defendants were found guilty not (or not just) of ‘malfeasance in office’ or ‘judicial misconduct’, but for the criminal consequences of it – killings, tortures, kidnappings – *as if* they had perpetrated these crimes. Indeed, the convictions asserted that they did.

The most recent historical case seems to be the sentence to life imprisonment handed down to four former Argentine judges and public prosecutors, in 2017 (in the context of the ‘Megacausa’, in Mendoza), on the grounds that they deliberately failed to prosecute secret police agents who had arrested, tortured and eventually murdered several political dissidents, even though they had the legal duty to do so and to protect the victims, whose deaths they could have prevented. The decision sets a historical precedent for Latin American transitional justice, with some political – and arguably, legal – consequences for other countries, including Chile, given that its Supreme Court granted the extradition of one of the four defendants to Argentina, in 2013, after having found that the charges brought against him in Mendoza would have been punishable as murder under Chilean criminal law as well.

The theoretical and doctrinal foundations of such decisions are by no means settled matters. Beyond the relatively straightforward cases of ‘farcical trials’, there have been several instances of criminal prosecution and trials, where prosecutors and judges acted on the basis of an unjust, but applicable law, delivering or upholding unfair convictions leading to imprisonment, or even death. In addition, judicial or prosecutorial failure to prevent killings, tortures and kidnappings committed by state agents in the context of dictatorships are absolutely not simple cases of criminal liability of those prosecutors or judges as perpetrators or aiders and abettors of these crimes.

This is a matter where legal traditions tend to diverge. Anglo-American legal tradition seems to abide by the principle of judicial immunity, at least where there is an actual (not farcical) exercise of jurisdiction, so that judges only face the risk of being held liable for judicial misconduct. By contrast, German criminal law, for instance, finds it less difficult to ascribe criminal liability for killings or unlawful detentions, on the condition that the judge’s decision can be considered as judicial misconduct at the same time; so, the defendant will be convicted for judicial misconduct in addition to (not instead of) murder or unlawful detention. In 2017 the ‘Megacausa’ court in Argentina rejected a defense counsel argument based on the former legal tradition – alleging that judges do not commit murder, when by omission they fail to prevent a killing, but only commit the crime of judicial dereliction of duty, an omissive variant of judicial misconduct. In its ruling, the Court instead favoured the German tradition, just as the Chilean Supreme Court had done in its extradition ruling.

Criminal liability of judges and prosecutors for murder, torture, and unlawful detention, especially in cases of failure to prevent these crimes, also raises complicated issues of causality, *mens rea* and modes of liability. Depending on the prevailing patterns of judicial involvement in criminal repression in each historical case, i.e. the degree of proximity courts had to the dictatorial regime’s agents who ordered or directly perpetrated the crimes, and the level of legal formality of the proceedings, asserting criminal liability of judges and prosecutors could pose questions related to the weak or absent

causal link between the justice officer's conduct and the crime's result, if the killings or tortures would have happened anyway. Besides, criminal intent or – more broadly – *mens rea* requirements could be difficult to prove, if those officers were not certain of what would happen to the detainees, were unaware of their actual power to intervene, or were afraid of the consequences of such an intervention for their personal safety. Finally, if judicial immunity is rejected, a defense of mistake of law could be raised, if the defendant is not to be blamed for having mistakenly assumed that they were bound by law to prosecute and convict.

The issue, its political relevance, and its theoretical and doctrinal foundations are challenging enough to justify an international colloquium and a publication with expert academic contributions on the relevant cases and on cross-cutting topics to be dealt with.

The project aims at comparing the patterns of judicial involvement in the crimes of a dictatorship discernible in the cases under study, and the way in which each legal system has dealt with the phenomenon, in order to identify common issues and relevant differences and to evaluate the conditions under which criminal liability could be asserted.

II. Structure of the Colloquium

First day: Case Studies

The colloquium presents a number of case studies which were selected for their relevance to the topic: NS dictatorship (Judges' Trial in Nuremberg and subsequent prosecution by FRG and GDR courts), SED-dictatorship, Argentina's Junta dictatorship, Chile's Pinochet dictatorship.

Notwithstanding fundamental differences between the cases referred to, the term 'dictatorship' is used as an umbrella to denote authoritarian or totalitarian rule which resulted in grave violation of human rights.

The project focuses on case studies from Germany, Argentina and Chile, mainly because they all have faced the experience – even if in quite different historical circumstances and degrees – of having held, or tried to hold, judges or members of military tribunals responsible for crimes committed through the exercise of jurisdiction or the failure to exercise it. The fact that the three case studies are relatively well researched (as a starting point for the specific focus), and that the three countries have a common understanding of the foundations of criminal liability may further contribute to the feasibility of the project.

Second day: Crosscutting Topics

Studies on five crosscutting topics will be presented at the colloquium, where the focus of the debate will be placed on commonalities, differences and conditions for criminal liability.

The chosen topics are: Judicial immunity and its limits; malfeasance in office or criminal responsibility for murder, torture, and unlawful detention; intention and mistake of law in malfeasance in office and judicial murder, torture, and unlawful detention; modes of liability and jurists' responsibility for crimes of dictatorships and judges' responsibility for participation in a criminal association. For each one, international and comparative legal approaches will be offered, considering the legal systems where each issue seems to have garnered more attention, at a practical or legal doctrinal level.

Participants

Markus Abraham, Universität Hamburg, Germany
Daniela Accatino, Universidad Austral de Chile, Chile
Claudia Cárdenas, Universidad de Chile, Chile
Alejandra Castillo, Universidad Diego Portales, Chile
Nancy Combs, William and Mary Law School, United States of America
Jaime Couso, Universidad Diego Portales, Chile
Kai Cornelius, Universität Hamburg, Germany
Julia Geneuss, Universität Hamburg, Germany
Héctor Hernández, Universidad Diego Portales, Chile
Florian Jeßberger, Humboldt-Universität zu Berlin, Germany
Milan Kuhli, Universität Hamburg, Germany
Fernando Londoño, Universidad Diego Portales, Chile
Rocío Lorca, Universidad de Chile, Chile
Juan Pablo Mañalich, Universidad de Chile, Chile
Antonio Martins, Universidade Federal do Rio de Janeiro, Brasil
Omar Palermo, Universidad Nacional de Cuyo, Argentina
Luis Emilio Rojas, Universidad Alberto Hurtado, Chile
Elies van Sliedregt, Tilburg University, The Netherlands
Francesco Viganò, Judge at the Constitutional Court and Bocconi University, Italy
Moritz Vormbaum, Universität Münster, Germany
Gerhard Werle, Humboldt-Universität zu Berlin, Germany
Javier Wilenmann, Universidad Adolfo Ibáñez, Chile

Tentative Program

DAY ONE: 14th June 2023 – Universidad Diego Portales

Part I: Case Studies

9:30 – 11:30 Panel 1: Germany

NS-dictatorship

- Patterns of judicial involvement and its criminal prosecution
- Nuremberg Judges' Trial and FRG and GDR domestic prosecution, legal rationale, and doctrines for convicting jurists

Florian Jeßberger & Milan Kuhli

SED-dictatorship

- Patterns of judicial involvement, **Moritz Vormbaum**
- Legal rationale and doctrines for prosecuting and convicting jurists, **Gerhard Werle**

Moderator: Judith Schönsteiner

12:00 – 13:30 Panel 2: Argentina and Chile

Argentina's Junta dictatorship

- Patterns of judicial involvement and its criminal prosecution and legal rationale and doctrines for convicting jurists, **Omar Palermo**

Chile's Pinochet dictatorship

- Patterns of judicial involvement and its criminal prosecution and legal rationale and doctrines for prosecuting jurists, **Jaime Couso**

Reflection on the role of the judiciary, **Daniela Accatino**

Moderator: Cath Collins

Part II: Crosscutting Topics

15:30 – 17:00 Panel 3: Judicial Immunity and its Limits

- A constitutional-comparative perspective on continental Europe and an international criminal law perspective, **Francesco Viganò**
- The Anglo-American approach, **Nancy Combs**
- A South American approach, **Javier Wilenmann**

Moderator: Angélica Torres

Part II: Crosscutting Topics (continuation)

9:00- 11:00 Panel 4: Invalidation of “judicial” decisions in cases of pharsical prosecutions

- A German perspective, **Markus Abraham**
- A Chilean perspective, **Juan Pablo Mañalich**
- International criminal law perspective, **Claudia Cárdenas**

Moderator: Guillermo Silva

11:30 – 13:30 Panel 5: Attribution of Liability: Crimes and Modes of Responsibility (part 1)

Malfeasance in office or criminal responsibility for murder, torture, and unlawful detention?

- Malfeasance in office as a crime in the context of dictatorships. A comparative overview
Kai Cornelius
- Beyond malfeasance in office. Imputation issues concerning judicial murder, torture and unlawful detention, **Luis Emilio Rojas**

Intention and Mistake of law in malfeasance in office and judicial murder, torture, and unlawful detention

- A continental law perspective, **Antonio Martins**
- International and comparative criminal law, **Alejandra Castillo**

Moderator: Javier Contesse

15:30 – 16:30 Panel 5: Attribution of Liability: Crimes and Modes of Responsibility (part 2)

Modes of liability and jurists’ responsibility for crimes of dictatorships

- Comparative criminal law doctrine, **Héctor Hernández**
- International criminal law, **Elies van Sliedregt**

Moderator: Jaime Winter

17:00 – 18:30 Panel 5: Attribution of Liability: Crimes and Modes of Responsibility (part 3)

Judge’s responsibility for participation in a criminal association

- International perspectives, **Rocío Lorca**
- A German perspective, **Julia Geneuss**
- A comparative approach, **Fernando Londoño**

Moderator: Juan Pablo Mañalich

18:30 Final remarks and end of the Colloquium