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Marc Henzelin: European investigations, Swiss banks and unusual clients

By Tom Webb on Wednesday, 7 May 2014 at 5:39 PM GMT

GIR editorial board member Marc Henzelin (//globalinvestigationsreview.com/people/wwl/41499/marc-henzelin) is an investigations, international business crime defence and asset recovery lawyer at Lalive in Geneva. His career has spanned private practice, academia and the judiciary, and he was a legal advisor to the Red Cross between 1987 and 1992. During April 2014's International Bar Association Trans-National Crime conference in Istanbul, Henzelin spoke to GIR about the advantages of the European model of prosecutions, Swiss banking secrecy and being asked to represent Saddam Hussein.

You're a part-time judge on Geneva's Cour de Cassation. How do your skills as a judge influence your role as an investigations lawyer?

The Cour de Cassation as a matter of law does not exist any more, in the sense that we have had a new court of criminal procedure since 2011. We now have a full court of appeal in Geneva, which is allowed to review the judgments of first instance on the facts as well – and not only on the law – as it was before with the Cour de Cassation. The Cour de Cassation still exists because of the cases which were docketed before the system changed. I am still in the Cour de Cassation, but as a matter of fact I should be back to the court of appeal now.

My judicial role doesn't influence anything for investigations, but it influences the way you present things. Once you sit as a judge you see the mistakes that many lawyers make, so you can change the way you present things. As a lawyer, I now look more critically at my work and the work of other lawyers from the judge's perspective. But of course strict and extensive conflict checks are conducted before acting judges sit in court and it doesn't give acting judges any privileges when they plead before a court. I am sure that some of my colleagues would be delighted to rebuff me even more given that I am sitting as a judge!

In many European jurisdictions, local prosecutors take charge of investigations. How does this change the nature of investigations compared to jurisdictions with centralised enforcement agencies? How should companies take this into account?

In common law systems the police investigates, and then once the investigation is over the matter is handed to the prosecution, which presents the case before the court – so all the investigation is done by agencies. In the continental system, the investigation is carried out by the police as a matter of fact, but the prosecutor monitors the investigation and gives instructions, and oversees the investigation. So the difference is that there is close control by the judiciary at an early stage, which in my view is a good thing, because it prevents the police from going in the wrong direction or in a direction that the prosecution cannot assume before a Court.

The ultimate goal of the investigator is to go to court and win the case in court. Prosecutors are generally qualified lawyers with experience of criminal procedure, who go to court regularly. So they have more experience with the ultimate goal, or the end result, than investigative agencies.

I like the system where a prosecutor, who is a fully qualified lawyer by training but who acts as a magistrate, is supposed to take account of the prosecution evidence but also the defence evidence, to a certain extent. For example if there is exculpatory evidence or evidence of mitigating circumstances such as doubts regarding the mental health of the suspect, the prosecutor is obliged to obtain a medical opinion. The role of the prosecutor in the continental system is not only to prosecute but to gather facts and as such his or her role is to look for any and all evidence, incriminating or exculpatory. This mitigates the toughness of the true adversarial US system, especially for the suspect or accused person who doesn't have the means to hire good defence counsel.

But US agencies coordinate investigations and negotiate resolutions with companies. How is this different from the continental prosecution model?

You are right, in the US the situation is closer to the continental system, in terms of organisation between the investigation and the prosecution, as compared with the English common law system, except that the police or the DoJ are not obliged to gather exculpatory evidence. This makes a big difference, especially in connection with the huge powers prosecutors have in the US system to make plea bargains. The result may well be in the US that the suspect is obliged to make a plea bargain, not because of the facts of the case, but because he or she doesn't have the means to lead a proper investigation and collect exculpatory facts and evidence.

Switzerland has recently showed willingness to relax its banking secrecy laws by agreeing to cooperate with foreign tax probes. How will this affect Switzerland's banking industry?

First, Switzerland has never had banking secrecy for criminal offences. It has always cooperated very well with other countries when it received mutual legal assistance treaty (MLAT) requests about serious offences. There was no question of banking secrecy when it came to criminal investigations. Never.

On tax issues it is a bit different: in cases of tax fraud, which is a misdemeanour in Switzerland, the authorities readily cooperated, bearing in mind however that for facts to be qualified as a tax fraud in Switzerland there is a higher threshold than in the US. For tax fraud, there must be forged, false or fake documents in support of the tax return. Providing inaccurate or incomplete information in a tax return does not per se qualify as fraud, as the tax return is by definition subject to the assessment of the tax authorities. If you provide a false balance sheet or use false invoices, for instance, that is tax fraud, and it's criminal like any fraud.

On the other hand if you "forget" to declare in your return that you have a bank account in another country, you didn't forge any documents. It is the tax authorities which have to match the tax return with what they think is the reality and possibly to investigate. If there is a contradiction, then there will be discussions between the taxpayer and tax authorities, and possibly an administrative fine. In Switzerland tax evasion as such is not a criminal offence, but an administrative one. There is a double taxation treaty between Switzerland and the US which dates back maybe 10 or 12 years, which would already allow MLATs between Switzerland and the US in tax matters, but the US Senate apparently never ratified it – who knows why.

What will be the change in practice? Banking secrecy will not be lifted as such. Again, it is already lifted for serious offences, or if there are certain treaties with third countries. But more double taxation treaties may be signed with countries other than the US which would allow for assistance in tax matters. In the future, Switzerland might also follow the trend towards automatic information exchanges. If all the OECD countries adopt the standard of automatic exchange of information, then Switzerland cannot remain a kind of island in the middle of the Alps with a different system. In that sense it will change, but interestingly enough the cooperation with the US could very well be practised within the framework of the actual and signed treaties between Switzerland and the US. So you might think that the situation has changed dramatically – it has changed dramatically in fact, but not so much in law.

So what will be the future of the banking system? First, in macro-economic terms, Switzerland's financial services sector is probably less than 10 per cent of its GDP, unlike countries such as Luxembourg or Monaco. We have other very strong industries, and other services we can provide. Even if banks suffer a little bit, it will not be the end of the country, and we are not ready to sacrifice the rest of the economy for our banks.

On the banking system itself, I think these changes are good for the Swiss banking system in general and in the long term. Why? Because in the last few years, some Swiss bankers relied too much on banking secrecy to get clients and money into Switzerland. We have excellent framework conditions in Switzerland for banking activities. A stable and strong democracy, a strong rule of law, an excellent judicial system, long tradition of services, a good economy, we are in the middle of Europe, speak several languages, and so on. We have very good bankers, excellent experts in finance, and we are quite well recognised for that, and for asset management and so on. But bankers who rely just on banking secrecy became fat cats, in the sense that they did not have to be competitive in order to get new clients. They just had to wait for clients who wanted to evade taxes.

With the changes now, in practice, our bankers will have to be more competitive again, and I'm sure they will be able to do that. So all in all, I am quite confident that these changes will be for the benefit of Switzerland.

Bankers cooperating with foreign tax authorities can face criminal investigations in Switzerland for breaching secrecy laws. For example, former UBS banker Renzo Gadola's collaboration with the US Internal Revenue Service has led to a criminal investigation by the Swiss attorney general's office. How can Swiss clients navigate such issues, given that they may face prosecution whatever they do?

I actually currently have several whistleblower cases – not Renzo Gadola. It's difficult, I would say, to make generalisations. One of my clients just wanted to make money out of the information that he provided. He tried to sell data to different countries, even to commercial entities, to make money. Eventually, the list ended up in a state where authorities were interested in getting them. It's a breach of contract, it's a breach of data laws, it's a violation of banking secrecy.

You should distinguish that case from the employee who decides that he is fed up with banking secrecy, with tax evasion, who wants to change his life and who cooperates for moral reasons. But usually it's a mix. It's rare that you have cases where the person just wants to break the data protection laws and make money, or the guy who is purely idealistic. It's usually in the middle.

Then you have the case where somebody has to cooperate, because of foreign authorities bringing charges, issuing arrest warrants etc. The Swiss authorities may start an investigation against this person for breaking banking secrecy, but I would not worry much for him or her.

I am quite confident that the Swiss authorities would not prosecute him or her to the end and that there would be no convictions. But there are different cases: it's not just one type of person called 'whistleblower'.

What most frequently complicates the cross-border investigations you carry out?

The big problem is multi-jurisdiction prosecutions, where there are different countries involved or potentially involved. This happens all the time with transnational business crime. Take corruption cases. Cases can start in the US, or start in Switzerland because of a suspicious activity report. A case could start in Switzerland for money laundering, and you have the US to contend with because they consider themselves the cops of the rest of the world. Then the UK gets involved, because it was a UK bank, and then France because it's a French company.

You have five different investigations and five different systems which collide with each other. Take, for instance, a deferred prosecution agreement (DPA). If you make an internal investigation followed by a DPA in the US, not only will it not be recognised in France, but you might even be criticised, or worse, prosecuted for it, as the French would think that your internal investigation's purpose might have just been to cover up things and mislead the justice system, or at least French justice. In the US, prosecutors, the DoJ, want quick results, so they will push like hell to get results. And in the end you have to choose between 150 years in prison or a three-month suspended sentence and to collaborate with US authorities.

On the other hand, you have to fight in France, let's say, with a system which is completely different, completely alien to the American logic. In France it will take maybe 10 years for the investigation, it's impossible to make a plea bargain and it's hard – if not impossible – to recognise a US DPA. And what is the effect of one sentence in another country? Of course, in the European Union you have the Schengen agreement, so if there is a conviction in one country it is recognised in the other countries. But if you have a conviction in the US, it is not systematically recognised in Europe. If you get a rather lenient sentence in France or Switzerland, which is usually the case for white-collar crimes as compared with the US, the DoJ will not consider that you were properly sentenced and will continue the prosecution, maybe with a red notice on top of that. How can you reconcile these different procedures?

For private investigations, the situation is the same. If you investigate in Switzerland on behalf of a foreign receiver, you may be prosecuted in Switzerland for the violation of Swiss sovereignty; you have to go through the official channels of MLAT or at least take some precautionary measures, whereas in the US it is a must to investigate.

These are the big problems in our area of work, hence the necessity to work with lawyers whom we know very well and who understand each system very well, but are also capable of understanding other systems and listening to other lawyers.

Are different jurisdictions starting to cooperate more to avoid these kinds of issues?

It depends on the systems and the persons: usually prosecutors in the US need to show results, so if they have to mitigate their investigation or effort because of some effort made in a third country, it's a bit difficult for them. They may need to get approval from someone higher up the hierarchy.

You have this contradiction where on the one hand the actors of the justice system seek justice, but on the other hand are pushed for results, and to make sure that the public and political authorities understand that they are doing their job.

There is also sometimes much mistrust and misunderstanding between the actors. For instance in Switzerland, they may be absolutely convinced that authorities in Dubai will not cooperate or that the UK is unpredictable and unreliable. In my understanding that may be wrong. But of course to put together an Arabic-speaking prosecutor and a German or French-speaking prosecutor is difficult – because of the language, because of the difference in systems, the differences in practice, priorities, and so on. The end result is usually that jurisdictions will compete with each other, resulting in a nightmare for the people who are under investigation or being prosecuted, and for those who have to investigate.

You declined to represent Saddam Hussein in 2005. Why did you do that?

At that time, I was a professor at the University of Geneva, where I taught international criminal law. I also had previous experience as a legal advisor for the International Committee of the Red Cross in different countries, including Arabic countries. I had some experience in humanitarian law, the law of war, and so on. The mandate came from Jordanian lawyers.

It was a very interesting challenge. I think one of the questions which should have been raised is the legitimacy of the special tribunal set up by the Americans to judge Saddam Hussein; because in my understanding of international law, an occupying power can judge a person only for acts committed during war. Otherwise, the ordinary legal authorities of the occupied countries must judge the person for acts committed before the war, or matters should be deferred to an international tribunal.

When the US changed the institutions of Iraq to set up this puppet tribunal, it was a violation of international law, to say the least. It was an interesting defence to try to oppose the tribunal itself. But there was a big controversy inside the defence team. Certain lawyers made very tough public statements, comparing George W Bush with Hitler, and said that Saddam Hussein was a perfectly respectable person, which was probably not very clever.

What exactly made you resign?

I thought it was just impossible in practice to make an intelligent defence in these conditions, not to speak of the security situation in Iraq. Scores of prosecutors and witnesses were killed. And anyway, the Americans made the life of the defence just impossible. It wasn't even possible to see Saddam Hussein. And when there was a possibility that the daughter of Gaddafi would join the team, I resigned; this was the end of my adventure with the defence team of Saddam Hussein!

But it's a pity, because I think that the defence could have had a point, even though my mother cried when she heard that I might represent Saddam Hussein. She said I do very, very dirty work!