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Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (editors)

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Back cover: *Excerpt from Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report, 30 September 2020. The experts showed courage and incision by challenging power in the International Criminal Court system in their report.*

4

Bend It Like Bentham: The Ambivalent 'Civil Law' vs. 'Common Law' Dichotomy Within International Criminal Adjudication

Alexander Heinze*

As early as in 1869, Robert von Mohl, Professor of Political Sciences at the University of Tübingen and one of the first who coined the term 'Rechtsstaat', published a three-and-half pages long critique of the state of international criminal law that he ended with words that might well be uttered today:

> There is no hope that this [namely, the state of international criminal law] is going to improve. Governments are occupied with mutual envy, heads of State perceive themselves as high above matters that in their eyes are pedantic scholarly ideas, scholars and academics are still confused and too divided to formulate meaningful advice […]. After all, there would be no complete achievement without North America's consent; this consent, however, is out of the question due to the barbaric state of international concepts and terms and the increasingly defiant attitude of both the media and domestic legislators. Thus, in this matter [that is, the matter of interna-

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> tional criminal law] it is made sure that the trees of intellectual complacency do not grow up to the sky.[1]

Surely, especially the critical perception of the media is due to the historical context. Yet, what von Mohl emphasized with drastic words might only be slightly exaggerated with a view to the current state of international criminal law discourse: the "barbaric state of international concepts and terms".

A prominent example of this are the terms adversarial–inquisitorial and common–civil law – certainly the most common taxonomy of international criminal justice. These categories lack clarity and definition and have proven to be of limited descriptive value. This does not render them ill-suited; on the contrary, they may in fact serve as a tool to gain a better understanding of why certain procedural approaches are selected over others. However, they need to be defined, refined, and complemented by other more precise topographies of power within international criminal jurisdictions.

In this chapter, I will demonstrate, as a premise of my argument, that different procedural traditions create diverse attitudes and very distinct points of view about legal norms. Evidentiary rules, for instance, are so rooted in their historical and cultural context that they cannot be transplanted in a piecemeal fashion from a common law or civil law system into international criminal justice, because different legal traditions and cultures foster different responsibilities within a system. To transplant a procedural element from one system into another requires an accurate description of the default legal system, for which the common–civil law taxonomy is unsuitable.

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[1] Robert von Mohl, *Staatsrecht, Völkerrecht und Politik*, Dritter Band: Politik, Zweiter Band, Verlag der H. Laupp'schen Buchhandlung, Tübingen, 1869, p. 700 (translated by the author):

> Leider ist nun aber auch eine baldige Verbesserung nicht zu hoffen. Die Regierungen haben mit gegenseitigem Neide zu viel zu thun, die leitenden Staatsmänner stehen zu hoch über dem, was ihnen eine pedantische Schulgrille erscheinen mag, die Wissenschaft ist noch viel zu confus und unter sich uneinig, als dass sie mit Auctorität einen Rath formuliren könnte, als dass an einen Congress und eine allgemeine Vereinbarung zu denken wäre. Und schließlich wäre nicht einmal etwas vollständiges erreicht, wenn nicht auch Nordamerika seine Zustimmung gäbe; eine solche aber ist bei dem barbarischen Zustande der internationalen Begriffe daselbst und bei dem immer trotzigeren Auftreten roher Zeitungsschreiber und Gesetzgeber außer aller Frage. Es ist also auch in diesem Punkte schon dafür gesorgt, dass die Bäume intelligenter Selbstzufriedenheit nicht in den Himmel wachsen.

I will therefore first describe the procedural models that are commonly employed for international criminal justice (common law vs. civil law; adversarial vs. inquisitorial) and then, in a second part, identify which taxonomy serves best to categorise the procedural framework of international criminal justice. This taxonomy has to be descriptive, empirical, analytical and interpretive (explanatory), taking into account the structural, institutional, sociological and political features of procedural provisions of international criminal tribunals. To that end, of all existing categories, Damaška's concepts of co-ordinate vs. hierarchical officialdom and a reactive vs. an activist State, with conflict-solving vs. policy-implementing types of proceedings, serve best to model procedural frameworks in international criminal justice, because they are more precise topographies of power within international criminal jurisdictions. Damaška, drawing on Weber and other social theorists, builds a bridge to political theory, is able to encapsulate the complexities of real legal processes, and creates models of relatively unusual combinations of features by using Weberian ideal-types. His models embrace the differences of legal thought between common law and civil law, which at the same time underline the aforementioned utility of such categories – not as models in themselves, but as features of Damaška's ideal-types. The combination of sociological, empirical and political elements with the use of ideal-types allows an insight into the nature of a society's legal system that is shaped by the kinds of individuals[2] who dominate it.

What appears to be a mere snapshot of procedural practice is symptom of a much larger picture. This chapter is thus an essay about definition, terminology, deconstructionism, and the arbitrary use of concepts. It

[2] I prefer the term 'individual' over 'actor', since the premise of this chapter is that decisions in international criminal law are based on the individual's personal legal background. I use the term 'actors' to describe agents that construct a legal system. Individual actors – or individuals – have the ability to act reflexively but in doing so "they are significantly constrained by the structures in which they operate" (Nerida Chazal, *The International Criminal Court and Global Social Control*, Routledge Taylor & Francis, Abingdon, 2016, p. 4). The individual as judicial actor, for instance, can shape the legal discourse but will basically reproduce both concepts, terminology and methodology of the epistemic group the individual is connected to (*ibid*.). See, in more detail, Alexander Heinze, "Bridge over Troubled Water – A Semantic Approach to Purposes and Goals in International Criminal Justice", in *International Criminal Law Review*, 2018, vol. 18, p. 946.

addresses both the perspective of the practitioner and the legal scholar – if there is, and ever has been, a difference.[3]

4.1. Introduction

It is a popular tool for legal argumentation to refer to the nature of criminal proceedings before the International Criminal Court ('ICC'). I will review two recent examples. For one, in a decision on a 'no case to answer' motion – a motion that has become a viable weapon for the Defence before the ICC[4] – the Appeals Chamber remarked "that the Court's legal framework combines elements from the Common Law and Romano-Germanic legal traditions".[5] This classification – using the terms "Com-

[3] See the illuminating remarks by Peter Birks, "The Academic and the Practitioner", in *Legal Studies*, 1998, vol. 18, pp. 397–413, especially 405. For the opposite position, see the remark of Justice Sir Robert Megarry in *Cordell v Second Clanfield Properties Ltd*, Chancery Division, 8 July 1968, Property, Planning and Compensation Reports, vol. 1, p. 848, 855: "The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation, and intermittent opportunities for reconsideration. But he is exposed to the period of yielding to preconceptions, and he lacks the advantage of that impact and sharpening of focus which the detailed facts of a specific case bring to the judge. Above all, he has to form his ideas without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law. This is as true today as it was in 1409 when Hankford J. said "Home ne scaveroit de quel metal un campane fuit, si ceo ne fuit bien batu, *quasi diceret*, le ley per bon dusputacion serra bien conus"; and these words are nonetheless apt for a judge who sits, as I do, within earshot of the bells of St. Clements. I would therefore give credit to the words of any reputable author in book or article as expressing tenable and arguable ideas, as fertilisers of thought, and as conveniently expressing the fruits of research in print, often in apt and persuasive language. But I would do no more than that; and in particular I would expose those views to the testing and refining process of argument. Today, as of old, by good disputing shall the law be well known". For a nuanced view, see Basil S. Markesinis, *Comparative Law in the Courtroom and Classroom*, Hart, Oxford, Portland, Oregon, 2003, p. 36.

[4] International Criminal Court ('ICC'), Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on "No Case to Answer" Motions), 3 June 2014, ICC-01/04-01/06-772, para. 32 (http://www.legal-tools.org/doc/128ce5/); ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Bosco Ntaganda*, Appeals Chamber, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion", 7 September 2017, ICC-01/04-02/06-2026, paras. 43, 44, 48, 56 (http://www.legal-tools.org/doc/7b95ed/).

[5] ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Bosco Ntaganda*, Appeals Chamber, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion", 5 September 2017, ICC-01/04-02/06-2026, para. 52 (https://www.legal-tools.org/doc/7b95ed).

mon Law" juxtaposed to "Romano-Germanic legal traditions" – helped the Chamber to argue that "a 'no case to answer' procedure is not inherently incompatible with the legal framework of the Court".[6]

The nature of the procedural law at the ICC is also playing a role in the ongoing dispute amongst different Chambers concerning whether to make a preliminary admissibility decision (including on *prima facie* relevance and probative value) when just one piece of evidence is submitted,[7] as had been the previous practice,[8] or to defer this decision "until the end of the proceedings", following the alternative approach allowed by the *Bemba* Appeals Chamber.[9]

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6 *Ibid*., para. 44.

7 Cf. ICC, Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo* ('*Bemba*'), Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386, para. 37 ('Appeals judgement on evidence admission decision') (http://www.legal-tools.org/doc/7b62af/), arguing that the word "may" in Article 69 (4) allows a Trial Chamber to take this approach; *Bemba*, Trial Chamber, Judgment pursuant to Article 74 of the Statue, 21 March 2016, ICC-01/05-01/08-3343, para. 222 (http://www.legal-tools.org/doc/edb0cf/).

8 See, for example, ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ('*Katanga and Chui*'), Trial Chamber, Decision on the Prosecutor's Bar Table Motions, 12 May 2011, ICC-01/04-01/07-2635, para. 15 (http://www.legal-tools.org/doc/7710b6/). For a similar approach at the International Criminal Tribunal for the former Yugoslavia ('ICTY'), see Christine Schuon, *International Criminal Procedure: A Clash of Legal Cultures*, T.M.C. Asser Press, The Hague, pp. 137–8 (shift from admissibility to weight or reliability).

9 *Bemba*, Appeals judgement on evidence admission decision, para. 37, see above note 7; in the same vein, see ICC, Situation in the Central African Republic, *The Prosecutor v. Bemba et al.* ('*Bemba et al.*', Trial Chamber VII, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285, para. 9 (http://www.legal-tools.org/doc/5a06b3/). The Defence's request for leave to appeal was rejected, mainly for being "premature", by Trial Chamber VII; see *Bemba et al.*, Trial Chamber VII, Decision on Babala and Arido Defence Request for Leave to Appeal the Trial Chamber's "Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1285)", 12 October 2015, ICC-01/05-01/13-1361 (http://www.legal-tools.org/doc/a19620/); ICC, Situation in the Republic of Côte d'Ivoire, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* ('*Gbagbo and Ble Goudé*'), Trial Chamber I, Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405, paras. 12 *et seq*. ('Decision on the submission and admission of evidence') (http://www.legal-tools.org/doc/7b6dce/), with dissenting opinion of Judge Henderson: Annex to Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405-Anx, paras. 13, 16 *et seq.* ('Dissenting Opinion of Judge Henderson') (http://www.legal-

In the *Gbagbo and Blé Goudé* case, Trial Chamber I opted for the latter approach by majority.[10] In his dissenting opinion, Judge Henderson (who is from common law dominated Trinidad and Tobago) rejected this approach on two premises: first, in "adversarial proceedings", the Chamber's approach would violate the rights of the accused;[11] and second:

> Although the legal architecture of the Court blends aspects of both civil and common law systems, as highlighted by my learned colleague in the Appeals Chamber, the Rome Statute provides for *key aspects of the proceedings to be conducted in an adversarial nature*, insofar as Articles 66(2) and Article [*sic*] 67(1)(e) of the Statute confine the discharge of the burden of proof to the Prosecutor and provide for the confrontation of the evidence by the accused.[12]

For Judge Henderson, apparently, both the "discharge of the burden of proof to the Prosecutor" and "the confrontation of the evidence by the accused" are elements of the adversarial procedural model and not, *argumentum a contrario*, of the inquisitorial procedural model.

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tools.org/doc/6fbd2c/). However, against this approach, albeit *obiter*, see *Bemba*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, ICC-01/05-01/08-3636-Red (http://www.legal-tools.org/doc/40d35b/); *Bemba*, Appeals Chamber, Separate opinion Judge Van den Wyngaert and Judge Morrison, 8 June 2018, ICC-01/05-01/08-3636-Anx2, para. 18 (http://www.legal-tools.org/doc/c13ef4/):

> Whereas this [approach] may have been unproblematic in the context of a case relating to offences against the administration of justice. We are of the opinion that it is not appropriate in cases relating to article 5 of the Statute. […] Not only is it necessary to rule on the admissibility of all evidence submitted by the parties, the Trial Chamber must also apply the admissibility criteria of article 69 (4) of the Statute sufficiently rigorously to avoid crowding the case record with evidence of inferior quality. We are confident that, if this had been done in the present case, many of the problems that we have identified in this section would not have arisen.

In a similar vein, see *Bemba*, Appeals Chamber, Concurring Separate Opinion of Judge Eboe-Osuji, 14 June 2018, ICC-01/05-01/08-3636-Anx3, paras. 293 *et seq*. (http://www.legal-tools.org/doc/b31f6b/). Guariglia tags the two models as 'submission model' vs. 'admission model', see Fabricio Guariglia, "'Admission' v. 'Submission' of Evidence at the International Criminal Court: Lost in Translation", in *Journal of International Criminal Justice*, 2018, vol. 16, p. 315. On the common law-civil law dimension of the dispute, see Kerstin Bree Carlson, *Model(ing) Justice*, Cambridge University Press, Cambridge, 2018, p. 76.

10 *Gbagbo and Blé Goudé*, Decision on the submission and admission of evidence, paras. 12 *et seq.*, see above note 9.

11 *Ibid.*, Dissenting Opinion of Judge Henderson, para. 9.

12 *Ibid.*, para. 7 (footnote omitted, emphasis added).

Judge Henderson even goes on to remark:

> In accordance with this Chamber's 'Directions on the Conduct of Proceedings', this trial was also to be conducted on a basis more consistent with the practice and procedure of an adversarial trial, in which the phases of trial provide for each *party* to present its case and its evidence to the Chamber.[13]

In other words, Judge Henderson concludes, from the Chamber's Directions on the Conduct of Proceedings, a preference for what he calls "an adversarial trial" – a phrase that he seems to use interchangeably with "proceedings to be conducted in an adversarial nature" in the same paragraph of his dissenting opinion. However, the Chamber's Directions on the Conduct of Proceedings do not once use the term 'adversarial'. On top of this, paragraph 12 of the Directions – the one referred to by Henderson – provides for elements that might well be part of an inquisitorial model of procedure, as I will show later. When the Chamber, presided by Henderson, recalls that "it may intervene at any time during the presentation of evidence and may order the production of any evidence it considers necessary for the determination of the truth", it refers to elements that would sound very familiar to lawyers from, say, France, Germany or Spain. Throughout his dissenting opinion, Henderson seemingly shares the chorused belief that only an adversarial procedure can protect the rights of the accused – an assumption that is refuted by many non-adversarial proceedings in the world.

These two examples suggest that the categorisation of the procedural model of an international criminal tribunal – the ICC in this case – is crucial for legal interpretation and argumentation. Judge Silvia Fernández de Gurmendi, the former President of the ICC, portrayed it thus: "Every day, questions arise which may be answered differently depending on whether the issue is analysed through the lens of an inquisitorial or adversarial system".[14] In contrast, an anonymous former Judge at the International Criminal Tribunal for the former Yugoslavia ('ICTY') reportedly said that "[t]he conflict between civil and common law is overstated".[15]

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13 *Ibid.* (footnote omitted, emphasis in the original).

14 Silvia Fernández de Gurmendi, "Enhancing the Court's Efficiency: From the Drafting of the Procedural Provisions by States to their Revision by Judges", in *Journal of International Criminal Justice*, 2018, vol. 16, p. 346.

15 Cited in Daniel Terris, Cesare P.R. Romano and Leigh Swigart, *The International Judge*, Oxford University Press ('OUP'), Oxford, 2007, p. 111.

The purpose of this chapter is to define the internal system of procedural rules at the ICC. To this end, it is necessary to identify the best model that describes what the ICC process is. Only then can a determination be made of how certain rules *should be* interpreted. The sought model is supposed to specify what the priorities of the criminal justice system ought to be or to identify the optimal means of implementing these priorities. In other words, a normative-prescriptive model is not desired.[16] Instead, what is needed is a 'magnifying glass' which provides a good view of the internal organisation of the ideas and structures of criminal procedure.[17] Because procedural questions can only be answered by a contextual interpretation involving comparative, institutional and sociological elements, this model must describe more than the framework of procedural provisions for a particular procedural problem. The model has to incorporate legal and political traditions, because those roots are not easily changed.[18] Describing the process before the ICC, many authors – and judges – have overlooked its structural, institutional, sociological and political features.[19]

[16] Cf. the approaches of Neil Walker and Mark Telford, *Designing Criminal Justice: The Northern Ireland System in Comparative Perspective*, Her Majesty's Stationery Office, Norwich, 2000, p. 3 and Davor Krapac, "Some Trends in Continental Criminal Procedure in Transition Countries of South-Eastern Europe", in John Jackson, Máximo Langer and Peter Tillers (eds.), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 121; see the definition of "normative" in Aaron Rappaport, "The Logic of Legal Theory: Reflections on the Purpose and Methodology of Jurisprudence", in *Mississippi Law Journal*, 2003–2004, vol. 73, p. 572: "The term 'normative', like many words, has a varied meaning. For our purposes, normative questions refer to 'should' questions, questions about how individuals or institutions should act. […] A statement that a decision is 'justified' or 'good' is a normative statement if it implies that a decisionmaker is, was or will be under an obligation to reach a certain decision. Thus, the claim that a legal right to assisted suicide is justified typically means that a court should rule in that way". Although in most cases, the terms "prescriptive" and "normative" are used interchangeably, Rappaport defines prescriptive as a methodology that helps to identify "authoritative principles that answer the important 'should' questions", see *ibid*., p. 574.

[17] Cf. Krapac, 2008, p. 121, see above note 16.

[18] Cf. Robert A. Kagan, *Adversarial Legalism: The American Way of Law*, Harvard University Press, Harvard, Massachusetts, 2003, pp. 5–6.

[19] Stephanos Bibas and William W. Burke-White, "International Idealism Meets Domestic-Criminal-Procedure Realism", in *Duke Law Journal*, 2010, vol. 59, p. 641; about theories and models in more detail, see Michael S. Moore, *Placing Blame – A Theory of the Criminal Law*, OUP, Oxford, 1997/2010, pp. 4 ff.

4.2. Modelling the International Criminal Process

The debate on international criminal procedure is still heavily influenced by the apparent dichotomy between the inquisitorial 'civil law' and the adversarial 'common law' process.[20] Beyond that, there are countless theories that account for the structure of criminal procedure itself. The most commonly used models[21] are 'adversarial' vs. 'inquisitorial'. Since the dichotomies 'civil law' vs. 'common law' and 'adversarial' vs. 'inquisitorial' (this sharp distinction between the mentioned dichotomies or models is in itself an ideal)[22] play the most prominent role in the interpretation of rules at international criminal tribunals, I will limit my analysis to those categories. Suffice to say that there have always been other attempts to model criminal procedure. The relevant approaches can generally be divided into descriptive and normative models, although not all of them fit into this distinction and many of them seem to have an overlap between a rather descriptive and a somewhat normative take.[23] The most prominent example of the former category is Packer's crime control and due process model. This bifurcated approach focuses, on the one hand, on the efficient suppression of crime and, on the other, on fair trial rights and the concept of limited governmental power.[24] Thus, under 'crime control', speed, effi-

[20] Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, OUP, Oxford, 2016, pp. 1–7. Critically about the use of these models, see Christoph Burchard, "Perspektiven pluralistischer Strafrechtsvergleichung", in *Rechtswissenschaft*, 2017, vol. 8, p. 296: "Begonnen sei mit der klassischen Herausbildung von Rechtskreisen und Modellen (z.B. zur strafrechtlichen Beteiligungslehre). Obwohl sich dagegen zunehmend Widerstand formiert, insbesondere weil sie zu 'gewaltsamen Vereinfachungen' führen und ideologisch vorbesetzt sind (polemisch: Common Law, Civil Law und der Rest), haben sie doch eine bemerkenswerte Beständigkeit. Wollte man das rechtsvergleichende Rechtskreis- und Modelldenken nun am Maßstab der wissenschaftlichen Neutralität, Universalität und Genauigkeit messen, so müsste man es verwerfen" (footnotes omitted).

[21] The terms 'model' and 'system' are often misleadingly used interchangeably, see also the critique by Teresa Armenta-Deu, "Beyond Accusatorial or Inquisitorial Systems: A Matter of Deliberation and Balance", in Bruce Ackerman, Kai Ambos, and Hrvoje Sikirić (eds.), *Visions of Justice - Liber Amicorum Mirjan Damaška*, Duncker & Humblot, Berlin, 2016, p. 57.

[22] See below Section 4.3.1.

[23] See, in more detail, Alexander Heinze, *International Criminal Procedure and Disclosure*, Duncker & Humblot, Berlin, 2014, pp. 133 ff.

[24] Herbert L. Packer, *The Limits of the Criminal Sanction*, Stanford University Press/OUP, Stanford, California/Oxford, 1969, pp. 149–53; see also the accounts of Yvonne McDermott, *Fairness in International Criminal Trials*, OUP, Oxford, 2016, pp. 9–10; Katja Šugman Stubbs, "An Increasingly Blurred Division between Criminal and Administrative

ciency, and finality are the overriding values that any rule or measure may not compromise,[25] while 'due process' aims at the protection of the 'most disadvantaged' and thus demands equal treatment regardless of wealth or social status.[26] Packer's categorisation served as a basis for further elaborations, for example, taking into account rehabilitation and societal stability,[27] focusing on cases that never reach the courtroom,[28] emphasising more strongly the protection of the innocent,[29] and the interests of victims.[30]

Last but not least, Damaška, in his seminal *The Faces of Justice*,[31] developed a set of models based on attitudes towards State authority and on concepts of government.[32] First, the 'hierarchical' and 'co-ordinate' models describe two structures of State authority that express two "ideals of officialdom".[33] Damaška's second pair of procedural models refer to

Law", in Ackerman, Ambos and Sikirić (eds.), 2016, p. 353, see above note 21; Liz Campbell, Andrew Ashworth, and Mike Redmayne, *The Criminal Process*, fifth edition, Oxford University Press, Oxford, 2019, pp. 39 ff.

25 Cf. Heinze, 2014, p. 134, see above note 23.

26 Packer, 1969, p. 168, see above note 24.

27 John Griffiths, "Ideology in Criminal Procedure or A Third 'Model' of the Criminal Process", in *Yale Law Journal*, 1969–1970, vol. 79, pp. 359–417.

28 Satnam Choongh, "Policing the Dross – A Social Disciplinary Model of Policing", in *British Journal of Criminology*, 1998, vol. 38, p. 625.

29 Keith A. Findley, "Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process", in *Texas Tech Law Review*, 2008–2009, vol. 41, pp. 141 ff.

30 Kent Roach, "Four Models of the Criminal Process", in *Journal of Criminal Law & Criminology*, 1999, vol. 89, p. 672; Hadar Aviram, "Packer in Context: Formalism and Fairness in the Due Process Model", in *Law & Social Inquiry*, 2011, vol. 36, 237–258, 241. See more recently Gerson Trüg, "Die Position des Opfers im Völkerstrafverfahren vor dem IStGH – Ein Beitrag zu einer opferbezogenen verfahrenstheoretischen Bestandsaufnahme", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2013, vol. 125, p. 79, who however neglects existing procedural models which take the role of the victim into consideration. See generally Ambos, 2016, p. 7, see above note 20.

31 Steven G. Calabresi, "The Comparative Constitutional Law Scholarship of Professor Mirjan Damaška: A Tribute", in Ackerman, Ambos and Sikirić (eds.), 2016, p. 107, see above note 21 ("a key work in the field of comparative procedure").

32 Mirjan Damaška, *The Faces of Justice and State Authority*, Yale University Press, New Haven and London, 1986, pp. 8–12. For a comprehensive overview of the reviews of this book see Izhak Englard, "The Faces of Justice and State Authority: A Review of the Reviews", in Ackerman, Ambos and Sikirić (eds.), pp. 199–211, see above note 21.

33 Damaška, 1986, p. 16, see above note 32.

the notions of the State: the 'reactive State' and the 'activist State'.[34] The task of the reactive State is limited to "providing a supporting framework within which its citizens pursue their chosen goals".[35] The type of proceeding in a reactive State is 'conflict solving',[36] amounting to a contest between two formally co-equal disputants before the State official as the neutral decision maker.[37] In contrast, the nature of proceeding in an activist State is 'policy implementing': the justice system is considered an instrument to implement certain policies.[38]

4.2.1. 'Civil Law' and 'Common Law': The Division into Legal Families

International criminal procedure has traditionally been analysed as a blending of the common law and civil law traditions.[39] Both concepts describe a certain legal system or legal tradition,[40] that is, "an operating set of legal institutions, procedures and rules"[41] (legal system) or "a set of

[34] In more detail, see Heinze, 2014, pp. 145 ff., above note 23; Bruce Ackerman, "My Debt to Mirjan Damaška", in Ackerman, Ambos and Sikirić (eds.), 2016, p. 18, see above note 21.

[35] Damaška, 1986, p. 73, see above note 32.

[36] *Ibid*., p. 97.

[37] *Ibid*., pp. 73–80 and 97–147.

[38] *Ibid*., pp. 82, 84.

[39] Ambos, 2016, p. 1, see above note 20; Vladimir Tochilovsky, "Trial in International Criminal Jurisdictions: Battle or Scrutiny?", in *European Journal of Crime Criminal Law & Criminal Justice*, 1998, vol. 6, pp. 55–59; Mark Findlay, "Synthesis in Trial Procedures? The Experience of International Criminal Tribunals", in *International & Comparative Law Quarterly*, 2001, vol. 50, pp. 26–53; Theodor Meron, "Procedural Evolution in the ICTY", in *Journal of International Criminal Justice*, 2004, vol. 2, pp. 521–525; Daryl A. Mundis, "From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence", in *Leiden Journal of International Law*, 2001, vol. 14, pp. 367–82; Peter C. Keen, "Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals", in *Leiden Journal of International Law*, 2004, vol. 17, pp. 767–814; Schuon, 2010, p. 11, see above note 8; Jens David Ohlin, "A meta-theory of international criminal procedure, Vindicating the rule of law", in *UCLA Journal of International Law & Foreign Affairs*, 2009, vol. 14, p. 81.

[40] Generally see Heinze, 2014, pp. 104 ff., above note 23; Emmanouil Billis, *Rolle des Richters im adversatorischen und im inquisitorischen Beweisverfahren*, Duncker & Humblot, Berlin, 2015, pp. 14 ff.

[41] John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems in Europe and Latin America*, fourth edition, Stanford University Press, Stanford, California, 2019, p. 1; Brianne McGonigle Leyh, *Procedural Justice? Vic-*

deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught"[42] (legal tradition). According to estimates, 34 per cent of the world's jurisdictions are based on the civil law model, or civil law systems mixed with others (for example, indigenous or religious legal ideologies),[43] while approximately 28 per cent of the jurisdictions follow the common law model, including systems compounded with it.[44]

4.2.1.1. Civil Law

The term 'civil law' is derived from the Latin '*ius civile*'[45] and also referred to as Romano-Germanic law or Continental European law.[46] Some even say that the civil law traditions have most widely influenced international law, international organisations, and indeed, the common law system in which "[t]he ghost [Roman law] walks and sometimes talks".[47] Lawyers with a common law background normally use the term to capture all non-English legal traditions.[48] Generally speaking, there are three connotations associated with the concept: (1) the application of legal principles, normally derived from or based on written law; (2) the search for

tim Participation in International Criminal Proceedings, Intersentia, Cambridge *et al*., 2011, p. 65.

42 Merryman and Pérez-Perdomo, 2019, p. 2, see above note 41; McGonigle Leyh, 2011, p. 65, see above note 41.

43 Heinze, 2014, p. 106, see above note 23.

44 Cf. University of Ottawa, "World Legal Systems Research Group" (available on its web site).

45 Joseph Dainow, "The Civil Law and the Common Law: Some Points of Comparison", in *American Journal of Comparative Law*, 1966–1967, vol. 15, p. 420.

46 Merryman and Pérez-Perdomo, 2019, pp. 2–3, see above note 41, noting that civil law dates back to 450 B.C., which is the date most often quoted for the publication of the Twelve Tables in Rome; John Henry Merryman and David S. Clark, *Comparative Law – Western European and Latin American Legal Systems – Cases and Materials*, Bobbs-Merrill, Indianapolis, 1978, p. 4.

47 Barbara D. Barth, "American Legal Education: Some Advice from Abroad", in *Buffalo Law Review*, 1974, vol. 23, 681–708, 690. Critically, however, Aniceto Masferrer, "Tradition and Foreign Influences in the 19th Century Codification of Criminal Law: Dispelling the Myth of the Pervasive French Influence in Europe and Latin America", in Aniceto Masferrer (ed.), *The Western Codification of Criminal Law*, Springer, Cham, 2018, pp. 3–50.

48 Heinze, 2014, p. 107, see above note 23.

truth; and (3) a largely inquisitorial approach in proceedings.[49] Typical procedural elements of the civil law tradition are the following:

1. the 'one case approach';[50]
2. an investigating magistrate, paradigmatically the *juge d'instr uction*,[51] tasked to investigate the truth;
3. a State prosecutor, as a public official, also tasked to investigate the truth;[52]
4. the judge, as an active umpire, who is (also) under a legal duty to establish the true facts of a case and to submit the appropriate evidence accordingly;[53] and
5. the victim, as a participant with his or her own procedural rights (a *partie civile*).[54]

In contrast, civil law's emphasis on the written law[55] is less relevant given the increasing reliance on statutes and other written sources in mod-

[49] McGonigle Leyh, 2011, p. 70, see above note 41; Michael Bohlander, "Language, Culture, Legal Traditions, and International Criminal Justice", in *Journal of International Criminal Justice*, 2014, vol. 12, pp. 494 ff.; on the importance of truth-seeking, see for example, Michèle-Laure Rassat, *Traité de procedure pénale*, Presses Universitaires de France, Paris, 2001, p. 297; Frédéric Desportes and Laurence Lazerges-Cousquer, *Traité de procédure pénale*, fourth edition, Economica, Paris, 2016, mn. 550; Hans-Heiner Kühne, *Strafprozessrecht*, ninth edition, C.F. Müller, Heidelberg, 2015, mn. 1, 628, 751; Karl Peters, *Strafprozeß*, fourth edition, C.F. Müller, Heidelberg, 1985, pp. 16, 82–3; Billis, 2015, pp. 42 ff., see above note 40.

[50] Where only one case is prepared by a State official who carries out the major part of the investigations, see Kai Ambos, "International Criminal Procedure: 'adversarial', 'inquisitorial' or mixed?", in *International Criminal Law Review*, 2003, vol. 3, p. 4; Schuon, 2010, p. 4, see above note 8; Máximo Langer, "The Rise of Managerial Judging in International Criminal Law", in *American Journal of Comparative Law*, 2005, vol. 53, p. 839.

[51] Heinze, 2014, p. 107, see above note 23.

[52] See, on the prosecutor, Thomas Weigend, "Prosecution: Comparative Aspects", in Joshua Dressler (ed.), *Encyclopedia of Crime and Justice*, second edition, MacMillan, New York *et al*., 2002, pp. 1232–4. This is why the prosecutor, like the judge, has a duty to gather both inculpatory and exculpatory evidence, see *ibid*., p. 1234.

[53] Schuon, 2010, p. 4, see above note 8; Langer, 2005, p. 840, see above note 50; Heinze, 2014, p. 108, see above note 23. About "judge-led trials" at the ICC see Megan A. Fairlie, "The Unlikely Prospect of Non-adversarial Trials at the International Criminal Court", in *Journal of International Criminal Justice*, 2018, vol. 16, pp. 295–313.

[54] List from Ambos, 2016, p. 2, see above note 20. On the role of the victim as a *partie civile* in the criminal procedure of France and Italy, respectively, see for example, Rassat, 2001, pp. 247–93, see above note 49; Gilberto Lozzi, *Lezioni de procedura penale*, G. Giappichelli, Turin, 2001, pp. 128–33. See also Ambos, 2016, pp. 175 ff., see above note 20.

ern common law systems. At any rate, the civil law tradition, as "a body of general principles carefully arranged and closely integrated",[56] suggests an ideological element in the history and reality of codification, including elements of legal theory and the sociology of law.[57] Further, the generality of legal rules is high – codes in civil law are said to be a collection of abstract principles rather than specific rules for particular situations or even concrete cases.[58] Finally, since legal certainty and predictability[59] are "supreme value[s]" and basically "unquestioned dogma[s]"[60] in the civil law tradition – think only about its strict take on the principle of legality (*nullum crimen sine lege*)[61] – it promotes sophisticated methods of interpretation[62] and common definitions and classifications.[63]

4.2.1.2. Common Law

Common law is also referred to as 'Anglo-American' law. This might be misleading because it suggests that English and American laws are rather similar. It also ignores the plurality within US legal systems and the relationship of English law to Scottish and (Northern) Irish laws. However, this ambiguity might only exist with regard to legal systems and their (un-

55 Merryman and Pérez-Perdomo, 2019, pp. 20–26, especially 25, see above note 41; see also Dainow, 1966–1967, p. 424, see above note 45 ("Generally, in civil law jurisdictions the main source or basis of the law is legislation, and large areas are codified in a systematic manner. These codes constitute a very distinctive feature of a Romanist legal system, or the so-called civil law".); in more detail, Heinze, 2014, p. 108, see above note 23.

56 Dainow, 1966–1967, p. 424, see above note 45; see also Heinze, 2014, p. 108, see above note 23, with further references.

57 Charles H. Koch Jr., "Envisioning a Global Legal Culture", in *Michigan Journal of International Law*, 2003–2004, vol. 25, p. 24.

58 Joseph Sanders, "Law and Legal Systems", in Edgar F. Borgatta and Rhonda J.V. Montgomery (eds.), *Encyclopedia of Sociology, Vol. III*, second edition, Macmillan, New York *et al.*, 2000, pp. 1544, 1546; see also Dainow, 1966–1967, p. 424, see above note 45; Heinze, 2014, p. 109, see above note 23. For a German perspective, see Michael Bohlander, "Radbruch Redux: The Need for Revisiting the Conversation between Common and Civil Law at Root Level at the Example of International Criminal Justice", in *Leiden Journal of International Law*, 2011, vol. 24, p. 402.

59 Koch, 2003–2004, p. 36, see above note 57.

60 Merryman and Pérez-Perdomo, 2019, p. 48, see above note 41.

61 Cf. Kai Ambos, *Treatise on International Criminal Law, Vol. I: Foundations and General Part*, OUP, Oxford, 2013, pp. 88 ff.

62 Koch, 2003–2004, p. 31, see above note 57; Heinze, 2014, p. 109, see above note 23.

63 Koch, 2003–2004, p. 33, see above note 57; see also Bohlander, 2014, p. 504, see above note 49.

intentional) equation by using the word 'Anglo-American'. If one is talking about legal traditions in the way previously mentioned, the term 'Anglo-American' can indeed be used.

The common law is characterised by the concept of a dialectical competition between the parties, in which the stronger – and therefore true – version of the case will prevail.[64] Typical procedural elements of this tradition are:

1. a party-driven process;[65]
2. the 'two-case approach', that is, the parties prepare two cases during the pre-trial stage and present their respective cases subsequently at trial;[66]
3. an attitude towards getting the best results for the clients instead of uncovering the truth;[67]
4. the judge, as a passive umpire, whose task is to ensure that the parties abide by the procedural rules;[68]
5. complex rules of evidence;[69] and
6. the jury, as a decision maker.[70]

While the civil law tradition emphasises codification, the chief source[71] of law in common law legal systems is case law of the courts.[72] It

64 McGonigle Leyh, 2011, p. 70, see above note 41; Schuon, 2010, p. 4, see above note 8. See generally Bohlander, 2014, pp. 493 ff., see above note 49; Billis, 2015, pp. 27 ff., see above note 40; Carlson, 2018, pp. 73–74, see above note 9.

65 That is, the matter of what evidence to submit, and in which order, is mainly left to the parties, Schuon, 2010, p. 3, see above note 8.

66 Schuon, 2010, p. 3, see above note 8.

67 Kagan, 2003, p. 244, see above note 18.

68 See "Democracy? Freedom? Justice? Law? What's all this?", in *The Economist*, 23 December 1999 (available on its web site).

69 Heinze, 2014, p. 111, see above note 23.

70 *Ibid.*

71 Many observers from civil law systems still ignore that the common law in common law legal system has often been replaced by statutory law, see in the same vein Massimo Donini, "An impossible exchange? Versuche zu einem Dialog zwischen civil lawyers und common lawyers über Gesetzlichkeit, Moral und Straftheorie", in *Jahrbuch der Juristischen Zeitgeschichte*, 2017, vol. 18, no. 1, p. 342. See also Geoffrey Samuel, *A Short Introduction to Judging and to Legal Reasoning*, Edward Elgar, Celtenham, Northampton, MA, 2016, p. 31: "The common law has of course traditionally been regarded as being based upon cases and precedents. Before the 19th century this was largely true, but today the position is dramatically different. By far the most important source of law in England is

is "both the source and the proof of the law, pronounced in connection with actual cases".[73] Consequently, statutes are "usually not formulated in terms of general principles but consist rather of particular rules intended to control certain fact situations specified with considerable detail",[74] which involves the danger of over-criminalisation.[75] While the civil law tradition follows abstract (deductive) reasoning than a casuistic (inductive) approach,[76] decisions in common law are reached through confrontation

legislation and the great majority of cases decided by the courts involve the interpretation and application of a legislative text"; Carissa Byrne Hessick, "The Myth of Common Law Crimes", in *Virginia Law Review*, 2019, vol. 105, pp. 965-1024.

72 Michael Zander, "Forms and Functions of the Sources of the Law from a Common Law Perspective", in Albin Eser and Christiane Rabenstein (eds.), *Neighbours in Law – Are Common Law and Civil Law Moving Closer Together? Papers in Honour of Barbara Huber on her 65th Birthday*, Edition Iuscrim, Freiburg, 2001, pp. 32, 43; Heinze, 2014, p. 111, see above note 23. For a more nuanced note, see Birks, 1998, p. 399, see above note 3 ("[T]he self-image of the common law as judge-made is incomplete. It is judge-and-jurist-made. The common law is to be found in its library, and the law library is nowadays not written only by its judges but also by its jurists.").

73 Dainow, 1966–1967, p. 425, see above note 45.

74 *Ibid*., pp. 419, 425.

75 See Darryl K. Brown, "Criminal Law Theory and Criminal Justice Practice", in *American Criminal Law Review*, 2012, vol. 49, pp. 78–79 with further references: "Observers on both sides of the Atlantic overwhelmingly take the view that Anglo-American codes over-criminalize, meaning that statutes label conduct as criminal that should not be so labelled because the conduct is not sufficiently harmful and wrongful, and committing it does not manifest culpability". See also Sabine Swoboda, *Verfahrens- und Beweisstrategien vor den UN-ad hoc Tribunalen*, Nomos Verlagsgesellschaft, Baden-Baden, 2013, p. 218: "Zuletzt sei noch auf den Teufelskreis der Expansion des materiellen und prozessualen Strafrechts hingewiesen, der die Entwicklung des US-amerikanischen Strafrechts prägt. Dieser Teufelskreis nimmt seinen Anfang in der beständigen Ausweitung der materiell-rechtlichen Strafgrundlagen durch den Gesetzgeber. Den Expansionstendenzen des materiellen Rechts versuchen die Gerichte mit immer weiteren Verfeinerung des Verfahrens- und Beweisrechts zu begegnen, woraufhin der Gesetzgeber die ihm strafprozessual gesetzten Grenzen abermals mit neuen, noch expansiver ausgeformten Strafvorschriften zu unterlaufen versucht".

76 Bohlander, 2011, p. 402, see above note 58. This general observation lacks nuances but is dictated by space constraints. It goes without saying that the approach to judicial or legal decision making in civil law traditions is not that obvious. In fact, Arthur Kaufman – drawing on Peirce and Lüderssen – recognised three "methodological instruments" (*methodische Instrumente*): Deduktion, Induktion and Abduktion. Abduktion occurs in the initial stage of a trial: The decision maker searches for a hypothesis about what his or her judgment could be. Frankly, this presupposes a hermeneutical preconception of the judgment, what Kaufmann calls *Vorverständnis* but might be a euphemistic phrasing of prejudice (*Vorurteil*). Abduktion is thus a form of *Rechtsbegründung*, which I will describe below 4.5.3., and a way to ensure the court's *jura novit curia*. See Arthur Kaufmann, "Be-

and reasoned debate,[77] that is, by assessing "the force of arguments" from all sides.[78] Legal certainty is "not elevated to the level of dogma",[79] as is often the case in civil law systems. Renowned scholars such as Jeremy Bentham and Robert Kagan associated 'common law' or 'adversarial legalism' with unpredictability, legal uncertainty and costliness.[80]

merkung zur positive Begründung und zur Falsifikation des Rechts", in Cornelius Prittwitz *et al.* (eds.), *Festschrift für Klaus Lüderssen*, Nomos, Baden-Baden, 2002, p. 83, 92. It is interpretation proceeding from the (hypothetical) result, Joachim Hruschka, *Strafrecht*, second edition, Walter de Gruyter, Berlin, New York, 1988, p. XVIII ("Auslegung vom Ergebnis her"). Formulating a hypothesis by abduction is a necessary requirement to be able to formulate the major premise (*Obersatz*) that contains the written rule that is applied (*ibid*., p. 94). This is the inductive approach. What follows is a comparison between case and law, the *Untersatz*. This comparison has famously been described as "moving back and forth between case and law" (*Hin- und Herwandern des Blickes zwischen Obersatz und Lebenssachverhalt*) by Karl Engisch in his *Logische Studien zur Gesetzesanwendung*, third edition, Carl Winter, Heidelberg, 1963, pp. 14-15. It is thus an analogical approach. What follows as a last step is the falsification: The subordination of *Untersatz* and *Obersatz* through a syllogism. This *Subsumtion* is a deductive approach (*ibid.*, p. 94). I translated *Subsumtion* as 'subordination' for reasons of simplification. Drawing on Frege, 'subordination' and *Subsumtion* are distinct: The former is the subordination of a term under another term, while the latter is the attribution (that word might come closest) of a matter to a term, see Gottlob Frege, *Schriften zur Logik und Sprachphilosophie*, edited by Gottfried Gabriel, Felix Meiner Verlag, Hamburg, 2001, pp. 25-28. See also James R. Maxeiner, "Legal Certainty: A European Alternative to American Legal Indeterminacy?", in *Tulane Journal of International and Comparative Law*, 2007, vol. 15, pp. 542, 577 *et seq*.; Winfried Hassemer, *Tatbestand und Typus - Untersuchungen zur strafrechtlichen Hermeneutik*, Heymann, Cologne *et al*., 1968, pp. 18 *et seq*. About judges' preconceptions also Thomas W. Merrill, "Learned Hand on Statutory Interpretation: Theory and Practice", in *Fordham Law Review*, 2018, vol. 87, p. 1, 8; Carl-Friedrich Stuckenberg, "Der juristische Gutachtenstil als cartesische Methode", in *Zeitschrift für Didaktik der Rechtswissenschaft*, 2019, vol. 6, p. 323, 326. The traditional hermeneutic approach has come under scrutiny by the proponents of a structural (pragmatic) jurisprudence, see Janine Luth, *Semantische Kämpfe im Recht*, Universitätsverlag Winter, Heidelberg, 2015, p. 40 with further references.

77 Christopher J. Peters, "Adjudication as Representation", in *Columbia Law Review*, 1997, vol. 97, pp. 358–9.

78 Jeffrey S. Wolfe and Lisa B. Proszek, "Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer", in *Tulsa Law Journal*, 1997, vol. 33, p. 305. See also Geoffrey Samuel, *A Short Introduction to Judging and to Legal Reasoning*, Edward Elgar, Celtenham, Northampton, MA, 2016, p. 3.

79 Merryman and Pérez-Perdomo, 2019, p. 48, see above note 41.

80 Kagan, 2003, p. 4, see above note 18; Jeremy Bentham, "Truth versus Ashhurst or law as it is, contrasted with what it is said to be", in John Bowring (ed.), *The Works of Jeremy Bentham, Volume V*, Simpkin, Marshall, Tait, Edinburgh, London, 1792/1843, pp. 231, 235; see also Ian Bonomy, "The Reality of Conducting a War Crimes Trial", in *Journal of International Criminal Justice*, 2007, vol. 5, pp. 348 ff. Recently, this even implied the US

An important feature of the common law is a strong mistrust of government.[81] As Bradley puts it: "We are not comfortable, especially in the United States, where distrust of government is mother's milk, with a system in which government officials determine guilt with little input from the defendant's advocate, and none from ordinary citizens on a jury".[82] Thus, in the US for instance, both the federal and the State constitutions subject governmental power to crosscutting institutional checks and judicially enforceable individual rights.[83]

4.2.2. 'Adversarial' and 'Inquisitorial'

The terms 'adversarial' and 'inquisitorial' are probably the most common terms used to categorise procedural systems.[84] Once an author writes about domestic or international criminal procedure in a general sense, it does not take long until both terms appear. In that case, it is often alleged that this or that procedural system is adversarial or inquisitorial in nature. Adversarial features are enumerated and called for, and it is likely that the term 'adversarial' is used to justify the introduction or rejection of certain procedural features.

Supreme Court in a decision about plea bargaining: "[W]e accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to halt", see United States, Supreme Court ('US SC'), *Lafler v. Cooper*, 21 March 2012, 132 S. Ct. 1376, p. 1397; see also Pamela R. Metzger, "Fear of Adversariness: Using Gideon To Restrict Defendants' Invocation of Adversary Procedures", in *Yale Law Journal*, 2013, vol. 122, p. 2555 ("The Court's anxiety about adversariness is not limited to shoring up the viability of the plea bargaining system. Rather, this anxiety extends to adversarial constitutional criminal procedures in the trial process itself" (footnote omitted)).

81 Andrew E. Taslitz, "Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding", in *Georgetown Law Journal*, 2005–2006, vol. 94, p. 1595; Daniel H. Foote, "Reflections on Japan's Cooperative Adversary Process", in Malcolm M. Feeley and Miyazawa Setsuo (eds.), *The Japanese Adversary System in Context*, Macmillan, Besingstoke, 2002, pp. 29, 37.

82 Craig M. Bradley, "The Convergence of the Continental and the Common Law Model of Criminal Procedure", in *Criminal Law Forum*, 1996, vol. 7, p. 472.

83 Kagan, 2003, p. 15, see above note 18.

84 See also the account of Damaška's description of the variety of senses and the meaning of 'adversarial' and 'inquisitorial' by John D. Jackson, "Re-visiting 'Evidentiary Barriers to Conviction and Models of Criminal Procedure' after Forty Years", in Ackerman, Ambos and Sikirić (eds.), 2016, p. 241, see above note 21; Masha Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*, Intersentia, Cambridge, Antwerp, Portland, pp. 92 ff.

Now, what does this 'adversarial' really mean? Over the years, while comparative scholars have drawn attention to the dangers of using adversarial or inquisitorial labels to characterise legal processes in the common law and civil law traditions,[85] they have used those terms quite differently and there have been no agreements concerning their meaning.[86] In fact, there has been considerable confusion about the meaning of the terms 'adversarial' or 'accusatorial', on the one hand, and 'non-adversarial' or 'inquisitorial', on the other, because these terms are assigned a variety of loose meanings.[87] It is not difficult to find diverse definitions; a quick look into an encyclopaedia is sufficient. To be clear, the potential of a definition has been a matter of controversy, mainly due to the fact that the term 'definition' is in itself hard to define.[88] Definitions may be approached from several angles: a philosophical angle, accounting for the "sense of words and terms, for the nature of the corresponding general ideas and finally for the nature of 'things'"; a linguistic and philological angle, determining "the variations in linguistic form, generally of a lexical item, produced by actual usage"; and a creative or prescriptive angle that "is motivated by the intention of limiting the notion and prohibiting any other usage".[89]

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85 See generally Swoboda, 2013, pp. 69 ff., see above note 75.

86 John D. Jackson, "The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?", in *Modern Law Review*, 2005, vol. 68, p. 740; Fedorova, 2012, p. 93, see above note 84.

87 Sean Doran, John D. Jackson, and Michael D. Seigel, "Rethinking Adversariness in Nonjury Criminal Trials", in *American Journal of Criminal Law*, 1995–1996, vol. 23, p. 13; Mirjan Damaška, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study", in *University of Pennsylvania Law Review*, 1973, vol. 121, pp. 507, 513; Giulio Illuminati, "The Accusatorial Process from the Italian Point of View", in *North Carolina Journal of International Law & Commercial Regulation*, 2009–2010, vol. 35, p. 297 ("Any debate on comparative law, especially in the field of criminal procedure, requires clearly defined concepts. Although it is broadly used, the concept of an accusatorial system is one of the most difficult to understand and scholars offer very different explanations. What is certain is that the notions of accusatorial and inquisitorial processes are abstractions. As a matter of fact, the traditional dichotomy alludes to two hypothetical models obtained by making a generalization from some real features of existing and no longer existing systems. It follows that it is not a matter of how the law is interpreted that defines the dichotomy; rather, the concept depends on the choice of an ideologically oriented scale of values").

88 Alain Rey, "Defining Definition", in Juan C. Sager (ed.), *Essays on Definition*, John Benjamins Publishing, Amsterdam, Philadelphia, 2000, p. 1.

89 Rey, 2000, p. 2, see above note 88.

Thus, when I try to illustrate that the term 'adversarial' is by no means used in only one sense, I am employing the second perspective mentioned above (referring to the paper of Damaška within the *Encyclopedia of Crime and Justice*, but also to other scholars, who have been sensible of the issue and thus tried to bring light to the darkness).[90] Due to the lack of space, I am mainly reflecting upon the term 'adversarial'. Its counterpart 'inquisitorial' I will analyse only in a comparative fashion because the analysis applies to this term as well. The terms shall first and foremost be defined pragmatically,[91] that is, how they *are* used,[92] and not so much how they *should* be used or can be used (the latter semantic dimension does a play a role, though). The condition for speech and language from a pragmatic perspective is context.[93] Second, the terms will be defined and conceptualised at the same time. I thus focus on both "lexical semantemes and their meanings in common usage" (definition of words) and "concepts and their instantiation by terms" (definition of concepts).[94] With regard to concepts and terms, the common usage of the 'adversarial' shall be determined.[95] Due to space restrictions, the distinction between 'word', 'term' and 'concept' must be reserved for another time.[96]

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90 Cf. Fedorova, 2012, p. 93, see above note 84; Albin Eser, "Changing Structures: From the ICTY to the ICC", in Ackerman, Ambos and Sikirić (eds.), 2016, pp. 213–234, see above note 21.

91 About the pragmatical turn in textual interpretation Umberto Eco, *Die Grenzen der Interpretation*, Hanser, München, 1992, pp. 350 ff.; Noah Bubenhofer, *Sprachgebrauchsmuster*, De Gruyter, Berlin, New York, 2009, p. 43. About the difference between semantics and pragmatics Lawrence B. Solum, "Contractual Communication", in Harvard Law Review Forum, 2019, vol. 133, p. 23, 27.

92 About the usage of words see already Wittgenstein, *Philosophische Untersuchungen*, posthum 2nd ed., Blackwell, Malden, 1958, reprint 1999, p. 20.

93 Bubenhofer, 2009, p. 43, see above note 91; Luth, 2015, p. 23, see above note 76.

94 Rey, 2000, p. 2, see above note 88.

95 Cf. the famous quote of d'Alembert: "Il est un grand nombre de sciences où il suffit, pour arriver à la vérité, de savoir faire usage des notions les plus communes. Cet usage consiste à développer les idées simples que ces notions renferment, et c'est ce qu'on appelle définir", Jean Le Rond d'Alembert, *Œuvres De D'Alembert, Tome Deuxième*, Partie 2, A. Belin, Paris, 1821, p. 410 ("In order to arrive at the truth, in a large number of sciences it suffices to be able to use the most common concepts. This use consists of developing the simple ideas contained in these concepts, and this process is called 'definition'" (translation Rey, 2000, p. 2, see above note 88).

96 In fact, ironically, a clear distinction between the three seems to be diluted due to the use of language. In his distinction between 'Wort' and 'Begriff', Rickert opines that the conduct of defining is when a certain name or word describes a certain term ('Begriff'), see

The term 'adversarial' can be used at least in five different contexts: in addition to (i) a traditional and (v) a historical meaning, it may describe (ii) a theoretical model, (iii) a procedural type and (iv) an procedural ideal.[97]

4.2.2.1. Traditional Meaning

In Anglo-American jurisdictions, the term 'adversarial' evokes both the aspirations and the "actual features of Anglo-American criminal justice".[98] Very often, it is used to refer to the division of responsibilities between the decision-maker and the parties,[99] or to the assistance of counsel and the due process of law.[100] Since these features are present in both le-

Heinrich Rickert, *Zur Lehre von der Definition*, C.A. Wagner, Freiburg im Breisgau, 1888, p. 18 ("Die Form wird sich immer so darstellen: dieser oder jener Name bezeichnet einen Begriff, dessen Elemente die mit diesen oder jenen anderen Namen bezeichneten Vorstellungen bilden".). Sigwart concludes that a 'Begriff' can never described, only a word ('Wort') can, see Cristoph Sigwart, *Logik, Erster Band* (Tübingen: H. Laupp'sche Buchhandlung 1873), p. 324 ("Nennt man die Angabe aller Merkmale eines Begriffs oder des Genus proximum und der Differentia specifica Definition, so ist klar, dass es sich darin nicht um eine Begriffserklärung, sondern, sofern etwas erklärt wird, nur um eine Worterklärung handeln kann".). While some translate 'Begriff' as 'concept' (Juan C. Sager (ed.), *Essays on Definition*, John Benjamins Publishing, Amsterdam, Philadelphia, 2000, p. 208; Heikki E. S. Mattila, "Legal Vocabulary", in Peter M. Tiersma and Lawrence M. Solan (eds.), *Language and Law*, Oxford University Press, Oxford, 2012, p. 27), Ogden and Richards translate it as 'thought', see C. K. Ogden and I. A. Richards, *The Meaning of Meaning*, Harcourt, Brace & World, New York, 1923, p. 99. The latter seems more convincing. In that vein, von der Pfordten points out that words and sentences are parts of speech and language, respectively. Terms, by contrast, belong to thoughts and thinking, see Dietmar von der Pfordten, "Begriffe – Sprache – Recht", in Frank Schorkopf and Christian Starck (eds.), *Rechtsvergleichung - Sprache - Rechtsdogmatik: Siebtes Deutsch-Taiwanesisches Kolloquium vom 8. bis 9. Oktober 2018 in Göttingen*, Nomos, Baden-Baden, 2019, p. 41. For an entire different understanding of 'term' (in the context of contracts), see Frederick Wilmot-Smith, "Term Limits: What is a Term?", in *Oxford Journal of Legal Studies*, 2019, vol. 39, p. 705, 706: "[T]erms are the propositions of law made true by contracting parties through their acts. The second subsection refines that definition, distinguishing two different ways lawyers use the concept of a term.", footnote omitted. Concepts, by contrast, are external components of language. They are context-dependent, which distinguishes them from terms or thoughts, see Luth, 2015, p. 74, see above note 76.

97 By contrast, Fedorova identifies only three different "senses" of the term adversarial: a traditional model, a theoretical model and an ideal model, see Fedorova, 2012, pp. 94–6, above note 84.

98 Mirjan Damaška, "Adversary System", in Dressler (ed.), 2002, p. 25, see above note 52.

99 US SC, *McNeil v. Wisconsin*, 13 June 1991, 501 U.S. 171, 111 S. Ct. 2204; Fedorova, 2012, p. 94, see above note 84.

100 Damaška, 2002, p. 25, see above note 98.

gal systems with a common law tradition and those with a civil law tradition, the term 'adversarial' in that context is not qualified to be used as a distinction.

With regard to "actual features of Anglo-American criminal justice", those features should not be confused with features of the common law process. The latter are important for an understanding of 'adversariness' as a procedural type. "Actual features of Anglo-American criminal justice" are, for example, the confrontation style,[101] the privilege against self-incrimination,[102] the right to pre-trial release and the hostility to preventive detention,[103] as well as its basis on liberal ideology (including the presumption of innocence and the requirement of proving guilt beyond reasonable doubt).[104] Thus, the *traditional meaning* of 'adversarial' is simply the opposite of 'inquisitorial' in the sense of continental European criminal justice prior to its reform in the wake of the French Revolution.[105] Damaška summarises:

> The traditional concept of the adversary system evokes both actual features of Anglo-American criminal process and its aspirations. Inevitably, therefore, it combines both descriptive and prescriptive elements and cannot be expected to achieve rigorous internal consistency and coherence. It is not so much analytically precise as it is hortatory and rhetorical, aimed at mobilizing consent and at winning points in legal argumentation.[106]

4.2.2.2. Theoretical Model

The second context is 'adversariness' as a *theoretical model*. This theoretical model describes the goal of the process: conflict resolution.[107] Procedures facilitating the implementation of conflict resolution most effectively are named 'adversarial'.[108] As Damaška points out: "In this second sense, then, the adversary system [sic] is a blueprint designed to promote

[101] Which is – in this sense – "subverted" by plea bargaining mechanisms, see *ibid*.
[102] US SC, *Malloy v. Hogan*, 15 June 1964, 378 U.S. 1, p. 7.
[103] Damaška, 2002, p. 25, see above note 98.
[104] *Ibid*.
[105] *Ibid*., p. 26.
[106] *Ibid*.
[107] Fedorova, 2012, p. 95, see above note 84.
[108] Damaška, 2002, p. 26, see above note 98.

the choice of certain procedures. Elements of the blueprint and features traditionally classed as adversary do not coincide". The goal of conflict resolution can be pursued by a variety of approaches and models.[109] 'Adversariness' in this sense is thus normative.

4.2.2.3. Procedural Type

The third meaning of 'adversariness' is a procedural one. According to Damaška, it is a "procedural type designed by comparative law scholars to capture characteristic features of the common law process, particularly when contrasted with continental systems".[110] This procedural type is *purely descriptive* and sometimes called the 'lowest-common-dominator approach', meaning that the adversarial and inquisitorial categories simply contain the features shared by all common and civil law criminal procedure systems, respectively.[111] For instance, the trial by jury or the hearsay rule would qualify as features of the adversarial system if all common law jurisdictions included these elements at a certain moment in time.[112] Thus, scholars who adopt the lowest-common-denominator approach call a common denominator 'adversarial' or 'inquisitorial' simply because they find it across a number of systems and then label the system adversarial or inquisitorial.[113] Nevertheless, it remains unclear what happens when one of the common denominators is withdrawn – either that system can no longer be called 'adversarial' or 'inquisitorial' or the denominator that was withdrawn is no longer 'common'.[114]

4.2.2.4. Ideal-Type Procedure

Fourth, 'adversariness' can also be an ideal-type of procedure, which does not serve as an abbreviated description of actual procedure but would have a *purely normative meaning*.[115] This approach conceptualises the

[109] *Ibid*., p. 27.

[110] *Ibid*., p. 28.

[111] *Ibid*.; see also Joachim Herrmann, "Various Models of Criminal Proceedings", in *South African Journal of Criminal Law & Criminology*, 1978, vol. 2, pp. 4–6.

[112] Máximo Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure", in *Harvard International Law Journal*, 2004, vol. 45, p. 7.

[113] Jackson, 2005, pp. 737, 741, see above note 86.

[114] *Ibid*.

[115] *Ibid*., p. 742; Illuminati, 2009–2010, p. 298, see above note 87 ("The features of the accusatorial system are determined only through contrast to those of the inquisitorial system

terms adversarial and inquisitorial as Weberian ideal-types.[116] These models do not exactly exist in any historical legal system,[117] but while common law jurisdictions would be closer to the adversarial type, civil law jurisdictions would be closer to the inquisitorial type.[118] The approach, instead, only labels concrete criminal procedure as closer to or farther from the ideal-type.[119] For instance: 'adversarial' as an ideal of procedure would include the presumption of innocence, the privilege against self-incrimination and the use of oral testimony, which are then contrasted with counter-tendencies[120] to be found (allegedly) in Continental proceedings.[121] 'Accusatorial'[122] as an ideal procedure has, according to Jackson, at times been used to describe the reformed Continental procedures of the nineteenth century whereby the separate functions of prosecuting and ascertaining facts were severed, with the former entrusted to the prosecutor and the latter to the investigating judge.[123] In the US, 'inquisitorialism', on the contrary, has always been used as an idealised system against which the courts defined their own system.[124] In a both insightful and sur-

and vice-versa; therefore they represent only ideal models that, in practice, can combine in different ways in relation to several variables".); Fedorova, 2012, pp. 97 ff., see above note 84. About the meaning of "normative" see below Section 4.4.4.4.1. and Heinze, 2014, pp. 172 ff., see above note 23.

116 Langer, 2004, p. 8, footnote 29, see above note 112. Tatjana Hörnle even says, that the terms "adversarial" and "inquisitorial" cannot be something else than ideal-types, see Tatjana Hörnle, "Unterschiede zwischen Strafverfahrensordnungen und ihre kulturellen Hintergründe", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2005, vol. 117, p. 804. About Weber's ideal types in more detail, see Heinze, 2014, pp. 180–3 and 195–9, see above note 23.

117 Doran, Jackson and Seigel, 1995–1996, p. 14, see above note 87.

118 Langer, 2004, p. 8, see above note 112.

119 Hörnle, 2005, p. 804, see above note 116; Langer, 2004, p. 9, see above note 112.

120 In reality, of course, the safeguards mentioned are nowadays provided for in most procedural systems that are labelled "inquisitorial" and enshrined in Article 6 European Convention on Human Rights, see Heinze, 2014, pp. 155–7, see above note 23.

121 Damaška, 1973, pp. 506, 569, see above note 87. See as an example US SC, *Crawford v. Washington*, 8 March 2004, 124 S. Ct. 1354, p. 8, and – as a commentary – Sarah J. Summers, "The Right to Confrontation after Crawford v. Washington: A 'Continental European' Perspective", in *International Commentary on Evidence*, 2004, vol. 2, pp. 1–13.

122 About the difference between 'accusatorial' and 'adversarial', see Heinze, 2014, pp. 131–3, see above note 23.

123 Jackson, 2005, pp. 737, 740, see above note 86.

124 William E. Connolly, "The Challenge to Pluralist Theory", in William E. Connolly (ed.), *The Bias of Pluralism*, Atherton Press, New York, 1969, pp. 3, 22–24. In more detail see Heinze, 2014, pp. 152 ff., see above note 23.

prising article – at least for Continental lawyers – Sklansky stated: "A lengthy tradition in American law looks to the Continental, inquisitorial system of criminal adjudication for negative guidance about our own ideals. Avoiding inquisitorialism is taken to be a core commitment of our legal heritage".[125]

The anti-inquisitorialism debate in the US reveals that there is a variant form of adversariness and inquisitorialism as an ideal-type procedure: an *ideal model of proof*. By contrast to an ideal procedure which applies to the entire procedure, an ideal model of proof only applies to a particular hypothesis of proof, like the question of how the truth is established,[126] or whether the decision-maker should be a judge or a jury.[127] For example, while the adversarial model of proof claims that the truth is best discovered by powerful statements on both sides of a question, for the inquisitorial model of proof this goal is best achieved by an active judge and a strong investigating (State) agency, which are committed to objectivity.[128]

4.2.2.5. Historical Meaning

A fifth meaning of 'adversariness' was promoted by Vogler and also mentioned by other authors.[129] It is usually called 'historical meaning'.[130] Illuminati states that "[t]he historical approach is essential not only to identify the real origins of the dichotomy, but also to fully understand the meaning of the parameters of the opposition and the way they have

[125] David Alan Sklansky, "Anti-Inquisitorialism", in *Harvard Law Review*, 2008–2009, vol. 122, pp. 1635–6.

[126] Cf. John D. Jackson and Sean Doran, *Judge Without Jury – Diplock Trials in the Adversary System*, Clarendon Press, Oxford, 1995, p. 60; Doran, Jackson and Seigel, 1995–1996, p. 14, see above note 87.

[127] Taslitz, 2005–2006, pp. 1589, 1591, see above note 81. De-emphasising the relevance of the judge–jury question for a categorisation as "adversarial" or "inquisitorial" model of proof, see Jackson and Doran, 1995, p. 60, see above note 126. See also Heinze, 2014, pp. 153 ff., 231–2, 268–276, above note 23.

[128] Cf. Gary Goodpaster, "On the Theory of American Adversary Criminal Trial", in *Journal of Criminal Law & Criminology*, 1987–1988, vol. 78, p. 121.

[129] See, for example, Illuminati, 2009–2010, pp. 298 ff., see above note 87.

[130] Sabine Swoboda, "A Normative Theory of Criminal Procedure", Book Review, in *Criminal Law Forum*, 2007, vol. 18, p. 157; Swoboda, 2013, p. 69, see above note 75; cf. Paul Roberts, "Comparative Criminal Justice Goes Global", in *Oxford Journal of Legal Studies*, 2008, vol. 28, pp. 370, 375.

changed in the course of time".[131] More concretely, under the historical perspective, it is particularly relevant which party is given prosecutorial power and whether the judge can initiate proceedings *proprio motu*.[132] Thus, "the essential structural elements of the adversarial method" are:

1. The state must be prevented by law from using its power to apply psychological or physical pressure to distort the free testimony of the individual.
2. The state must be prevented by law from using its superior resources to create an unfair trial.
3. The individual must be an active subject of the process and not merely a passive object.[133]

In the same vein, Illuminati has identified the private nature of prosecution, including the discretionary power to instigate a prosecution case; the burden of proof on the prosecutor; the equality of arms between the parties and their control of the evidence; the principle of publicity and orality of the trial; the judge's passive role as the arbitrator of the dispute; and, the fact that the private accuser was left in charge of gathering the evidence as historical features of adversarialism.[134]

By contrast, an inquisitorial process is often seen as something akin to the Francophone model of criminal procedure, deriving originally from Napoleon's criminal procedure code of 1808 or even earlier.[135] This process is characterised by the following features: (1) the process "is based upon a hierarchical system of authority in which power is delegated downwards through a chain of subordinate officials of decreasing status"; (2) the procedure assumes the form of a "continuous, bureaucratic process"; (3) it employs "different forms of intolerable pressure against defendants in order to achieve co-operation, including physical and mental torture in every imaginable form", often in complete secrecy; and (4) finally, the inquisitorial trial prefers the method of "rational deduction and

[131] Illuminati, 2009–2010, p. 298, see above note 87; Luigi Ferrajoli, *Dirito e Ragione*, eighth edition, Laterza, Rome-Bari, 2004, p. 574.

[132] Illuminati, 2009–2010, see above note 87.

[133] Richard Vogler, *A World View of Criminal Justice*, Ashgate, Aldershot, 2005, p. 130.

[134] Illuminati, 2009-2010, p. 300, see above note 87.

[135] Paul Roberts and Adrian Zuckerman, *Criminal Evidence*, second edition, OUP, Oxford *et al*., 2010, p. 47 with further references.

forensic enquiry" to a fair and orderly process of communication between the parties.[136]

Obviously, this understanding of 'adversariness' reminds us of the traditional meaning of this term in the sense of aspirations and features. Thus, Swoboda gives this approach a second name: "due process adversariality".[137]

4.2.2.6. Máximo Langer: A New Theoretical Framework

In his article "From Legal Transplants to Legal Translations", Langer proposes "a new theoretical framework to reconceptualize the adversarial and the inquisitorial systems".[138] With that framework, he strives to "*describe* the differences between the criminal procedures of the common and civil law traditions".[139] This theoretical framework pretends to provide "a clear axis of reference in comparing the differences between the adversarial and the inquisitorial systems".[140] Thereby, Langer identifies certain core levels[141] of a criminal process. Each one of these levels can have an adversarial or inquisitorial shape.[142] By identifying these core levels, Langer avoids the shortcomings of the usual adversarial–inquisitorial dichotomy. Instead, his new theoretical framework "should be understood not only as two different ways to arrange powers and responsibilities between the

[136] Vogler, 2005, pp. 19–20, see above note 133; for another description of the historical meaning of inquisitorial see Illuminati, 2009–2010, pp. 301 ff., see above note 87. For a recent detailed, instructive and nuanced account of the origin of Roman-Canon legal proof in criminal cases, see Mirjan Damaška, *Evaluation of Evidence*, Cambridge University Press, Cambridge, 2019, pp. 10 *et seq*.

[137] Swoboda, 2007, p. 157, see above note 130.

[138] Langer, 2004, p. 5, see above note 112.

[139] *Ibid*. (italics added).

[140] *Ibid*.

[141] Langer himself calls it "levels", although it might as well be called "categories", see *ibid*., p. 13.

[142] Langer's identification of core levels of a criminal process that appear in a different shape is reminiscent of Klamberg's so-called "differentiated functional approach". Borrowing from Lindblom and Edelstam, Klamberg's approach "describes how different objectives and functions such as crime control and due process vary during criminal proceedings", Mark Klamberg, *Evidence in International Criminal Trials*, Martinus Nijhoff, Leiden, Boston, 2013, p. 9. The argument is "that the criminal procedure has to be broken into in specific procedural activities which may determine the outcome of a legal issue and appear to resemble the casuistic approach", *ibid*., p. 92. For an application of the approach to procedural models such as 'inquisitorial', 'adversarial', 'civil law' and 'common law', see *ibid*., p. 501.

main actors of the criminal process (judges, prosecutors, defense attorneys, etc.), but also as two different procedural cultures".[143] The levels are: the technique for handling cases; the procedural culture; and ways to distribute powers and responsibilities between the main actors.

4.2.2.6.1. The Technique for Handling Cases

The first difference is the technique for handling cases, as "the adversarial and inquisitorial systems present substantial differences in the way they structure procedure".[144] In Langer's view, choosing between these two techniques "may affect how accurately an international jurisdiction distinguishes the guilty from the innocent and establishes the historical background that led to mass atrocities; how swiftly it investigates and adjudicates cases; how fair or unfair the public perceives international criminal proceedings to be; and similar issues".[145] One example is case-management techniques: in the inquisitorial system, a written dossier is the backbone of the whole process and a major case-management tool, from the first stage of the proceeding in which the police intervene, to the phase of appeals against the verdict;[146] conversely, in the adversarial system, oral and public hearings play an important role in the management of cases, even in bargained ones.[147] In fact, plea bargaining had been an unknown case-management tool in inquisitorial systems until recently,[148] despite its widespread usage in Anglo-American jurisdictions.[149]

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[143] *Ibid*., p. 6.

[144] Langer, 2005, pp. 835, 848, see above note 50.

[145] *Ibid*.

[146] For a description of the role of the written dossier in inquisitorial systems, see Rudolf B. Schlesinger, "Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience", in *Buffalo Law Review*, 1977, vol. 26, pp. 365–67.

[147] Langer, 2004, p. 16, see above note 112.

[148] For a classic analysis, see John H. Langbein, "Land Without Plea Bargaining: How the Germans Do It", in *Michigan Law Review*, 1979, vol. 78, pp. 204–225. It becomes obvious that Langbein was influenced by Rheinstein.

[149] For historical analyses of how the practice of plea bargaining developed in U.S. jurisdictions, see Albert W. Alschuler, "Plea Bargaining and Its History", in *Law & Society Review*, 1979, vol. 13, pp. 211–245; George Fisher, "Plea Bargaining's Triumph", in *Yale Law Journal*, 2000, vol. 109, pp. 857–1086; Lawrence M. Friedman, "Plea Bargaining in Historical Perspective", in *Law & Society Review*, 1979, vol. 13, pp. 247–259; John H. Langbein, "Understanding the Short History of Plea Bargaining", in *Law & Society Review*, 1979, vol. 13, pp. 261–272.

4.2.2.6.2. The Procedural Culture

Second, adversariality and inquisitorialism must be distinguished in relation to the 'procedural culture'. At first glance, the meaning of 'procedural culture' is rather vague. However, it becomes clearer considering the two elements of procedural culture: (i) the structure of interpretation and meaning, and (ii) the internal dispositions of legal actors.

First, Langer describes the structure of interpretation and meaning as "the basic ideas about prosecution and adjudication of criminal cases".[150] Within these two "procedural languages", the same terms or "signifiers" often have different meanings,[151] such as the words "prosecutor"[152] or "truth".[153] At the same time, there are ideas and concepts that exist only

[150] Langer, 2005, p. 848, see above note 50.

[151] Langer, 2004, p. 10, see above note 112.

[152] *Ibid*.: "For instance, in the adversarial system, the word 'prosecutor' means a party in a dispute with an interest at stake in the outcome of the procedure; in the inquisitorial system, however, the word signifies an impartial magistrate of the state whose role is to investigate the truth". On the different conceptions of the prosecutor in the Anglo-American system and the inquisitorial one, see, for example, William T. Pizzi, "Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform", in *Ohio State Law Journal*, 1993, vol. 54, pp. 1349–51; Weigend, 2002, pp. 1233–4, see above note 52.

[153] Langer, 2004, p. 10, see above note 112:

> This word has a different meaning in each procedural structure of interpretation and meaning. In the adversarial system, even if the dispute is about 'truth', the prosecution tries to prove that certain events occurred and that the defendant participated in them, while the defense tries to question or disprove this attempt. The adversarial conception of truth is more relative and consensual: if the parties come to an agreement as to the facts of the case, through plea agreements or stipulations, it is less important to determine how events actually occurred.
>
> Langer explains the last sentence in more detail:
>
> This may sound like an exaggeration because, in U.S. jurisdictions, the judge still has to verify the factual basis for a guilty plea. But in practice, U.S. judges are usually deferential to the agreements of the parties about the facts.
> [footnote omitted]
>
> He then continues:
>
> In the inquisitorial structure of interpretation and meaning, 'truth' is conceived in more absolute terms: the official of the state – traditionally, the judge – is supposed to determine, through an investigation, what really happened, regardless of the agreements or disagreements that prosecution and defense may have about the event.
>
> On the conception of truth predominant in the inquisitorial system as opposed to the accusatorial one, see Antoine Garapon, "French Legal Culture and the Shock of 'Globalization'", in *Social & Legal Studies*, 1995, vol. 4, pp. 496–497.

in one but not the other. For instance, the adversarial system includes both "confession"[154] and "guilty plea",[155] while the inquisitorial procedural structure only knows "confession".[156] In this system, "a defendant cannot end the phase of determination of guilt or innocence by admitting his guilt before the court. While the admission of guilt may be very useful to the judge in seeking the truth, the judge still has the final word on the determination of guilt".[157]

Second, just as the adversarial and inquisitorial structures of interpretation and meaning are grounded in concrete procedural practices, they are also internalised by the relevant legal actors.[158] Langer calls this the "dimension of individual dispositions". Langer's "source of inspiration"[159] for the development of this dimension of internal dispositions was Pierre Bourdieu's sociological concept of *habitus*, which can be defined as "a set of *dispositions* which induce agents to act and react in certain ways. The dispositions generate practices, perceptions, and attitudes which are 'regular' without being consciously co-ordinated or governed by any 'rule[...]'".[160]

For Langer, internal dispositions are patterns "acquired by the internalization of the procedural structures of interpretation and meaning, through a number of socialization processes".[161] These patterns are, for example, the judge's role to be a passive umpire. This role

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[154] Which Langer describes as "an admission of guilt before the police", see Langer, 2004, p. 11, see above note 112.

[155] Which is "an admission of guilt before the court that, if accepted, has as its consequence the end of the phase of determination of guilt or innocence", *ibid*.

[156] *Ibid*. See, for example, Myron Moskovitz, "The O.J. Inquisition: A United States Encounter with Continental Criminal Justice", in *Vanderbilt Journal of Transnational Law*, 1995, vol. 28, p. 1153.

[157] Langer, 2004, p. 11, see above note 112, continuing: "In any case, if an admission of guilt happens during the pre-trial phase, the case must still go to trial before the judge can make a final determination". See, in more detail, John H. Langbein, *Comparative Criminal Procedure: Germany*, West Publishing Co., St. Paul, Minnesota, 1977, pp. 73–74.

[158] Langer, 2004, p. 11, see above note 112.

[159] Langer speaks of "source of inspiration", because he explicitly does not follow the theoretical framework of Pierre Bourdieu in this chapter, see *ibid*., p. 12, footnote 41.

[160] John B. Thompson, "Editor's Introduction", in Pierre Bourdieu, John Thompson, Gino Raymond and Matthew Adamson (eds.), *Language and Symbolic Power*, Harvard University Press, Cambridge, 1999, p. 12.

[161] Langer, 2004, p. 12, see above note 112. Those "socialisation processes" are, for example, "law schools, judiciary school, prosecutor's office and law firm training, interaction with

> is not only due to the adversarial structure of interpretation and meaning; it is also due to the phenomenon that a substantial number of legal actors have internalized this structure of meaning in a common law jurisdiction, they have come to consider this as the proper role of a judge and will usually act accordingly – i.e., censoring a judge who participates too actively in the interrogation of witnesses.[162]

In other words, "to the extent that legal actors internalize these structures of meaning and then interpret and interact with reality through them, one could say that these structures of meaning constitute and shape legal actors as subjects".[163]

These individual dispositions are often underestimated and become especially relevant in the case of the transfer of legal ideas, norms, and institutions between adversarial and inquisitorial systems, as well as legal transplants in general.[164] As I will demonstrate later, ignoring these individual dispositions leads to many difficulties, as happened in Italy[165] and Germany,[166] and as it still occurs at the ICC.[167]

4.2.2.6.3. Ways to Distribute Powers and Responsibilities Between the Main Legal Actors

Finally, adversarial and inquisitorial procedures differ at another level, which Langer calls the "dimension of procedural power".[168] Langer ob-

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the courts, etc.". As a result of this socialisation, "a substantial number of actors in the criminal justice system are predisposed to understand criminal procedure and the various roles within it in a particular way, and these dispositions become durable over time", *ibid*.

162 *Ibid*.

163 *Ibid*.

164 *Ibid*.

165 See below Section 4.3.2. See also Heinze, 2014, pp. 152, 316 ff., 529 ff., 535 ff., see above note 23; Michael Vitiello, "Bargained-for-Justice: Lessons from the Italians?", in *University of the Pacific Law Review*, vol. 48, 2017, pp. 247–263; Ennio Amidio, "Rethinking Evidence under Damaška's Teaching", in Ackerman, Ambos and Sikirić (eds.), 2016, p. 54, see above note 21.

166 For more details see Kai Ambos and Alexander Heinze, "Abbreviated Procedures in Comparative Criminal Procedure: A Structural Approach with a View to International Criminal Procedure", in Morten Bergsmo (ed.), *Abbreviated Criminal Procedures for Core International Crimes*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 57 *et seq*.

167 See Heinze, 2014, pp. 535 ff., see above note 23.

168 Langer, 2004, p. 13, see above note 112. Langer remarks that "[t]his dimension of procedural power has also been relatively overlooked by comparative criminal procedure analyses, and it is central not only to describing the differences between the adversarial and the

serves that "[t]he main actors of the criminal process – judges, prosecutors, defense attorneys, defendants, police, etc. – have different quanta of procedural powers and responsibilities in each system".[169] He provides examples relating to the powers and responsibilities of the decision-maker[170] *vis-à-vis* the prosecution and the defence.[171] He thereby includes institutional considerations, describing the relationships of power between the "office of the prosecution, the judiciary, the bar, the public defense office, the police, etc.",[172] but also with regard to "permanent professional actors and lay people".[173] Again, Langer alludes to the so-called "internal dispositions of legal actors" being also intertwined with the dimension of procedural power.[174] He remarks that, for instance, "an inquisitorial structure of interpretation and meaning gives the judge broad investigatory powers while giving more limited powers to the prosecution and defense. At the same time, though, any attempt to change this structure of interpretation and meaning will usually generate a reaction by the judges who protest against being disempowered through a new procedural structure of meaning".[175] This statement does not only describe certain anomalies and contradictions in domestic settings such as Italy,[176] and in the context of the rather diverse procedural regime of the ICC,[177] but it also shows that the

inquisitorial systems, but also to identifying potential *loci* of resistance towards judicial reforms in adversarial and inquisitorial institutional settings", see *ibid*., with footnote 47.

169 *Ibid*.

170 *Ibid*., with footnote 48: "The inquisitorial judges are also more powerful than adversarial professional judges because of their power to decide which evidence is produced at trial and the order in which it is presented, as well as through their power to lead the interrogation of witnesses and expert witnesses. However, this last statement must be qualified. The adversarial judges have inherent powers – i.e., contempt powers – that the inquisitorial ones lack. In addition, since there is less hierarchical control over the decisions of the adversarial judges than the inquisitorial judges, the former also have more power in this respect".

171 *Ibid*.: "An example of this is the power that the defense has in the adversarial system to do its own pre-trial investigation – a power generally not present in inquisitorial systems".

172 *Ibid*.

173 *Ibid*., with footnote 50: "In the inquisitorial system, the power of lay people as decision-makers is minimal or entirely non-existent. In the adversarial system, it is much more substantial, at least in comparative terms". Cf. also Kagan, 2003, see above note 18.

174 Langer, 2004, p. 14, see above note 112.

175 *Ibid*. with further references.

176 See above note 165.

177 See, for instance, the question of how much evidence should be communicated to the Chamber (see in detail Heinze, 2014, pp. 80 ff. and 508 ff., see above note 23): contrary to

above mentioned features of potential differences between adversarial and inquisitorial procedures operate jointly in reality and tend to reinforce, though also eventually subvert, one another.[178]

To summarise, the four adversarial–inquisitorial levels according to Langer are:

1) Technique to handle criminal cases
2) Procedural culture
   a) Structure of interpretation and meaning
      - basic ideas about prosecution and adjudication of criminal cases
   b) Internal dispositions of legal actors
      - internalisation of these basic ideas by legal actors
      - practices, perceptions and attitudes which are 'regular' without being consciously co-ordinated or governed by any 'rule'
3) Legal identity
   - awareness of coming from an adversarial or inquisitorial system influences the own definition of legal actors
4) Ways to distribute powers and responsibilities between the main legal actors
   - that is, active judge?[179]

4.2.2.7. Conclusion

As demonstrated above, one possible (and most often used) model of criminal process is through the categories 'adversarial' and 'inquisitorial'. Its suitability for a contextual interpretation of procedural rules and the

the *Lubanga* Pre-Trial Chamber, the *Bemba* Pre-Trial Chamber demanded to have access to evidence other than that on which the parties intend to rely at the confirmation hearing, since otherwise the Chamber could be deprived of its power to order further disclosure (*Bemba*, Pre-Trial Chamber, Decision on the evidence disclosure system and setting a timetable for disclosure between the parties, 31 July 2008, ICC-01/05-01/08-55, para. 44 ('Decision on disclosure') (http://www.legal-tools.org/doc/15c802/)). In other words, without knowing what evidence exists, the power to order further disclosure is not more than a paper promise.

178 Langer, 2004, p. 14, see above note 112.

179 Cf. figure 13 in Heinze, 2014, p. 128, see above note 23.

Statute of the ICC will be assessed later. However, it can already be concluded that the terms have various meanings and are used either as *Nominaldefinition*[180] or as *Realdefinition* without the ensuing reflection on the possibility of other (pragmatic) meanings.[181]

Before the US Supreme Court, for example, the different meanings and uses of 'adversarial' and 'inquisitorial' became apparent in *McNeil v. Wisconsin*, where the majority decided to limit the scope of *Miranda* protections – that is, *in casu*, the right to counsel. Even though *Miranda*-type warnings are also generally required in legal systems of the civil law tradition,[182] in his dissenting opinion, Justice Stevens stated: "today's decision is ominous because it reflects a preference for an inquisitorial system that regards the defense lawyer as an impediment rather than a servant to the cause of justice".[183]

Justice Scalia responded to this allegation:

> The dissent condemns these sentiments as 'revealing a preference for an inquisitorial system of justice.' […] We cannot imagine what this means. What makes a system adversarial rather than inquisitorial is not the presence of counsel, much less the presence of counsel where the defendant has not requested it; but rather, the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties. In the inquisitorial criminal process of the civil law, the defendant ordinarily has counsel; and in the adversarial criminal process of the common law, he sometimes does not. Our system of justice is, and has always been, an inquisitorial one at the investigatory stage (even the grand jury is an inquisitorial body), and no other disposition is conceivable. Even if detectives were to bring impartial magistrates around with them to all interrogations, there would be no decision for the impartial magistrate to umpire. If all the dissent means by a 'preference for

[180] A *Nominaldefinition* would not explain but constitute both usage and core elements of a word *ab initio*, cf. Klaus Friedrich Röhl and Hans Christian Röhl, *Allgemeine Rechtslehre*, third edition, Verlag Franz Vahlen, Munich, 2008, p. 39.

[181] A *Realdefinition* is an analytical or lexical definition that explains both common usage and core elements of the words, cf. Röhl and Röhl, 2008, p. 39, see above note 180.

[182] Bradley, 1996, pp. 471, 475, see above note 82.

[183] *McNeil v. Wisconsin*, Dissenting Opinion of Justice Stevens, see above note 99.

> an inquisitorial system' is a preference not to require the presence of counsel during an investigatory interview where the interviewee has not requested it—that is a strange way to put it, but we are guilty.[184]

Obviously, Justices Stevens and Scalia simply applied different meanings of 'inquisitorial': while Justice Stevens (probably subconsciously) was referring to a historical meaning of this term, Justice Scalia rather meant a combination of procedural type and ideal-type.[185] Nevertheless, it was Justice Stevens who caused this misunderstanding by not explaining which meaning he was referring to (Justice Scalia did not do this either, but he at least committed himself to more detailed explanations of the term).

Unfortunately, the reluctance to define 'adversarial' and 'inquisitorial' remains even before the ICC, although at this level the protagonists should be aware of the different understandings of legal terms. For example, the Pre-Trial Chambers in the *Katanga and Chui* and *Bemba* cases referred to "the requirements of *adversarial proceedings* and the principle of equality of arms"[186] and the Trial Chamber in the *Katanga and Chui* case stated in a hearing that "the *adversarial nature of the proceedings* and the fairness of the proceedings under Art. 64(2) of the Statute will be reinforced".[187] In a decision of the *Bemba* Trial Chamber, the dissenting Judge Kuniko Ozaki observed that "ICC proceedings are closer to the *adversarial legal system than to the inquisitorial system*".[188]

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184 *McNeil v. Wisconsin*, see above note 99.

185 See also Sklansky, 2008–2009, p. 1636, see above note 125.

186 *Katanga and Chui*, Trial Chamber, Decision on the Prosecutor's Application for Protective Measures Pursuant to Article 54(3)(f) of the Statute and Rule 81(4) of the Rules, 25 March 2009, ICC-01/04-01/07-989-tENG, para. 3 (http://www.legal-tools.org/doc/f50c3c/) with reference to *idem*, Decision on the Redaction Process, 12 January 2009, ICC-01/04-01/07-819-tENG, para. 7 (http://www.legal-tools.org/doc/a7527b/) (italics added); *Bemba*, Appeals Chamber, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release", 16 December 2008, ICC-01/05-01/08-323, para. 32 (http://www.legal-tools.org/doc/5a1931/).

187 *Katanga and Chui*, Trial Chamber, Trial Chamber Hearing, 12 February 2010, ICC-01/04-01/07-T-101-Red-ENG, Judge Cotte, p. 2, lines 21–22 (http://www.legal-tools.org/doc/1f2b06/).

188 *Bemba*, Trial Chamber, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, ICC-01/05-01/08-1039, 24 November 2010, para. 20 ('Dissenting Opinion of Judge Kuniko Ozaki') (http://www.legal-tools.org/doc/f62f75/).

All those statements – whether correct or not – share both a lack of a proper explanation as to the meaning of 'adversarial' and the transparent use of *Realdefinitionen* and *Nominaldefinitionen*. Thus, one can only guess that the first statement probably refers to an ideal model while the second is a combination of a theoretical model and a procedural ideal. The third statement obscures the matter even more by referring to the 'inquisitorial system' instead of inquisitorial proceedings or the inquisitorial trial. However, the adversarial system is not similar to the adversarial trial,[189] let alone that the countless attempts to define the terms "system"[190] and "trial"[191] and to grasp them as concepts. Applied to the criminal process, a

[189] Marvin Zalman, "The Adversary System and Wrongful Conviction", in C. Ronald Huff and Martin Killias (eds.), *Wrongful Conviction: International Perspectives on Miscarriages of Justice*, Temple University Press, Philadelphia, 2008, p. 71.

[190] Especially the late Luhmann promoted the idea of sociological systems, where communication is a central feature, Niklas Luhmann, *Einführung in die Systemtheorie*, edited by Dirk Baecker, 4th ed., Carl-Auer, Heidelberg, 2008, pp. 100 ff.; Richard Nobles, and David Schiff, "Taking the Complexity of Complex Systems Seriously", in *The Modern Law Review*, 2019, vol. 83, p. 662. Luhmann relied on theories of systems, as they had developed within biology and cybernetics. Law, within this theory, is one of society's subsystems, *ibid* and Dietmar Braun, "Rationalisierungskonzepte in der Systemtheorie Niklas Luhmanns und in der Handlungstheorie Hartmut Essers: Ein Theorienvergleich", in Rainer Greshoff and Uwe Schimank (eds.), *Integrative Sozialtheorie? Esser – Luhmann – Weber*, VS Verlag, Wiesbaden, 2006, p. 363 (377 with fn. 13). Teubner has taken this further, drawing on Luhmann's version of systems theory, autopoietic systems theory to observe a wide range of linked legal or potentially legal issues such as juridification, pluralism, transnational law, justice, the role of law in inter-social sub-system conflict, among others, see, e.g., Gunther Teubner, "Altera pars audiatur: Law in the Collision of Discourses", in Richard Rawlings (ed.), *Law, Society and Economy*, Oxford University Press (Clarendon Press), Oxford, 1997, Chapter 7.

[191] For Ingraham, 'trials' – more concretely – "are usually a review of facts collected by someone else (for example, by police, prosecutors, investigators, investigation judges or other officials, and defense lawyers) and presented to the decision maker in open court or through a written record", Barton L. Ingraham, *The Structure of Criminal Procedure*, Grenwood Press, New York *et al*., 1987, p. 24. It is rare that case law weighs in on the definition of "trial". In the Australian case *Dietrich v The Queen* ((1992) 177 CLR 292), Justice Deane indicated that trial must take place before a magistrate, judge or jury. Kirchengast interprets Deane's understanding of a criminal trial as being a "separate from the various other pre- and post-trial processes that constitute the means by which defendants are held to account for their wrongdoing", Tyrone Kirchengast, *The Criminal Trial in Law and Discourse*, Palgrave Macmillan, New York, 2010, p. 8. Vasiliev – albeit with a view to the International Criminal Trial – describes the trial phase as "the culmination of a host of preceding activities of the Prosecutor in investigating a case and preparing it for prosecution", Sergey Vasiliev, "Trial", in Luc Reydams, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford, 2012, pp. 700–1.

system is "a set of coordinated decision making bodies",[192] it encompasses "the entire criminal justice system to the conclusion of adjudication and sentencing"[193] and also focuses on the police, the prosecution, the defence and the judiciary.[194] Since Judge Ozaki analysed the "specific rules on the presentation of evidence through witnesses at the trial stage",[195] she should have stated more clearly why she was referring to the entire "inquisitorial system".

4.2.2.8. Appendix: Adversarial – Accusatorial

After I have tried to illustrate how many meanings the term 'adversarial' can have, the matter becomes increasingly diffused when a second term is introduced: 'accusatorial'.[196] Historically, 'accusatorial' is more commonly used than 'adversarial'.[197] Both terms are usually used interchangeably.[198] However, a closer look reveals that 'accusatorial' does not have the same meanings as 'adversarial'.[199] As previously mentioned, 'adversariness' can have a traditional and historical meaning and can be used in the context of a theoretical model, a procedural type or even an ideal of procedure. Before this term is used, every author should clearly give information about its meaning and/or context. 'Accusatorial', on the contrary, is seen as a classic procedural model.[200] As Goldstein puts it:

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192 Andrew Ashworth and Mike Redmayne, *The Criminal Process*, fourth edition, OUP, Oxford, 2010, p. 17 (this definition has not been retained in the following fifth edition).

193 Zalman, 2008, p. 71, see above note 189.

194 *Ibid*., p. 83.

195 *Bemba*, Dissenting Opinion of Judge Kuniko Ozaki, para. 20, see above note 188.

196 About the term, see also Armenta-Deu, 2016, pp. 58–60, above note 21.

197 Ettore Dezza, *Geschichte des Strafprozessrechts in der Frühen Neuzeit*, Thomas Vormbaum (ed., trans.), Springer, Berlin, Heidelberg, 2017, pp. 1–6 ff.; Klaus Geppert, *Der Grundsatz der Unmittelbarkeit im deutschen Strafverfahren*, Walter de Gruyter, Berlin, New York, 1979, p. 12; Máximo Langer, "In the Beginning was Fortescue: On the Intellectual Origins of the Adversarial and Inquisitorial Systems and Common and Civil Law in Comparative Criminal Procedure", in Ackerman, Ambos and Sikirić (eds.), 2016, p. 277, see above note 21.

198 Jackson, 2005, pp. 737, 740, see above note 86.

199 Cf. Abraham S. Goldstein, "Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure", in *Stanford Law Review*, 1974, vol. 26, p. 1016.

200 See also Alexander Bechtel, "Die Constitutio Criminalis Carolina von 1532 – Wegbereiter einer eigenständigen deutschen Strafrechtsdogmatik – Teil 2", in *Zeitschrift für das juristische Studium*, 2018, vol. 20, p. 25.

> An accusatorial system assumes a social equilibrium which is not lightly to be disturbed, and assigns great social value to keeping the state out of disputes, especially when stigma and sanction may follow. As a result, the person who charges another with crime cannot rely on his assertion alone to shift to the accused the obligation of proving his innocence. The accuser must, in the first instance, present reasonably persuasive evidence of guilt. It is in this sense that the presumption of innocence is at the heart of an accusatorial system. Until certain procedures and proofs are satisfied, the accused is to be treated by the legal system *as if* he is innocent and need lend no aid to those who would convict him. An accusatorial system is basically reactive, reflecting its origins in a setting in which enforcement of criminal laws was largely confined to courts.[201]

Examining the passage more closely, the term 'accusatorial' apparently comprises the traditional and historical meaning of adversariness, especially when it contrasts itself to the inquisitorial system like Vogler did.[202] Moreover, by promoting conflict resolution ("keeping the state out of disputes") it reminds us of 'adversariness' as a theoretical model and may even be regarded as 'adversariness' as an ideal of procedure. Thus, if an author wishes to refer to 'adversariness' in (almost) all its meanings, it may be appropriate to use the term 'accusatorial'. However, this will rarely be the case because then 'adversariness' receives its broadest meaning. In sum, the term 'accusatorial' should only be used in cases where the reference to 'adversariness' in its broadest meaning is intended.

[201] Goldstein, 1974, p. 1017, see above note 199.

[202] See above Section 4.2.2.5.

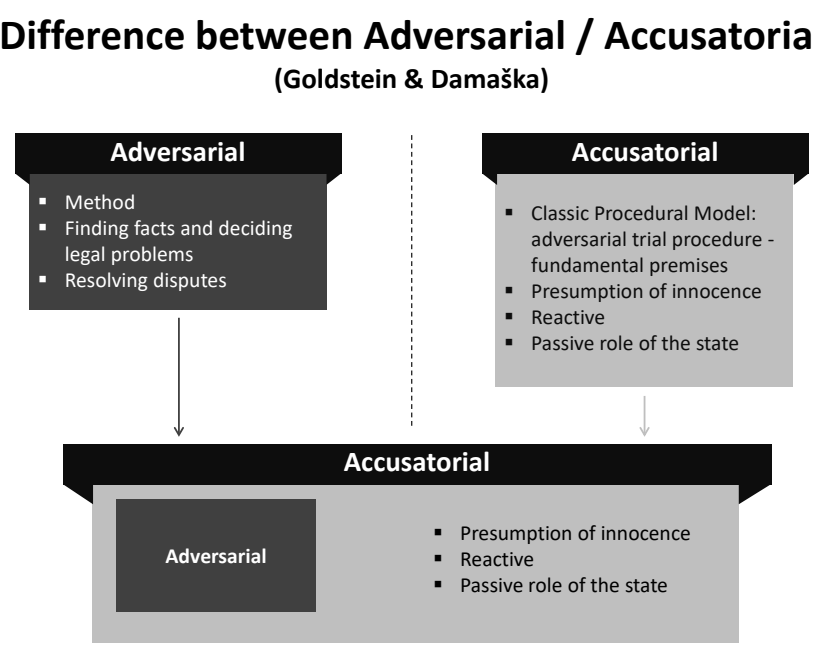

Figure 1: 'Adversarial' and 'Accusatorial'.[203]

4.3. Misleading Taxonomies

As it has become apparent, many models of criminal procedure are not free from considerable ambiguity and their authors seldom disclose their methodology, that is, they fail to state clearly what the purpose of those models is.[204] The disclosure and explanation of methodology is vital in scholarship. In the words of Francis: "[E]ven a string citation without an explanation of the methodology used in selecting the citations can serve merely to reinforce an ideological position rather than to provide evidence that has some claim to objectivity".[205] As a result, the use of such models often leads to misunderstanding rather than clarification.[206] This misunderstanding, in turn, impacts the description of domestic and international

[203] Heinze, 2014, p. 132, see above note 23.

[204] Mirjan Damaška, "Models of Criminal Procedure", in *Zbornik PFZ*, vol. 51, 2001, p. 477.

[205] Leslie Francis, "Law Reviews: The Changing Roles of Law Schools and the Publications They Sponsor", in *Marquette Law Review*, 2018, vol. 101, p. 1019, 1035.

[206] Johannes Frederikus Nijboer, *Beweisprobleme und Strafrechtssysteme – Proof and Criminal Justice Systems*, Peter Lang, Frankfurt *et al.*, 1997, p. 173.

criminal processes. The roots of the inconsistent and partly misleading way of using procedural models as support for legal interpretation can be traced back to domestic criminal trials.

4.3.1. Domestic (Criminal) Procedure

Wrong modelling in domestic procedure is manifold and mostly involves different understandings of 'common law', 'civil law', 'adversarial' and 'inquisitorial'. For instance, the legal traditions of the common law and the civil law are not clearly separated from the adversarial and inquisitorial procedural models. Carlson confuses the two.[207] Consider also a remark by Wolfe and Proszek:

> As in the common law tradition, the civil law courts apply rules of procedure to govern the means by which the ultimate decision is reached, but in much different form. The civil law and adversarial processes dramatically differ, in terms of the interrelated criteria of concentration, immediacy, and orality […][208] In a typical civil action in a common law court, this entire sequence of events – stretching over several weeks or months in a civil law court – would be telescoped into less than a minute of oral colloquy between judge and counsel.[209] With heightened immediacy and extensive orality, the common law court enables a rapid exchange of information; contrast this with a civil law court, which often requires that each set of questions, proposed to be asked of a witness, be submitted to the judge in advance, together with an 'offer of proof' supporting the proffered inquiry.[210]

This statement is terminologically unclear in several ways. In their paper on administrative and civil procedure in the US, the authors apparently strive to compare the common law and civil law legal traditions. Yet, even in the short paragraph outlined above, the terminology seems inconsistent. In the first sentence, the authors contrast the "common law tradition" with "civil law courts". In the second sentence, they are describing

[207] Carlson, 2018, p. 73, see above note 9 (Common law "[a]lso known as 'adversarial law'").

[208] Reference to John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems in Europe and Latin America*, third edition, Stanford University Press, Stanford, California, 2007, p. 116. Latest edition: Merryman and Pérez-Perdomo, 2019, p. 118, see above note 41.

[209] *Ibid*.

[210] Wolfe and Proszek, 1997, pp. 311–312, see above note 78, ellipsis and footnotes in the original.

the dichotomy of the inquisitorial and adversarial procedural model. However, they neither clarify which meaning both terms have nor are they consistent in the use of terminology: they do not contrast the inquisitorial model with the adversarial one but the "civil law process" with the "adversarial process". What does the "civil law process" in this regard mean? Does it describe the process within the civil law tradition? Which process? It could be civil procedure, administrative procedure or even criminal procedure. Or does it concern the civil procedure in general? If so, why should it be compared to the "adversarial process"? Civil procedure can be both adversarial and inquisitorial. Terminologically, the third sentence of the statement does not bring any clarification. On the contrary: "Civil action in a common law court" may be identified as a civil trial before a trial court within the common law tradition. Consequently, the authors also mention "civil action" before a "civil law court". This contributes to a confusion of civil law, civil action, civil law and common law court, civil process and adversarial process (all terms without any explanation): a person not familiar with the terminological subtleties will necessarily be confused. Does "civil action" not always take place before a "civil law court"? Even persons familiar with comparative law could only guess that the authors refer to a civil lawsuit before a court within the civil law tradition. Likewise, the question of whether this civil law tradition has an adversarial or inquisitorial procedural model for civil lawsuits remains unanswered.

The confusion of civil law as a legal tradition and civil law as contrasted to criminal law, which was partly the problem in the statement just mentioned, has also given rise to a misunderstanding in the following excerpt of an article of Freedman,[211] when he is referring to a study by Kaplan:

> In the criminal process there are special rules, particularly the exclusionary rules, that recognize values that take precedence over truth. The adversary system should be even more effective in determining truth in the civil process, therefore, where such values are not ordinarily applicable. A study of civil litigation in Germany conducted by Professor Benjamin Kaplan (later a Justice in the Supreme Judicial Court of Massachusetts) found the judge-dominated search for facts in

[211] Monroe H. Freedman, "Our Constitutionalized Adversary System", in *Chapman Law Review*, 1998, vol. 1, p. 78.

> German civil practice to be 'neither broad nor vigorous,' and 'lamentably imprecise.'[212] Professor Kaplan concluded that the adversary system in this country does succeed in presenting a greater amount of relevant evidence before the court than does the inquisitorial system.[213]

It is not clear what the author means: does he intend to say that in German civil procedure it is the judge who investigates the facts? This general remark would be incorrect due to the so-called *Beibringungsgrundsatz* or *Verhandlungsgrundsatz*.[214] Or is he trying to say that the criminal procedure within a civil law system like Germany provides for an active judge who investigates the facts? This is basically correct. However, the use of the term "civil litigation" for criminal procedure is at least questionable. In any case, Freedman's statement causes confusion.

The same applies to remarks about criminal procedure as 'inquisitorial' or 'adversarial'. It remains unclear whether 'adversarial' and 'inquisitorial' characteristics are being defined by the historical evolution of existent, institutionalised legal procedures, or whether existing procedural systems are to be interpreted and evaluated by reference to idealised models of an 'adversarial' and 'inquisitorial' process.[215] In US-courts, the terms 'inquisitorial', 'continental' and 'civil law' are not only confused, but also used inconsistently. As Sklansky[216] points out:

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[212] Benjamin Kaplan, "Civil Procedure – Reflections on the Comparison of Systems", in *Buffalo Law Review*, 1960, vol. 9, pp. 420–421.

[213] *Ibid*.

[214] According to this principle, it is within the responsibility of the parties to provide the court with and prove the facts the court has to base its decision on, see Hans-Joachim Musielak and Wolfgang Voit, *Grundkurs ZPO*, fifteenth edition, C.H. Beck, Munich, 2020, mn. 208–215; Martin Schwab, *Zivilprozessrecht*, fifth edition, C.F. Müller, Heidelberg, 2016, mn. 5; Othmar Jauernig and Burkhard Hess, *Zivilprozessrecht*, thirtieth edition, C.H. Beck, Munich, 2011, § 24; Walter Zeiss and Klaus Schreiber, *Zivilprozessrecht*, twelfth edition, Mohr Siebeck, Tübingen, 2014, mn. 174 *et seq*. For reasons why this principle cannot be transferred to the criminal process, see Edda Weßlau, *Das Konsensprinzip im Strafverfahren*, Nomos, Baden-Baden, 2002, pp. 98–103.

[215] Paul Roberts, "Faces of Justice Adrift? Damaška's Comparative Method and the Future of Common Law Evidence", in Jackson, Langer and Tillers (eds.), 2008, pp. 295, 298, 299, see above note 16.

[216] Sklansky, 2008–2009, p. 1639, see above note 125, footnotes in the original.

> Sometimes the Court implied that inquisitorial process was bad because it relied on untrustworthy evidence.[217] At other times the Court suggested the real concern was that Continental criminal procedure lent itself too easily to authoritarian abuse.[218] And sometimes it seemed as if the chief sin of Continental criminal procedure was simply that it was Continental – "wholly foreign" to our way of doing things.[219]

In most of those cases, the term inquisitorial is used in its historical sense,[220] without any explanation. For instance, in many US-cases that deal with the privilege against self-incrimination, the courts have pointed to a "preference for an accusatorial rather than an inquisitorial system of criminal justice" as among the "fundamental values and most noble aspirations",[221] which indicates that inquisitorialism does not provide for such a right. The same is indicated by the Supreme Court in *Miranda v. Arizona*,[222] where it explained that the privilege against self-incrimination must be protected from the time of arrest, because "[i]t is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries".[223] Thus, using the adversarial ideal as a contrast to (strictly speaking, as an alternative to)[224] the term "inquisitorial" indicates that "inquisi-

217 See *Crawford v. Washington*, see above note 121.

218 See *ibid*., p. 56, footnote 7.

219 See *ibid*., p. 62.

220 Johannes Frederikus Nijboer, "Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective", in *American Journal of Comparative Law*, 1993, vol. 41, p. 303.

221 US SC, *Murphy v. Waterfront Commission*, 15 June 1964, 378 U.S. 52, p. 55; US SC, *United States v. Balsys*, 25 June 1998, 524 U.S. 666, p. 690; US SC, *Withrow v. Williams*, 21 April 1993, 507 U.S. 680, p. 692; US SC, *Pennsylvania v. Muniz*, 18 June 1990, 496 U.S. 582, p. 595, footnote 8; US SC, *Doe v. United States*, 487 U.S. 201, pp. 212–13; US SC, *Andresen v. Maryland*, 28 June 1976, 427 U.S. 463, p. 476, footnote 8; US SC, *Michigan v. Tucker*, 10 June 1974, 417 U.S. 433, p. 455, footnote 2 (Brennan, J., concurring in the judgment); US SC, *Couch v. United States*, 9 January 1973, 409 U.S. 322, p. 328; US SC, *Piccirillo v. New York*, 25 January 1971, 400 U.S. 548, p. 566 (Brennan, J., dissenting); US SC, *Tehan v. United States ex rel. Shott*, 19 January 1966, 382 U.S. 406, p. 414, footnote 12.

222 US SC, *Miranda v. Arizona*, 13 June 1966, 384 U.S. 436.

223 *Ibid*., p. 477; cf. Sklansky, 2008–2009, pp. 1665–6, see above note 125.

224 Space restrictions do not allow for an elaboration of the topos 'alternative'. Strictly speaking, in the case law examples provided 'inquisitorial' is used as a false alternative. See in more detail Jürgen Rödig, *Die Denkform der Alternative in der Jurisprudenz*, Springer, Berlin, Heidelberg, New York, 1969, pp. 22 *et seq.* and Klaus F. Röhl, "Buchbesprechung

torial" is understood historically. Justice Frankfurter's statements in *Watts v. Indiana* very well demonstrate this:[225]

> Ours is the accusatorial, as opposed to the inquisitorial, system. […] Under our system, society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case not by interrogation of the accused, even under judicial safeguards, but by evidence independently secured through skillful investigation. […] The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights – these are all characteristics of the accusatorial system and manifestations of its demands.[226]

However, the safeguards mentioned by Justice Frankfurter have in fact been provided for in the German Criminal Procedure Code of 1877.[227] Moreover, many of those rights are enshrined in Article 6 of the European Convention on Human Rights.[228] Some authors and judges obviously tend to equate inquisitorial systems with coercive interrogation, unbridled search, and unduly efficient crime control,[229] that is, comparing a historical meaning of inquisitorialism not to a historical meaning of adversarialism but to an ideal, theoretical or procedural meaning. Freedman, for instance, refers to an ideal model of proof when he states:

> The adversary system, like any human effort to cope with important and complex issues, is sometimes flawed in execution. It is both understandable and appropriate, therefore, that it be subjected to criticism and reform. The case for radically

von Rödig, Die Denkform der Alternative in der Jurisprudenz", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1971, vol. 83, pp. 831–850.

225 US SC, *Watts v. Indiana*, 27 June 1949, 338 US 49, p. 54.

226 *Ibid*.

227 Germany, *Strafprozessordnung für das Deutsche Reich* (German Criminal Procedure Code), 1 February 1877, §§ 55, 136a ('StPO'); Karl H. Kunert, "Some Observations on the Origin and Structure of Evidence under the Common Law System and the Civil Law System of 'Free Proof' in the German Code of Criminal Procedure", in *Buffalo Law Review*, 1966–1967, vol. 16, pp. 142, 150, 151.

228 See Jackson and Doran, 1995, p. 57, see above note 126.

229 Goldstein, 1974, p. 1018, see above note 199.

> restructuring it, however, has not been made. On the contrary, based upon reason, intuition, experience, and some experimental studies, there is good reason to believe that the adversary system is superior in determining truth when facts are in dispute between contesting parties. Even if it were not the best method for determining the truth, however, the adversary system is an expression of some of our most precious rights. In a negative sense, it serves as a limitation on bureaucratic control. In a positive sense, it serves as a safeguard of personal autonomy and respect for each person's particular circumstances. The adversary system thereby gives both form and substance to the humanitarian ideal of the dignity of the individual. The central concern of a system of professional ethics, therefore, should be to strengthen the role of the lawyer in enhancing individual human dignity within the adversary system of justice.[230]

Although Freedman cites Damaška, he ignores Damaška's reference to the different meaning of the adversary or adversarial system.[231] That differentiation has been demonstrated by Doran *et al.*.[232] They do not only identify the different meanings of adversarial and inquisitorial but also clearly state which meaning they actually use, before they conclude:

> Thus far we have identified adversariness as an ideal procedural process that functions best as a method of resolving disputes between parties and as an ideal proof process that maximizes the ability of individuals to participate in legal processes designed to determine historical reality. Whether a particular governmental process will turn out to be adversarial depends on many factors, including the degree to which adversariness is seen by members of the society as compatible with (or necessary to) the aims of the procedure, the degree to which individuals are considered to have an important stake in the process, and the economic costs incurred.[233] It can be argued that enforcement of the criminal

[230] Freedman, 1998, p. 90, see above note 211.

[231] *Ibid*., p. 74, footnote 119; p. 76, footnotes 126 *et seq*.; and p. 77, footnotes 135 *et seq*.

[232] Doran, Jackson and Seigel, 1995–1996, p. 22, see above note 87, footnotes and information about omitted footnotes in the original.

[233] See Denis J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon Press, Oxford, New York, reprint 1987, pp. 326–337, arguing that procedural participants, at first, seek to find rational outcomes in an effective manner, but other concerns such as economic costs, the desire for proportionality between interests and accuracy, and

> law involves the implementation of state policy, thereby justifying the use of inquisitorial procedures. In fact, much of Anglo-American criminal procedure has been characterized as inquisitorial [fn omitted], particularly at the stage of police investigation and interrogation.[234] Nevertheless, the Anglo-American contested trial is adversarial in nature because at this stage the matter is viewed primarily as a dispute between the prosecution and the defense (the 'state' versus the 'accused') that requires impartial resolution. At this point, the focus shifts to the plight of the individual defendant. Concerns about the importance of appropriately implementing state policy yield in large part to concerns about protecting the rights of the accused, not the least of which is the right not to be falsely convicted.[235]

In sum, many authors – surely due to time constraints – do not resist the temptation of using false taxonomies by creating dichotomies without a clear definition of the categories or models. This is more than apparent in the case of the inquisitorial–adversarial or common-law–civil law models. Take the existence of the jury as another example. In the case *Blakely v. Washington*, Justice Scalia stressed that "the Framers' paradigm for criminal justice" rejected "civil law traditions" in favour of "the common law ideal of limited state power accomplished by strict division of authority between judge and jury"; the US Constitution "do[es] not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury".[236] Apart from his confusion over a tradition versus an ideal, what Justice Scalia really refers to is not a procedural model (adversarial–inquisitorial) but the relationship between a judge and a jury. This relationship would have been better described with the labels 'hierarchical' or 'co-ordinate'. Most importantly, it is nowadays widely recognised that the adversarial system and the jury trial, although

the ideal of participatory decision-making put restraints on the procedures and may even reduce their rational basis.

234 Abraham S. Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure", in *Yale Law Journal*, 1959-1960, vol. 69, pp. 1163–9.

235 See Ronald M. Dworkin, *A Matter of Principle*, OUP, Oxford, 1986, pp. 79–84, arguing that state policy in a cost-efficient society yields to the right of a person not to be falsely convicted only when that right means avoiding intentional conviction as opposed to avoiding, at all costs, accidental conviction of an innocent person.

236 US SC, *Blakely v. Washington*, 24 June 2004, 542 U.S. 296, p. 313.

usually found together, are not essential to each other.[237] Otherwise, the adversarial system that Japan introduced after World War II, that was closely oriented towards the American system, could not be described as adversarial, because it did not put the defendant in the adversarial seat during the investigative phase, and it had no jury during the trial phase.[238] The same could be said about the famous Diplock Courts in Northern Ireland.[239]

In more general terms, many authors and judges treat the inquisitorial system as a single, undifferentiated combination of a procedural model with a legal tradition and cautionary tale, stretching from the Middle Ages to the present day, and the large differences between a Napoleonic judge and a medieval inquisitor or modern European magistrate become blurred.[240] In the same vein, many other authors overlook that there is not one 'adversarial system' and that there are certain important discontinuities between the 'English common law tradition', and modern American practice:[241] English and early American criminal procedure were considerably less adversarial than is generally believed.[242] Bohlander illustrates this with the following both amusing and alarming report:

> Anecdotal and anonymous evidence may be permitted about this author's encounter with different international judges in a social context, one of whom apparently thought that in civil law systems, the accused has to prove her innocence and the other stating at a symposium, with undisguised surprise during the course of a debate about adversarial versus inquisitorial principles, that this had been an epiphany for them because, until that moment, they had thought that 'adversarial' simply meant that the prosecution is the adversary of the defence. Another otherwise very bright young lawyer who now is a professor at a renowned law school actually asked in all

[237] Gordon van Kessel, "European Trends Towards Adversary Styles in Procedure and Evidence", in Feeley and Miyazawa (eds.), 2002, p. 241, see above note 81.

[238] Shinomiya Satoru, "Adversarial Procedure without a Jury: Is Japan's System Adversarial, Inquisitorial, or Something Else?", in Feeley and Miyazawa (eds.), 2002, p. 115, see *ibid*.

[239] See generally Jackson and Doran, 1995, above note 126.

[240] Sklansky, 2008–2009, p. 1659, see above note 125.

[241] Ingraham, 1987, pp. 8–9, see above note 191.

[242] John H. Langbein, "The Criminal Trial Before the Lawyers", in *University of Chicago Law Review*, 1977–1978, vol. 45, pp. 263–316; R. Carter Pittman, "The Colonial and Constitutional History of the Privilege against Self-Incrimination in America", in *Virginia Law Review*, 1935, vol. 21, pp. 763–782.

> seriousness whether civil law systems knew something like the Fifth Amendment.[243]

After all, it seems that the terms 'adversarial' and 'inquisitorial', 'common law' and 'civil law' particularly suffered from a side effect of definition as observed by Lotze already in 1874: a "willkürliche und launenhaften Beschreibung"[244] (arbitrary and capricious course of the description).[245]

4.3.2. In International (Criminal) Procedure

In fact, two irrefutable facts counter the black and white picture of (historical) inquisitorialism and (ideal) adversarialism that is still drawn by judges and academics. First, the alleged 'adversarial' and 'inquisitorial' systems are all merging to a certain degree.[246] Therefore, second, no country has a pure adversarial or non-adversarial system.[247] Party authority is on the increase throughout Continental Europe, with both prosecutors and defence lawyers becoming more active and more partisan.[248] Italy, for instance, adopted a quasi-adversarial system for certain cases, which enhanced the authority of the parties at the expense of judicial power.[249] In general, the European Court of Human Rights influenced and changed domestic criminal procedure to a great extent, for example, emphasising the great importance of the trial stage (as opposed to the pre-trial stage)

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243 Bohlander, 2011, p. 407 with footnote 52, see above note 58.

244 Hermann Lotze, *System der Philosophie, Erster Teil, Drei Bücher der Logik*, Verlag S. Hirzel, Leipzig, 1874, § 60, p. 198.

245 Translation in Juan C. Sager (ed.), *Essays on Definition*, John Benjamins Publishing, Amsterdam, Philadelphia, 2000, p. 1.

246 Bradley, 1996, pp. 471 ff., see above note 82; Nico Jörg, Steward Field and Chrisje Brants, "Are Inquisitorial and Adversarial Systems Converging?", in Phil Fennell, Christopher Harding, Nico Jörg and Bert Swart (eds.), *Criminal Justice in Europe – A Comparative Study*, Clarendon Press, Oxford, 1995, p. 54.

247 Van Kessel, 2002, p. 225, see above note 237; see generally Christine van den Wyngaert, *Criminal Procedure Systems in the European Community*, Butterworths, London, 1993. Carlson, however, still acknowledges ideological differences, see Carlson, 2018, p. 73, see above note 9.

248 Bradley, 1996, pp. 471 ff., see above note 82; Johannes Andenæs, "Criminal Law, Criminology and Criminal Procedure", in *Journal International Law & Practice*, 1993, vol. 2, p. 464.

249 Van Kessel, 2002, p. 228, see above note 237. In more detail see above note 165.

and the oral form of proof (as opposed to the written form of proof).[250] The investigating magistrate – this form of active investigating judge that the US judges always contrast their system to – is either eliminated completely or has been heavily weakened. In Germany, since the Criminal Procedure Reform Act of 1974, the role of the *Ermittlungsrichter* has been amended to the extent that he or she is no longer responsible for the investigation but must authorise certain interfering actions by the prosecution.[251] Of course, there is still no 'investigating magistrate' in the US or in England and Wales, but the requirement of authorisation by a judge for certain action, for example, if the police want to arrest a suspect, does exist in those legal systems, too.[252] Even in France, the *juge d'instruction* has become controversial and its role has been constantly reduced.[253] To provide another example of merging procedural systems: Germany introduced the plea bargaining model, called *Verständigung*, in 2009.[254] The astonishing antagonism is that the German Criminal Procedure does, as a matter of principle, apart from some exceptions like §§ 265a, 391, 402, 405, 470(2) German Code of Criminal Procedure (*Strafprozessordnung*,

[250] Van Kessel, 2002, p. 234, see above note 237; Stuart Field and Andrew West, "A Tale of Two Reforms: French Defense Rights and Police Powers in Transition", in *Criminal Law Forum*, 1995, vol. 6, p. 473; Ksenija Turković and Krešimir Kamber, "One Face of Human Rights for Two Faces of Criminal Justice: A European Perspective", in Ackerman, Ambos and Sikirić (eds.), 2016, pp. 413 ff., see above note 21.

[251] See for example, StPO, § 162, see above note 227. Only in a case of emergency could the investigating judge take action himself, if no prosecutor is available (*ibid.*, § 165).

[252] Christoph J.M. Safferling, *Towards an International Criminal Procedure*, OUP, Oxford, 2001, pp. 99–100. Of course there are exceptions to this rule, especially where an arrest or a certain police action is possible without an arrest warrant issued by the judge. See, for instance, the recent discussion about GPS tracking. About the role of the judge in those systems in more detail see Heinze, 2014, pp. 229 ff., see above note 23.

[253] Stephen P. Freccero, "An Introduction to the New Italian Criminal Procedure", in *American Journal of Criminal Law*, 1994, vol. 21, pp. 345–384; Mireille Delmas-Marty, "The Juge d'Instruction: Do the English Really Need Him?", in Basil S. Markesinis (ed.), *The Gradual Convergence – Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century*, Clarendon Press, Oxford, 1994, pp. 46–58.

[254] Jenia Iontcheva Turner, "Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons", in *William & Mary Law Review*, 2016, vol. 57, no. 4, p. 1549, 1573. As a matter of fact, plea bargaining has been used in Germany since the 1980s, albeit informally. The words "*Absprache*" or "*Vereinbarung*" are wilfully avoided by the German legislator in order to not make the impression that a quasi-contractual agreement, and not the guilt of the accused, is the basis of the judgment. Cf. the explanations given by the German government, BT-Drs. 16/12310, p. 8.

'StPO'), prohibit any form of negotiated justice[255] since the German criminal process is governed by both the duty to clarify the facts (§ 244(2) StPO) and the principle of culpability (§ 46 (1) clause 1 StGB).[256] The consensual *Verständigung* was implemented while maintaining the rather active role of the judge.[257] The legislator thus failed to take into account the individual dispositions I have mentioned earlier.[258]

Nevertheless, it is not only the legal systems of the civil law tradition that lean towards the 'opposite' tradition; common law countries are tending to move away from the excesses of adversarial forms of adjudication, as well as from lay participation in fact-finding, as demonstrated through the example of increasing bench trials and decreasing jury trials,[259] and as I have elaborated in further detail elsewhere.[260] In the US, until 1976, only 3.4 per cent of State criminal trials were jury trials. Between 1976 and 2002, jury trials fell to 1.3 per cent.[261] In England, a crim-

[255] Gunnar Duttge, "Möglichkeiten eines Konsensualprozesses nach deutschem Strafprozeßrecht", in *Zeitschrift für die Gesamte Strafrechtswissenschaft*, 2003, vol. 115, no. 3, pp. 542 *et seq.*; Jürgen Seier, "Der strafprozessuale Vergleich im Lichte des § 136a StPO", in *Juristenzeitung*, 1988, vol. 43, no. 14, p. 684 shows that, in comparison to American law, German law does not allow "plea bargaining" as negotiated justice. Cf. also Heinz J. Dielmann, "'Guilty Plea' und 'Plea Bargaining' im amerikanischen Strafverfahren – Möglichkeiten für den deutschen Strafprozeß?", in *Goltdammer's Archiv für Strafrecht*, 1981, pp. 558 ff.; Claus Kreß, "Absprachen im Rechtsvergleich", in *Zeitschrift für die Gesamte Strafrechtswissenschaft*, 2004, vol. 116, no. 1, pp. 172–87; Andreas Ransiek, "Zur Urteilsabsprache im Strafprozess: ein amerikanischer Fall", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2008, vol. 3, pp. 116–22; Edda Weßlau, "Absprachen in Strafverfahren", in *Zeitschrift für die Gesamte Strafrechtswissenschaft*, 2004, vol. 116, p. 169. For a differentiated approach see Werner Schmidt-Hieber, "Der strafprozessuale 'Vergleich' – eine illegale Kungelei?", in *Strafverteidiger*, 1986, p. 357; Dominik Brodowski, "Die verfassungsrechtliche Legitimation des US-amerikanischen 'plea bargaining' – Lehren für Verfahrensabsprachen nach § 257 c StPO?", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2012, vol. 124, p. 733, comparing the German Verständigung and plea bargaining in the USA with a view to constitutional restraints.

[256] For more details see Ambos and Heinze, 2017, pp. 57 *et seq*., see above note 166.

[257] Walter Kargl, *Strafrecht*, Nomos, Baden-Baden, 2019, mn. 591.

[258] See above Secition 4.2.2.6.2.

[259] See above Section 4.3.1.

[260] See Heinze, 2014, pp. 231 ff., 269 ff., see above note 23.

[261] Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", in *Journal of Empirical Legal Studies*, 2004, vol. 1, p. 512, table 7. See generally Robert P. Burns, *The Death of the American Trial*, University of Chicago Press, Chicago and London, 2009, p. 86; Mirjan Damaška, *Evidence Law Adrift*, Yale University Press, New Haven and London, 1997, p. 127; Sean Doran and John D. Jackson, "The Case for Jury Waiver", in *Criminal Law Review*, 1997, pp. 161–164.

inal defendant's right to a jury trial was seriously weakened in the 1970s, and this trend has continued.[262] To authorise freer admission of hearsay evidence and to require greater judicial control, American authors tend to use models of the civil law tradition as orientation.[263] England has embraced a number of traditional inquiry-type procedures, such as open pretrial discovery and restrictions on the right to silence.[264]

In sum, *all* systems in the world today are 'mixed' or hybrid systems – incorporating some features typical of the common law, adversarial, or due-process models, along with other features typical of the civil law, inquisitorial, or crime-control models.[265] 'Common law' and 'civil law' or 'adversarial' and 'inquisitorial' do not qualify as alternatives,[266] since they basically fulfil every criterion[267] of a flawed legal distinction: a) its contours are rather soft, due to terminological imprecision;[268] b) certain elements of one category belongs to the other and *vice versa* ('overlap-

[262] Doran and Jackson, 1997, pp. 161–164, see above note 261.

[263] Craig M. Bradley and Joseph L. Hoffmann, "Public Perception Justice and the 'Search for Truth' in Criminal Cases", in *South California Law Review*, 1996, vol. 69, pp. 1267–1302; Peter L. Arenella, "Forword: O.J. Lessons", in *South California Law Review*, 1996, vol. 69, pp. 1233–66; Carl M. Selinger, "Dramatizing on Film the Uneasy Role of the American Criminal Defense Lawyer: True Believer", in *Oklahoma City University Law Review*, 1997, vol. 22, pp. 223–46.

[264] Van Kessel, 2002, p. 239, see above note 237; Jacqueline Hodgson, "The Future of Adversarial Criminal Justice in 21st Century Britain", in *North Carolina Journal of International & Commercial Regulation*, 2010, vol. 35, p. 320: "Just as countries like France and the Netherlands do not use pure inquisitorial processes of justice, so too England and Wales use, in theory, a mixed system"; in more detail see Heinze, 2014, pp. 269 ff., see above note 23.

[265] Richard S. Frase, "Comparative Criminal Justice Policy, in Theory and Practice", in Association Internationale de Droit Penal (ed.), *Comparative Criminal Justice Systems: from Diversity to Rapproachement*, Editions Érès, Tolouse, 1998, pp. 112, 113; Findlay, 2001, pp. 26, 29, see above note 39; Swoboda, 2013, p. 69, see above note 75; Armenta-Deu, 2016, p. 70, see above note 21. See also the refreshing (and rare) remark by Calabresi: "My thesis is that formally the U.S. is committed to adversarial procedure but that in practice U.S. procedure has become quite inquisitorial as of 2015. The U.S. has travelled a long distance in the last thirty years and more from its common law adversarial procedural roots", see Calabresi, 2016, p. 107, see above note 31; Jackson, 2016, p. 243, see above note 84.

[266] See already above note 224.

[267] The criteria are borrowed from Pierre Schlag, "Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction", in *Stanford Law Review*, 1988, vol. 40, pp. 929, 931.

[268] And terminological imprecision may lead to a bad argument, since it questions the validity of the premise, Pierre Schlag and David Skover, *Tactics of Legal Reasoning*, Carolina Academic Press, Durham, North Carolina, 1986, p. 13.

ping opposition'); c) certain elements belong in neither category ('false dichotomy'); and d) the terms 'civil law' and 'common law' do not come close to grasping cultural differences ('idiosyncratic definition'). Thus, in a way, the respective 'alternative' category is used for a strawman argument.

Notwithstanding this, it is indeed possible to determine the underlying tradition of a procedural system and how this system could be modelled. All existing systems today are still at least pre-dominantly of one theoretical type or its opposite.[269] Van Kessel, for example, identifies a "superadversary system" in the US, "more moderate adversary procedures" in England and "less adversary, inquiry style systems" in "Continental Europe".[270] Nevertheless, nobody would seriously react to the hybridisation of, for instance, the US- or the German system by calling them '*sui generis*'. Unfortunately, this does occur in relation to the procedural system of the ICC.[271] Fatou Bensouda, Chief Prosecutor at the ICC, writes that the Court has assimilated national examples so completely that its practice is, in effect, *sui generis.*[272] Many writers do the same.[273] Judge

[269] Frase, 1998, pp. 110, 112, 113, see above note 265.

[270] Van Kessel, 2002, p. 242, see above note 237. In a similar vein, Taruffo remarks that "the American procedural system is becoming more and more exceptional or even unique (mainly after the English reforms of the last years)", see Michele Taruffo, "Globalizing Procedural Justice – Some General Remarks", in Ackerman, Ambos and Sikirić (eds.), 2016, p. 378, see above note 21.

[271] In fact, the ICTY case law demonstrates a similar phenomenon, see, for instance, ICTY, *The Prosecutor v. Enver Hadzihasanovic and Amir Kubura*, Trial Chamber, Decision on defence motion seeking clarification of the Trial Chamber's objective in its questions addressed to witnesses, 4 February 2005, IT-01-47-T, p. 6 (http://www.legal-tools.org/doc/1c161c/) ("[T]he procedure followed before the Tribunal is a *sui generis* procedure combining elements from the adversarial and inquisitorial systems […]").; ICTY, *The Prosecutor v. Mucić et al.*, Decision on the Motion on Presentation of Evidence by the Accused Esad Landzo, Trial Chamber, 1 May 1997, IT-96-21-T, para. 15 (http://www.legal-tools.org/doc/5d2c0a/) ("A Rule may have a common law or civilian origin but the final product may be an amalgam of both common law and civilian elements, so as to render it *sui generis* […]").

[272] Fatou Bensouda, "The ICC Statute – An Insider's Perspective on a Sui Generis System for Global Justice", in *North Carolina Journal of International Law & Commercial Regulation*, 2010–2011, vol. 36, pp. 277–285; cf. Noah Weisbord and Matthew A. Smith, "The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure", in *North Carolina Journal of International Law & Commercial Regulation*, 2010–2011, vol. 36, p. 261.

[273] See, for example, Frédéric Mégret, "Beyond 'Fairness': Understanding the Determinants of International Criminal Procedure", in *UCLA Journal of International Law and Foreign*

Gurmendi describes the procedural framework of the ICC as "hybrid, innovative and sometimes ambiguous sui generis procedural system".[274] Additionally, the *Lubanga* Pre-Trial Chamber refers to the "Court's unique criminal procedure",[275] disregarding the fact that labelling it as such is probably as correct as saying that the US is adversarial and Continental Europe inquisitorial. In fact, labelling the ICC procedure as '*sui generis*' sounds rather like an excuse to stop analysing the process,[276] waiving the white flag of unpredictability and going into the case-by-case analysis mentioned at the beginning of this study. If the analysis stops at this point, the characterisation of a process as a hybrid between the adversarial and inquisitorial systems would not provide any insights about the process.[277] We are "mariners on the ocean without compass, star or land-

Affairs, 2009, vol. 14, p. 40; Ohlin, 2009, p. 77, see above note 39; Keen, 2004, pp. 767, 809, see above note 39; Håkan Friman, "Procedures of International Criminal Investigations and Prosecutions", in Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *Introduction to International Criminal Law and Procedure*, third edition, Cambridge University Press ('CUP'), Cambridge, 2014, p. 423; Jackson, 2005, pp. 737, 740, see above note 86; Hemi Mistry, "The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals", in Joanna Nicholson, (ed.), *Strengthening the Validity of International Criminal Tribunals*, Brill, Nijhoff, Leiden, Boston, 2018, p. 201, 215; Jonathan Hafetz, *Punishing Atrocities Through a Fair Trial*, Cambridge University Press, Cambridge, 2018, p. 110; Carlson, 2018, p. 71, see above note 9.

274 Fernández de Gurmendi, 2018, p. 346, see above note 14.

275 See ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo* ('*Lubanga*'), Pre-Trial Chamber, Decision on the final system of disclosure and the establishment of a timetable, 15 May 2006, ICC-01/04-01/06-102, annex, para. 65 (http://www.legal-tools.org/doc/052848/):

> Consequently, in the view of the single judge, the *consistency* of the disclosure process and the need to safeguard the *Court's unique criminal procedure* require that disclosure be carried out inter partes with regard to (i) the evidence that subsequently must be communicated to the Pre-Trial Chamber by filing it in the record of the case, that is the evidence on which the parties intend to rely at the confirmation hearing; and (ii) the other materials that the Prosecution must disclose to the Defence before the confirmation hearing but that neither party intends to present at that hearing.
> [emphasis added]

276 As one author noted, this "should not serve as an excuse for oversimplifying such an endeavor", see Scott T. Johnson, "On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia", in *International Legal Perspectives*, 1998, vol. 10, p. 181.

277 Langer, 2005, p. 837, see above note 50.

mark",[278] as Damaška suggests, losing our way when we are required to build *sui generis* procedures.[279]

4.4. Procedural Modelling as an Interpretive Tool

Due to the mixed nature of international criminal law, the identification of a common methodology to approach the gaps between rules and their application becomes a somewhat Sisyphean endeavour.[280] The main reason is that the word 'methodology' itself is understood differently, depending on both context and the author's background.[281] A legal methodology may be defined "as a systematic general approach to the duly purposive and consistent execution of a recurrent type of major task arising in the making or application of law".[282] One of these 'major tasks', at least in many jurisdictions within developed Western systems, is the interpretation of statutes.[283]

As Zahar and Sluiter point out, one of the most important areas of controversy and confusion in international criminal law has been the tribunals' choice and use of sources, to define, among other things, the elements of crimes and forms of personal criminal liability.[284] Safferling very critically describes the interpretation at the ICC as more or less based on coincidence and considers it as rather "eclectic" to revert to unreflected argumentation in order to quickly reach the favoured result.[285] It appears

[278] Mirjan Damaška, "Negotiated Justice in International Criminal Courts", in *Journal of International Criminal Justice*, 2004, vol. 2, p. 1019.

[279] John D. Jackson, "Transnational Faces of Justice: Two Attempts to Build Common Standards Beyond National Boundaries", in Jackson, Langer and Tillers (eds.), Oxford and Portland, Oregon, 2008, pp. 223, 224, see above note 16.

[280] Christoph J.M. Safferling, *Internationales Strafrecht*, Springer, Berlin, Heidelberg, 2011, p. 76.

[281] *Ibid*.

[282] Robert S. Summers, *Form and Function in a Legal System – A General Study*, CUP, Cambridge *et al*., 2006, p. 241.

[283] *Ibid*. Other tasks are, for instance, interpreting contracts and interpreting written constitutions. Methodologies may also exist for the application of case-law precedent, and for the drafting of statutes, and of contracts.

[284] Alexander Zahar and Göran Sluiter, *International Criminal Law*, OUP, Oxford, 2007, p. 79.

[285] Safferling, 2011, pp. 76–77, see above note 280.

that the recourse on both the case law of the *ad hoc* Tribunals and comparative law arguments depends on the desired outcome of the case.[286]

4.4.1. Some Brief General Remarks about Interpretation at the ICC

The core requirements for the interpretation of international treaties are contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ('VCLT') of 23 May 1969.[287] Article 31 of the VCLT reads:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
>   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

[286] *Ibid*, p. 77; see also the dissenting opinion of Judge Kaul in ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, paras. 28 *et seq*. (http://www.legal-tools.org/doc/338a6f/).

[287] See generally Richard K. Gardiner, *Treaty Interpretation*, OUP, Oxford, 2008. See also Shai Dothan, "The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights: Dedicated to the memory of professor Roger Goebel", in *Fordhan International Law Journal*, 2019, vol. 42, no. 3, pp. 766–794.

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

This Article is supplemented by Article 32 of the VCLT:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

These rules are applicable as customary law,[288] and must be applied in interpreting (justifying legal decisions respectively)[289] not only the ICC-Statute, but also "any other norm-creating instrument",[290] including the Statutes of the ICTY and the International Criminal Tribunal for Rwanda.[291]

[288] On the significance of the Vienna Convention to customary law, see International Court of Justice ('ICJ'), *Islamic Republic of Iran v. United States of America* (Case Concerning Oil Platforms), Judgment, 12 December 1996, ICJ Rep. 1996, p. 803, para. 23 (https://www.legal-tools.org/doc/4f8d61); ICJ, *Indonésia v. Malaysia* (Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan), Judgment, 17 December 2002, ICJ Rep. 2002, p. 23, para. 37 (https://www.legal-tools.org/doc/2082b5).

[289] Armin von Bogdandy and Ingo Venzke, "On the Democratic Legitimation of International Judicial Lawmaking", in *German Law Journal*, 2011, vol. 12, p. 1344.

[290] ICTY, *The Prosecutor v. Duško Tadić*, Appeals Chamber, Judgement, 15 July 1999, IT-94-1-A, para. 303 (http://www.legal-tools.org/doc/8efc3a/); Kriangsak Kittichaisaree, *International Criminal Law*, OUP, Oxford, 2001, p. 46.

[291] See, for example, ICTY, *Prosecutor v. Zlatko Aleksovski,* Appeals Chamber, Judgement, 24 March 2000, IT-95-14/1-A, para. 98 (http://www.legal-tools.org/doc/176f05/) ("References to the law and practice in various countries and in international institutions are not necessarily determinative of the question as to the applicable law in this matter. Ultimately, that question must be answered by an examination of the Tribunal's Statute and Rules, and a construction of them which gives due weight to the principles of interpretation (good faith, textuality, contextuality, and teleology) set out in the 1969 Vienna Convention on the Law of Treaties"); Antonio Cassese and Paola Gaeta (eds., rev.), *Cassese's International Criminal Law*, third edition, OUP, Oxford, 2013, pp. 11, 17 ff.

As Articles 31 and 32 of the VCLT illustrate, the interpretive methods of domestic legal systems[292] apply to a certain extent to international criminal law.[293] Like in other legal systems, the "starting point for interpretation"[294] in international criminal law is the wording, that is, the "ordinary meaning".[295] Article 31(2) of the VCLT refers to the "context for the purpose of the interpretation" (together with paragraph 1), which portrays the systematic interpretation.[296] The phrase "in the light of its object and purpose" in Article 31(1) makes reference to a teleological interpretation.[297] Considering the similarities between the domestic forms of interpretation and their counterparts in international criminal law, it is not surprising that the historic interpretation is classed as a "supplementary means of interpretation" that is subsidiary to grammatical, teleological, and systematic interpretation (Article 32). It takes on independent significance only if other means of interpretation lead to an ambiguous or manifestly absurd or unreasonable result (Article 32(a)–(b)). This approach recalls the words of Lord Denning in *Nothman v. Barnet LBC*: "Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind".[298]

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292 See Heinze, 2014, pp. 52 ff., see above note 23.

293 Thus, for example, ICTY, *The Prosecutor v. Duško Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-95-14/1, paras. 71 *et seq.* (http://www.legal-tools.org/doc/866e17/) distinguishes between the "literal", "teleological", and "logical and systematic interpretation". ICTY, *The Prosecutor v. Mucić et al.*, Trial Chamber, Judgement, 16 November 1998, IT-96-21-T, para. 158 *et seq.* (http://www.legal-tools.org/doc/6b4a33/), uses the "literal rule", the "golden rule", and the "mischief rule of interpretation". See also von Bogdandy and Venzke, 2011, p. 1344, see above note 289.

294 Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, fourth edition, OUP, Oxford, 2020, mn. 228.

295 In more detail see Ulf Linderfalk, *On the Interpretation of Treaties - The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer, Dordrecht, 2007, pp. 29 ff.

296 Werle and Jessberger, 2020, mn. 228, see above note 294; Safferling, 2011, p. 83, see above note 280. In more detail see Linderfalk, 2007, pp. 101 ff., 133 ff., see above note 295.

297 Safferling, 2011, p. 83, see above note 280.

298 United Kingdom, England and Wales, Court of Appeal, *Nothman v. Barnet London Borough Council*, 1978, 1 W.L.R. 220, p. 228.

4.4.2. Contextual Interpretation

Even when a statutory rule is as well designed and well drafted as feasible, "this cannot prevent doubts and disputes from arising about the meaning of the statute in application to some particular circumstances".[299] For this purpose, the addressees of the statute[300] need a methodology to interpret the statutes. Especially when a statute (such as the ICC Statute) contains many gaps and leaves many issues consciously ambiguous,[301] a well-designed interpretive methodology can often be highly useful: besides promoting consistency,[302] efficiency and predictability,[303] it can also resolve issues of vagueness and ambiguity.[304] Evidently, different judges in different jurisdictions of the same system or even different judges in the same jurisdiction in a given system may not all follow the same methodology.[305] This is especially the case at an international tribunal. However, an interpretive methodology only has these effects, as long as all judges

[299] Summers, 2006, p. 245, see above note 282.

[300] About the controversial question of who the addressees of a statute are, see in detail Alexander Heinze, "Private International Criminal Investigations and Integrity", in Morten Bergsmo and Viviane Dittrich (eds.), *Integrity in International Justice*, Torkel Opsahl Academic EPublisher, Brussels, 2020, p. 662 *et seq*.

[301] Ambos, 2013, Chapter II, pp. 74, see above note 61; Swoboda, 2013, p. 203, see above note 75.

[302] Rey, 2000, p. 13, see above note 88.

[303] Summers, 2006, p. 245, see above note 282:

> an approach in accord with a well designed interpretive methodology, not only can resolve interpretive issues, but can resolve them in a more objective, more reasoned, more faithful, more consistent, more predictable, more efficient, and more purpose-fulfilling fashion. When a genuine issue arises, appropriate interpretive arguments should be constructed, and the issue resolved in light of these. A well-designed interpretive methodology, purposively and systematically arranged, is needed to construct these arguments, to resolve any conflicts between them, and, ultimately, to facilitate the formulation of a reason for determinate action or decision under the statute that is faithful to its form and content.

[304] *Ibid*., p. 248 ("by reference to what would qualify as a clear standard case for application of the statute in light of its linguistic and factual context, in light of its immediate purposes, and in light of how far the case at hand is similar to (or different from) the features of what would be a clear standard case for application of the vague language"). About vagueness and ambiguity in more detail Ralf Poscher, "Ambiguity and Vagueness in Legal Interpretation", in Peter M. Tiersma and Lawrence M. Solan (eds.), *Language and Law*, Oxford University Press, Oxford, 2012, pp. 128 *et seq*. About vagueness and ambiguity in legal reasoning Schlag and Skover, 1986, p. 14, see above note 268.

[305] *Ibid*., p. 253; Fernández de Gurmendi, 2018, p. 345, see above note 14.

apply the same general methodology.[306] Of course, it is not the purpose of this chapter to develop a general methodology for the interpretation of the sources at the ICC. What it does require is the identification of a contextual interpretation. In that sense, the purpose of this chapter to provide definitions (or at least an aid to use certain definitions) is thus intertwined with the purpose on a contextual interpretation: to create a system of judgments.[307]

Article 31(3)(c) of the VCLT requires that in treaty interpretation "there shall be taken into account, together with the context: […] any relevant rules of international law applicable in relations between the parties".[308] This rule expresses the principle of 'systematic integration', as the International Law Commission concluded in its fifty-eighth session:

> Article 31(3)(c) VCLT and the 'principle of systemic integration' for which it gives expression summarize the results of the previous sections. They call upon a dispute-settlement body – or a lawyer seeking to find out 'what the law is' – to situate the rules that are being invoked by those concerned in the context of other rules and principles that might have

[306] Summers, 2006, p. 271, see above note 282 ("[A]n approach in accord with a duly-designed methodology prescribed for all judges would, if followed over time, yield far more objective, reasoned, faithful, consistent, predictable, efficient, and purpose-serving interpretations than would occur if an array of various judges were to take nonmethodological 'approaches' to interpretation").

[307] In this vein Rickert, 1888, p. 18, see above note 96 ("[U]nsere Erkenntniss würde dann vollendet sein, wenn wir unseren gesammten Vorstellungsinhalt in ein vollständiges System von nothwendigen Urtheilen gebracht hätten, deren Subjecte und Prädicate vollkommen eindeutige Begriffe sind. Daraus ergiebt sich für die Definition mit Nothwendigkeit: *sie muss die Begriffe so bestimmen, dass aus ihnen ein solches System von Urtheilen geschaffen werden kann. Sie ist also ein Werkzeug zur Bearbeitung der Bausteine, aus denen eine Wissenschaft aufgeführt wird, und aus seinem Zweck heraus müssen wir das Werkzeug zu verstehen suchen*", emphasis added). Translation by Sager 2000, p. 212, see above note 96: "[O]ur knowledge will be complete when we have fitted it into an all-embracing system of *judgments*, the subjects and predicates of which are completely determined *concepts*. It follows necessarily that definition, as the determination of concepts, *must form concepts in such a way that it is possible to create such a system of judgments*. Definition is thus a tool for shaping the components, from which the scientific systemis built, and we must seek to understand this tool in respect of this its purpose.", emphasis in the original).

[308] See generally, Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", in *International & Comparative Law Quarterly*, 2005, vol. 54, pp. 279–319; Duncan French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules", in *International & Comparative Law Quarterly*, 2006, vol. 55, pp. 300 ff.

> bearing upon a case. In this process the more concrete or immediately available sources are read against each other and against the general law 'in the background'. What such reading rules 'against each other' might mean cannot be stated in the abstract. But what the outcome of that specific reading is may, from the perspective of article 31(3)(c) in fact be less important than that whatever the outcome, its justification refers back to the wider legal environment, indeed the 'system' of international law as a whole.[309]

But how would a systematic interpretation work more precisely in the practice of adjudication? On an international level, it is certainly not possible to create Dworkin's superhuman Hercules who is able to find the one and only right answer in light of all legal practice in the system.[310] As I have shown elsewhere, different Chambers of the ICC come to different conclusions when conducting a contextual interpretation.[311]

4.4.3. Contextual Interpretation at the ICC

As I have demonstrated so far,[312] the common law–civil law dichotomy is mainly used descriptively as a systematic argument to justify the interpretation of a procedural rule. Conducting a contextual interpretation will help to verify the judges' decision and to approach the correct and definitive answer as closely as possible. However, while this might be characterised as the goal of contextual interpretation, it is still unclear how to conduct such an interpretation. For this purpose, Brugger identifies two kinds of contextual interpretation: a narrow type and a broad type. The narrow type includes "the phrases, paragraphs and articles/sections sur-

[309] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report on the Study Group of the International Law Commission, fifty-eighth session, 13 April 2006, UN Doc. A/CN.4/L.682, para. 479 (https://www.legal-tools.org/doc/dda184).

[310] Ronald M. Dworkin, *Taking Rights Seriously*, Gerald Duckworth & Co., London, 1977, p. 105 ("We might therefore do well to consider how a philosophical judge might develop, in appropriate cases, theories of what legislative purpose and legal principles require. We shall find that he would construct these theories in the same manner as a philosophical referee would construct the character of a game. I have invented, for this purpose, a lawyer of superhuman skill, learning, patience and acumen, whom I shall call Hercules"); rejecting the "right answer" in international law, see von Bogdandy and Venzke, 2011, p. 1354, above note 289.

[311] Heinze, 2014, pp. 85–6, see above note 23; see also Fernández de Gurmendi, 2018, p. 346, above note 14.

[312] See above Sections 4.1., 4.2.2.7. and 4.3.2.

rounding the provision to be construed".[313] This mirrors the so-called external system that consists, for instance, of the position of the rule within the Statute, the clause within the rule or of preceding or subsequent rules.[314] An example for the latter is the argumentation of the Pre-Trial Chamber I (Single Judge Sylvia Steiner) in the *Lubanga* case:

> According to its contextual interpretation, rule 121 (2) of the Rules must be interpreted in light of rule 122 (1) of the Rules, which also requires that the evidence on which the Defence intends to rely at the confirmation hearing be filed in the record of the case before the hearing commences.[315]

In reaction to this interpretation by Judge Steiner, the *Bemba* Pre-Trial Chamber also referred to the external system when interpreting Rule 121(2)(c) of the Rules of Procedure and Evidence of the ICC ('ICC-RPE'):

> The Chamber notes that rule 121(2)(c) of the Rules is to be interpreted 'in accordance with article 61 paragraph 3' of the Statute referring also to information which the Chamber may order to be disclosed pursuant to the second sentence of article 61(3) of the Statute. This allows the Chamber to have access to evidence other than that on which the parties intend to rely at the confirmation hearing.[316]

Another reference point of the external system of a rule is the official title of that rule, the section or part of the Statute in which it is situated. The Appeals Chamber in *Bemba*, for instance, used the systematic argument that the provisions on deliberations belonged to the 'Trial' sections in upholding the Trial Chamber's rejection of a request for provisional release of *Bemba*.[317]

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313 Winfried Brugger, "Concretization of Law and Statutory Interpretation", in *Tulane European and Civil Law Forum*, 1996, vol. 11, p. 238.

314 Franz Reimer, *Juristische Methodenlehre*, second edition, Baden-Baden, Nomos, Baden-Baden, 2020, mn. 311; Matthias Mahlmann, *Konkrete Gerechtigkeit: Eine Einführung in Recht und Rechtswissenschaft der Gegenwart*, Nomos, Baden-Baden, 2019, mn. 23; Kargl, 2019, mn. 617, see above note 257.

315 *Lubanga*, Pre-Trial Chamber, Decision on the final system of disclosure and the establishment of a timetable, 15 May 2006, ICC-01/04-01/06-102, annex, para. 42 ('Decision on disclosure') (http://www.legal-tools.org/doc/052848/).

316 *Bemba*, Decision on disclosure, para. 44, above note 177.

317 *Bemba*, Appeals Chamber, Public redacted version of Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled 'Decision on "Defence Urgent Motion for Provisional Release", 20 May 2015, ICC-01/05-01/08-3249-Red, paras. 25–6, 37–8, 41 (https://www.legal-tools.org/doc/f4dfd6).

Brugger's broader type of contextual interpretation includes all legal provisions that are valid within the particular legal order and in some manner concern the problem to be solved or the term or concept used in the pertinent norm.[318] This reflects the internal system, which is the law as a consistent system of values and norms.[319] This system might be perceived as a constitutional system of values.[320] For instance, the question of whether disclosure at the ICC should take place merely *inter partes* or also through the Registry was answered by the *Lubanga* Pre-Trial Chamber with an internal system reference:

> Consequently, in the view of the single judge, the *consistency of the disclosure process* and the need to safeguard the *Court's unique criminal procedure* require that disclosure be carried out inter partes with regard to (i) the evidence that subsequently must be communicated to the Pre-Trial Chamber by filing it in the record of the case, that is the evidence on which the parties intend to rely at the confirmation hearing; and (ii) the other materials that the Prosecution must disclose to the Defence before the confirmation hearing but that neither party intends to present at that hearing.[321]

The internal system of rules is still underrepresented in interpretation before international criminal tribunals. This is hardly surprising, since the analysis of the internal system goes along with the analysis of com-

[318] Brugger, 1996, p. 238, see above note 313.

[319] Ernst A. Kramer, *Juristische Methodenlehre*, fifth edition, C.H. Beck, Munich, 2016, p. 97. The term "internal system" (*inneres System*) goes back to Philipp Heck (*Begriffsbildung und Interessenjurisprudenz*, Mohr, Tübingen, 1932, pp. 149 ff.). Put differently, the entirety of legal norms is perceived as a consistent entity, a "unified whole" (*Sinnganzes*). See generally also Bernd Rüthers, Christian Fischer and Axel Birk, *Rechtstheorie*, eleventh edition, C.H. Beck, Munich, 2020, mn. 751. See also Burchard, 2017, p. 283, see above note 20: "Wer das zu vergleichende Recht nicht mehr nur 'in the books', sondern 'in action' würdigen will, der kommt um eine Untersuchung des 'law in context' (nicht zu verwechseln mit dem 'context in law') und um die Berücksichtigung von Rechtstatsachen bzw. der Rechtssoziologie nicht umhin". See also Kargl, 2019, mn. 619, see above note 257.

[320] In that vein the German Constitutional Court, see *Decisions of the German Constitutional Court* (Entscheidungen des Bundesverfassungsgerichts, BVerfGE) vol. 32, p. 206 and vol. 73, p. 269. See also Kargl, 2019, mn. 619, see above note 257. The ICC Statute can be perceived as a constitution, as I argued elsewhere, see Alexander Heinze, "The Statute of the International Criminal Court as a Kantian Constitution", in Morten Bergsmo und Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Torkel Opsahl Academic EPublisher, Brussels, 2018, S. 351-428.

[321] *Lubanga*, Decision on disclosure, annex, para. 65, above note 315 (emphasis supplied).

parative, institutional and sociological elements.[322] In other words: simply referring to the nature of proceedings as 'adversarial' or 'common law' has no value for a contextual interpretation. In this regard, Brugger states:

> [A] 'comparative method', although often cited as a method of interpretation in addition to the classical canon of statutory construction,[323] constitutes a subcategory of contextual interpretation. […] The context also includes the *institutional and functional context – the sharing of powers in concretizing law*, notably between the legislature and the judiciary, as provided by the legal system as a whole. […] Finally, a third part of the context of the legal provision is its *factual basis – the facts or the human action or the sphere of life regulated by the provision.* For reasons of practicality, judges should start with accurate empirical data, and should consider the conditions and consequences of their decisions. Failure to heed these maxims will lead to impractical and perhaps illegitimate solutions.[324] A judge should consider such real-life implications for the case to be decided, as well as the area of life involved and the legal system as a whole. For example, a beneficial resolution of a conflict in a specific case may do harm if applied to a broad range of cases. The legal 'equipment' for 'seeing' the real world appears mainly in the law of evidence and the rules of procedure.[325]

In sum, a broad contextual interpretation that focuses on the internal system of rules is neither restricted to the legal terms of the particular context nor to the external position of a provision within the respective statute or code.[326] Instead, a broad contextual interpretation involves the legal

[322] In a similar vein, see Kai Ambos, "Stand und Zukunft der Strafrechtsvergleichung", in *Rechtswissenschaft*, 2017, vol. 8, pp. 248–9.

[323] Brugger cites Hans J. Wolff, Otto Bachof and Rolf Stober, *Verwaltungsrecht*, ninth edition, C.H. Beck, Munich, 1974, pp. 161–2; for the latest edition, see Rolf Stober and Winfried Kluth, *Verwaltungsrecht, Teil 1*, thirteenth edition, C.H. Beck, Munich, 2017, mn. 41, 48.

[324] Brugger, 1996, pp. 224 ff., 239, see above note 313.

[325] *Ibid*., 238–9.

[326] The High Court of Australia calls this the "modern approach to statutory interpretation" that "(a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy", see High Court of Australia, *CIC Insurance Ltd. v Bankstown Football Club Ltd.*, 4 February 1997, 187 CLR 384, p. 408, cited by Jeffrey Barnes, "Contextualism: 'The Modern

background, which is the base that is inherent in each and every provision and interrelates to the components of the entire system.[327] As I see it, the broad contextual interpretation (internal system) reconciles objective and pragmatic meaning of a text. Take, for instance, the ongoing controversy around the interpretation of disclosure rules at the ICC: a contextual interpretation of the relevant disclosure and communication provisions would involve examining the broader issues behind it, such as the nature of the confirmation hearing (which, in turn, depends on the nature of the entire process)[328] and the role and function of the Pre-Trial Chamber (which, in turn, depends on the role and function of the Chambers in general).[329] This broad contextual interpretation thereby contains a teleological element – every provision must, in the context of the entire system, fulfil a certain purpose.[330]

The fact that the ICC-RPE (and of course RPE at other Internationalised Criminal Tribunals) were created as a result of a compromise is irrelevant for the internal system. The uniformity of a body of procedural rules is necessarily not reality but an ideal reference point of interpretation.[331] National laws too are the product of compromise and debate and influenced by several interests. Their contradictions and inconsistencies

Approach to Statutory Interpretation'", in *UNSW Law Journal*, 2018, vol. 41, no. 4, pp. 1083–4.

327 Cf. Karl Engisch, *Einführung in das juristische Denken*, eleventh edition, Kohlhammer, Stuttgart *et al*., 2010, p. 141 ("[Der systematische Zusammenhang] betrifft vielmehr letztlich die Fülle des im einzelnen Rechtssatz geborgenen Rechtsgedankens in seiner mannigfaltigen Bezüglichkeit auf die anderen Bestandteile des gesamten Rechtssystems").

328 See Ambos, 2016, pp. 354–8, see above note 20; Heinze, 2014, pp. 305–8., see above note 23; Triestino Mariniello and Niccolò Pons, "The confirmation of charges at the International Criminal Court", in Triestino Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity*, Routledge Taylor & Francis, London and New York, 2015, pp. 217–241; Fernández de Gurmendi, 2018, pp. 345–6, see above note 14.

329 See Heinze, 2014, pp. 202, 305–8 ff., see above note 23.

330 Cf. Engisch, 2010, p. 141, see above note 327 ("Da diese Sinnbezüglichkeit jedes Rechtssatzes auf die Gesamtrechtsordnung zum guten Teil eine *teleologische* ist, indem ja die Rechtssätze größtenteils die Aufgaben haben, im Zusammenhang mit anderen Normen bestimmte Zwecke zu erfüllen, diese andere Normen final zu ergänzen, lässt sich die systematische Auslegung von der teleologischen kaum trennen").

331 Rüthers, Fischer and Birk, mn. 278, see above note 319.

are manifold.[332] It is therefore for the decision maker to compensate these contradictions by consistent decision making.[333]

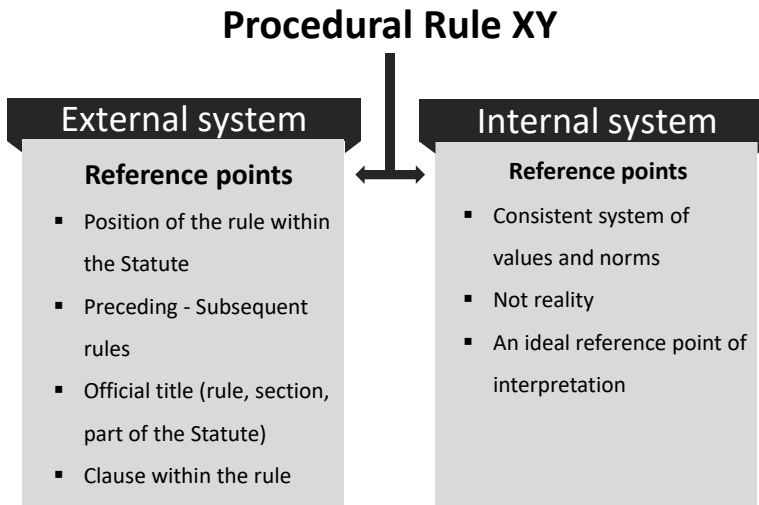

Figure 2: The External System and Internal System.

4.4.4. Modelling the Procedural Regime at the ICC

So far, I have not only demonstrated that many models exist to analyse criminal procedure, but also the misleading taxonomies that lead to a flawed analysis. This leads to the question of what the best model to analyse criminal procedure is, which shall serve as a tool for a contextual interpretation. This cannot be a prescriptive endeavour, such as preferring the adversarial model of proof over the inquisitorial model, because the latter (allegedly) allowed for coerced evidence and provided for an investigating judge, who bases his later decision upon the case file and who ignores the presumption of innocence. The system of legal process is the

[332] *Ibid.*; Dov Jacobs, "International Criminal Law", in Jörg Kammerhofer and Jean D'Aspremont, *International Legal Positivism in a Post-Modern World*, CUP, Cambridge, 2014, pp. 472–3.

[333] Rüthers, Fischer and Birk, mn. 278, see above note 319; about "provisions that do not seem to fit (*systemfremde Normen*)" Karl Riesenhuber, "English common law versus German Systemdenken? Internal versus external approaches", in *Utrecht Law Review*, 2011, vol. 7, p. 122; D. Neil MacCormick and Robert S. Summers, "Interpretation and Justification", in *idem* (eds.), *Interpreting Statutes*, Dartmouth Publishing Company, Aldershot *et al*., 1991, p. 535.

result of many ingredients, and some of them lie, as Reimann points out, "on an emotional and subconscious level, accessible to intuitive understanding, but – in the end – not explainable by any single theory".[334]

4.4.4.1. General Identification of a Purpose

Notwithstanding the impossibility of identifying only one model to analyse criminal procedure, there can indeed be a model that best serves the purpose of both identifying and categorising the procedural framework of international criminal justice. There is no single system and no model that would be useful for all purposes and acceptable to all.[335] It is thus vital to decide on the purpose of a particular investigation.[336] As Roberts puts it:

> In order to select a suitable methodology it is necessary to define the parameters of one's inquiry and to clarify the reasons for undertaking it. Subject-matter is determined by motivation, which in turn pre-selects method; but choice of subject-matter is also influenced by available methods (research is the art of the possible), which in turn provide motivation (ought implies can).[337]

The identification of the purpose simultaneously sets the direction for the following section: as indicated earlier,[338] the sought model is supposed to specify what the priorities of the criminal justice system ought to be or to identify the optimal means to implement these priorities. Since procedural questions can only be answered by a contextual interpretation involving comparative, institutional and sociological elements, this model must describe more than the framework of procedural provisions for a particular procedural problem. The model has to incorporate legal and political traditions because those roots are not easily changed.[339] Describ-

[334] Mathias Reimann, "The Faces of Justice and State Authority", Book Review, in *American Journal of International Law*, 1988, vol. 82, p. 208.

[335] Cf. Peter de Cruz, *Comparative Law in a Changing World*, third edition, Routledge-Cavendish, London, New York, 2007, p. 226.

[336] Sklansky, 2008–2009, p. 1637, see above note 125; de Cruz, 2007, p. 231, see above note 335.

[337] Roberts, 2008, pp. 295, 297, see above note 215.

[338] See above Section 4.1.

[339] Cf. Kagan, 2003, pp. 5–6, see above note 18.

ing the process before the ICC, many authors – and judges – have overlooked its structural, institutional, sociological and political features.[340]

4.4.4.2. Concrete Parameters of a Concept

In sum, the model that helps define the internal system of procedural rules at the ICC must resemble a blueprint. To define it negatively, this blueprint should, at first, *not be normative*.[341] Normative models tell us what ought to be done, that is, how people should act, how rules should be changed, or what a law's content should be.[342] It tells us what limits should be set in criminal law, and in the investigative and sentencing powers that go with it.[343] Second, the blueprint *cannot be prescriptive*, that is, it does not serve the purpose of this study to identify *authoritative principles* that answer the above 'should'-questions.[344] Third, the model *must not be evaluative*, that is, it should refrain from evaluating a certain type of procedure – adversarial, crime control, conflict solving and so on – as 'good' or 'bad' and as preferable or undesirable.[345] By contrast,

[340] See above note 19.

[341] For the purpose of this chapter, I simplify the normative–descriptive divide, which is "an aspect of the methodology debate that usually rages over a number of complex issues", see Andrew Halpin, "Methodology", in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, second edition, Blackwell Publishing, Chichester, 2010, pp. 615 ff.

[342] Brian H. Bix, *A Dictionary of Legal Theory*, OUP, Oxford, 2004, p. 148; Geoffrey A. Skoll, *Contemporary Criminology and Criminal Justice Theory*, Palgrave Macmillan, New York, 2009, p. 39; John Linarelli, "Analytical Jurisprudence and the Concept of Commercial Law", in *Penn State Law Review*, 2009–2010, vol. 114, pp. 132–3; Rappaport, 2003–2004, p. 572, see above note 16.

[343] Andrew Ashworth, "Criminal Law, Human Rights and Preventative Justice", in Bernadette McSherry, Alan W. Norrie and Simon Nronitt (eds.), *Regulating Deviance – The Redirection of Criminalisation and the Futures of Criminal Law*, Hart Publishing, Oxford and Portland, Oregon, 2009, p. 92.

[344] Rappaport, 2003–2004, p. 574, see above note 16 ("One answer is that such a methodology should help us identify authoritative principles that answer the important 'should' questions - whether citizens should obey the law, how courts should interpret the law, how government should enforce the law. This might be called a prescriptive, or 'topdown', approach"). See also Tom Campbell, "Prescriptive Conceptualism: Comments on Liam Murphy, 'Concepts of Law'", in *Australian Journal of Legal Philosophy*, 2005, vol. 30, p. 21.

[345] Cf. Sklansky, 2008–2009, p. 1640, see above note 125 ("Evaluative means the assessment of the attractiveness of anti-inquisitorialsm").; Moore, 1997/2010, p. 8, see above note 19. About a general argumentative framework for justifying evaluations and recommendations for legislative reform see Wibren Van Der Burg, "The Merits of Law. An Argumentative Framework for Evaluative Judgements and Normative Recommendations in Legal Research", in *Archiv fuer Rechts- und Sozialphilosphie*, 2019, vol. 105, no. 1, pp. 11-43.

defined positively, the model or the conceptualisation has to be *descriptive and analytical*, that is, it has to describe and analyse how the law *is*.[346] Fourth, it has to be *empirical*, outlining what *is*, with respect to both existing provisions ('law in the books')[347] and the actual working of the system ('law in action').[348] Empirical goals attempt to identify *facts* about the world such as how many trials are actually jury trials or the likelihood that the government will sanction a client for taking certain actions.[349] Thus, empirical research reveals the actual working of the criminal justice system.[350] Last but not least, the blueprint needs to serve *interpretative and explanatory* purposes. It is not sufficient that it helps to describe and analyse ICC procedure (with regard to its provisions and its actual working). A mere description and analysis of ICC provisions does not itself automatically result in having identified the system that serves as a basis for a contextual interpretation. Thus, the blueprint or concept of procedural models also needs to be explanatory or interpretive, explaining the significance of analysed provisions for a broader system.[351]

In sum, the blueprint or concept of models that best serves the purpose of identifying the system of ICC procedure has to be descriptive,

346 Sklansky, 2008–2009, p. 1640, see above note 125. However, see Antony Duff, "Theorizing Criminal Law: a 25th Anniversary Essay", in *Oxford Journal of Legal Studies*, 2005, vol. 25, pp. 354–5, who doubts that "is" and "ought" can be sharply distinguished because analysing the law means analysing a normative institution.

347 François Tanguay-Renaud and James Stribopoulus, *Rethinking Criminal Law Theory*, Hart Publishing, Oxford and Portland, Oregon, 2012, p. 196; in detail Thomas Scheffer, Kati Hannken-Illjes and Alexander Kozin, *Criminal Defence and Procedure - Comparative Ethnographies in the United Kingdom, Germany, and the United States*, Palgrave Macmillan, New York and London, 2010, pp. 10 ff.

348 Tanguay-Renaud and Stribopoulus, 2012, pp. 193, 196, see above note 347; see in detail Scheffer, Hannken-Illjes and Kozin, 2010, pp. 10 ff., see above note 347. For the purpose of this chapter, I use the word 'empirical' in a very broad sense, that is, as 'law in action', 'law in the real world', 'socio-legal studies', 'law and society' and 'sociology of law'. In the same vein, see William Twining, *General Jurisprudence*, OUP, Oxford, 2009, p. 226.

349 Rappaport, 2003–2004, p. 570, see above note 16. See also Jacqueline Hodgson, "The Challenge of Universal Norms: Securing Effective Rights Across Different Jurisdictions and Legal Cultures", in *Journal of Law and Society*, 2019, vol. 46, p. 95, 97 ("Comparative work that is also qualitative and empirical is able to explore the legal and occupational cultures that drive or challenge behaviour, as well as the impact of wider policy and economic structures within which criminal practice operates, and the broader legal traditions that shape contemporary criminal justice.", footnote omitted).

350 Tanguay-Renaud and Stribopoulus, 2012, p. 193, see above note 347.

351 Cf. Roberts, 2008, p. 311, see above note 215.

empirical, analytical and interpretive or explanatory with regard to structural, institutional, sociological and political features of procedural provisions of the ICC. It needs to provide a common language for a contextual interpretation, developing parameters that create a link between provisions and features of the Court, the identification of a system and the analysis of how certain rules are translated into that system.

4.4.4.3. Function of a Concept

In other words, the ICC lacks a 'general jurisprudence' or *Rechtsdogmatik*[352] in that regard, that is, on the basis of a positivistic reading of the Statute, a theory or a concept that facilitates the definition of an internal system of procedural rules at the ICC. This requires further explanation.

'General jurisprudence' is a term that developed throughout the eighteenth and nineteenth centuries[353] in different forms, meanings and functions. I have described these meanings elsewhere in detail.[354] Along the lines of both the German and French tradition (*Allgemeine Rechtslehre* or *théorie générale du droit*), I understand general jurisprudence – in very broad terms – as a participant theory[355] that analyses actual legal systems

[352] The contours of 'Rechtsdogmatik' are soft and its definition is thus controversial. The objective of Rechtsdogmatik is to build a bridge between the law and its application through a complex, manageable and transparent concretisation of the law, e.g. by creating definitions and abstractions, see Kargl, 2019, p. 315, see above note 257 ("Die Rechtsdogmatik sichert das Gesetzlichkeitsprinzip dadurch, dass sie die Kluft zwischen Gesetz und Gesetzesanwendung durch komplexe, aber handhabbare und durchsichtige Konkretisierungen der Gesetze – z.B. durch Definitionen sowie durch Verallgemeinerungen der Fälle – überbrückt.", footnotes omitted); from a comparative perspective Hein Kötz, "Rechtsvergleichung und Rechtsdogmatik", in Rabels Zeitschrift für ausländisches und internationales Privatrecht, 1990, vol. 54, pp. 203, 204 *et seq*. (note that Hein Kötz is heavily influenced by the Rabel school, see also Basil S. Markesinis, *Comparative Law in the Courtroom and Classroom*, Hart, Oxford, Portland, Oregon, 2003, p. 40). Put differently, the goals of Rechtsdogmatik are systematisation, coherence and consistency, see Chien-Liang Lee, "Die Bedeutung der Rechtsdogmatik für die Rechtsvergleichung", in Frank Schorkopf and Christian Starck (eds.), *Rechtsvergleichung - Sprache - Rechtsdogmatik: Siebtes Deutsch-Taiwanesisches Kolloquium vom 8. bis 9. Oktober 2018 in Göttingen*, Nomos, Baden-Baden, 2019, pp. 19, 21.

[353] Cf. David B. Goldman, *Globalisation and the Western Legal Tradition*, CUP, Cambridge *et al*., 2007, p. 28.

[354] Heinze, 2014, pp. 167–72, see above note 23.

[355] Röhl and Röhl, 2008, p. 6, see above note 180: "Participant theory" in this regard means that *Allgemeine Rechtslehre* is a form of legal theory that analyses the functioning of law, the meaning of law for the society and the history of law from an internal point of view. By contrast, "observer theories" (*Beobachtertheorien*) are formulated from an external point

at a relatively high level of generality.[356] The appeal of a general jurisprudence lies in its methodological aspect, that is, its desire to find definite criteria for the existence of law. Although this chapter is not about criteria for the existence of law, it still strives to identify criteria for the existence (and the labelling) of a system. Thus, for the purpose of this chapter, the methodological aspect of general jurisprudence is much more useful than the question of what law actually is. To be sure, the 'methodological aspect' of a general jurisprudence and *Rechtsdogmatik* respectively must be distinguished from methodology (for example, legal interpretation) itself: Rechtsdogmatik presupposes the lex lata, while methodology develops the same.[357]

According to Röhl, a general jurisprudence is not confined to analytical, empirical or normative observations, but is oriented towards a practical goal.[358] My practical goal is the definition of the internal system of procedural rules at the ICC. Since the achievement of this goal is the overriding objective, every method that advances that achievement is deemed to be appropriate.[359] I therefore agree with Twining's understanding of 'general jurisprudence': "'General' in this context has at least four different meanings: (a) abstract, as in '*théorie générale du droit*'; (b) universal, at all times in all places; (c) widespread, geographically or over time; (d) more than one, up to infinity".[360] Twining's method includes not only logical, linguistic, and conceptual techniques developed by analytical philosophers, but also tools of analysis developed in neighbouring disciplines (such as ideal-types, models, metaphors, and deconstruction).[361] In the words of Giudice: "conceptual and social scientific theories complement each other at the level of general approach; both are necessary per-

of view, usually by philosophers, sociologists, political scientists or economists. They critically review the law from the outside. About the difference between "*Beobachtertheorien*" and "*Teilnehmertheorien*" in more detail, see Marietta Auer, *Materialisierung, Flexibilisierung, Richterfreiheit: Generalklauseln im Spiegel der Antinomien des Privatrechtsdenkens*, Mohr Siebeck, Tübingen, 2005, pp. 212 ff. Thus, "legal philosophy", as contrast to "general jurisprudence", can be qualified as an observer theory.

356 Twining, 2009, p. 19, see above note 348.

357 Kargl, 2019, pp. 315–316, see above note 257.

358 Twining, 2009, p. 8, see above note 348.

359 *Ibid*.

360 See *ibid*., p. 18.

361 *Ibid*., p. 39. See also Röhl and Röhl, 2008, p. 2, see above note 180, for whom general jurisprudence is supposed to open the jurisprudence to interdisciplinarity.

spectives from which to understand a social phenomenon such as law. Conflict enters as a possibility at the level of particular claims made within either conceptual or social scientific theories".[362] For the internal system, external observations on law,[363] or talk about law,[364] are insufficient. Instead, what needs to be taken into account is the "law in minds",[365] a "style of thought",[366] "a web of beliefs, ideals, choices, desires, interests, justifications, principles, techniques, reasons, and assumptions",[367] which can be apprehended only from within, that is, from the standpoint of legal actors.[368] In a globalised world,[369] the challenge is not to find new concepts. It is rather the opposite, that is, to face the oversupply of new theories[370] (which are basically old theories with a new coat) by highlighting existing concepts and reaching beyond a theory's semantic arbitrariness[371] to falsify it.[372] Legal scholarship requires transparency, a demand that

362 Michael Giudice, "Ways of Understanding Diversity among Theories of Law", in *Law & Philosophy*, 2005, vol. 24, pp. 509–545, 532–535.

363 See *supra* note 355.

364 Heinze, 2014, pp. 170 (with footnote 604), 176, see above note 23.

365 William Ewald, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?", in *University of Pennsylvania Law Review*, 1994–1995, vol. 143, pp. 1961–90, 2111. See also William Ewald, "The Jurisprudential Approach to Comparative Law: A Field Guide to 'Rats'", in *American Journal of Comparative Law*, 1998, vol. 46, p. 705.

366 Ewald, 1994–1995, p. 1947, see above note 365.

367 *Ibid*., p. 1948.

368 Cf. Catherine Valcke, "Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems", in *American Journal of Comparative Law*, 2004, vol. 52, p. 718 with further references.

369 For the term "global" in comparison to "universal" see Goldman, 2007, p. 15, see above note 353, with further references. See also Twining, 2009, pp. 20–21, see above note 348 (footnote omitted) and William Twining, "Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context", in *International Journal of Law in Context*, 2005, vol. 1, p. 7, who considers "general" more flexible than "global" or "universal".

370 Canaris perceives the use of a "theory" as a rather classifying and semantic exercise, see Claus-Wilhelm Canaris, "Funktion, Struktur und Falsifikation juristischer Theorien", in *Juristenzeitung,* 1993, pp. 377-391 (379: "[Theorie] ermöglicht die begriffliche und/oder dogmatische Einordnung der einschlägigen Problemlösung(en)."). Hruschka demands from a 'Theory' to provide perspective and order but concedes that the name 'theory' is used for all kinds of solutions to particular problems and sometimes even for mere opinions and arguments, see Hruschka, 1988, pp. XII–XIII, see above note 76.

371 Cf. Röhl and Röhl, 2008, p. 2, see above note 180.

372 This is what Popper famously labelled as one of the "mere puzzles arising out of the misuse of language", Karl Popper, *Unended Quest*, Routledge, London and New York, 2005, p. 11. About Popper's remarks Axel Birk, "Der kritische Rationalismus und die Rechtswis-

shall be revisited in the conclusion of this chapter.[373] Francis recently made this point more concretely: "An author might have authority for a particular claim but miss how the claim is undermined by an entire area of thought that the author ignores".[374] In a rare critical review of the rhetoric in criminal law discourse, Hassemer observed that more or less all participants of this discourse have always tended to show a rhetorical vigour that a) rather emphasises the differences than similarities, b) take a certain view with resoluteness that is often tinted in moralism, and c) do not admit the need to consider other views.[375] Kuhn explained this in his seminal work *Die Struktur wissenschaftlicher Revolutionen* with the reluctance of a scientist to admit errors, even when they have been unmistakably proven.[376]

4.4.4.4. What Concept is Preferable?

In sum, a blueprint that models ICC procedure shall serve as a 'general jurisprudence' of ICC procedure; put differently: as an ICC-*Processdogmatic*. Thus, it needs to be descriptive, interpretive and explanatory, instead of normative and prescriptive. Furthermore, it has to take into account comparative law elements, sociological methodology and elements of legal thought, which are closely linked to comparative

senschaft. Bernd Rüthers und Karl-Heinz Fezer – ein Ausgangspunkt, unterschiedliche Folgerungen", in *Rechtstheorie*, 2017, vol. 48, no. 1, pp. 43, 44 *et seq*.

373 See below 4.5.3 *in fine*.

374 Francis, 2018, p. 1035, see above note 205.

375 See Winfried Hassemer, "Darf der strafende Staat Verurteilte bessern wollen ?", in Cornelius Prittwitz *et al.* (eds.), *Festschrift für Klaus Lüderssen*, Nomos, Baden-Baden, 2002, p. 222, translation by A.H. Original Quote: "(S)o neigen mehr oder weniger alle Teilnehmer am straftheoretischen Diskurs seit alters her rhetorisch zu einem Nachdruck, der weniger die Gemeinsamkeiten als die Unterschiede nach vorne stellt, vertreten sie ihren Standpunkt mit, auch moralisch getönter, Entschiedenheit und geben sie dem Bedürfnis, den Standpunkt des anderen ernsthaft zur Kenntnis zu nehmen, selten Raum. Das macht es schwer, Übereinstimmungen in der Sache festzuhalten und auf ihrer Basis zu neu definierten Streitlinien oder auch zu neuen Übereinstimmungen fortzuschreiten". More recently, Lynch identified (albeit with a view to the political discourse) "intellectual arrogance", Michael Patrick Lynch, *Know-It-All-Society*, Liveright, New York, London, 2019, p. 7.

376 Thomas S. Kuhn, *Die Struktur wissenschaftlicher Revolutionen*, twentyfifth edition, Suhrkamp, Frankfurt am Main, 2017, p. 162.

law.[377] I will now demonstrate what that means for the applicability of the concepts and models outlined above.

4.4.4.4.1. Normative or Descriptive

A very useful descriptive tool (that is preferred over a normative one) is provided by Damaška.[378] He puts, in the words of Nijboer,

> an analytical system of lines under or behind the existing systems. Damaška's work gives you a grip to discuss a number of aspects of different procedural systems better. When we stick to Damaška's analytical model instead of the traditional concepts as fixed background, I think we can avoid the conceptualisation of a system in devaluating concepts of another system.[379]

Damaška's categories serve as a valuable conceptual analysis[380] or analytical tool[381] to describe recent criminal procedure changes[382] and explain[383] the suitability of, or problems with, legal transplants.[384]

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377 See Wolfgang Fikentscher, *Modes of Thought – A Study in the Anthropology of Law and Religion*, second edition, Mohr Siebeck, Tübingen, 2004, p. 44.

378 Nijboer, 1997, p. 178, see above note 206.

379 *Ibid.*; Reimann, 1988, p. 206, see above note 334 ("In this second dimension he presents them as analytical tools that should, again like the system of chemical elements, 'assist us in tracing similarities and differences in component parts' (p. 3). As a result of this hybrid character, the book constantly mingles descriptive with analytical elements").

380 Roberts, 2008, pp. 295, 325, see above note 215. About the conceptual analysis in more detail, see Dietmar von der Pfordten, "About Concepts in Law", in Jaap C. Hage and Dietmar von der Pfordten (eds.), *Concepts in Law*, Springer, Heidelberg *et al.*, 2009, pp. 24 ff., who distinguishes between a classical model and a reductionist-positivist model of conceptual analysis.

381 Elisabetta Grande, "Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth", in Jackson, Langer and Tillers (eds.), 2008, p. 145, see above note 16, with reference to Mirjan Damaška, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study", in *University of Pennsylvania Law Review*, 1973, vol. 121, pp. 506–589.

382 Reimann, 1988, p. 206, see above note 334 ("In that sense, [Damaška's models] are presented as a descriptive picture of the procedural universe, albeit in idealized form").

383 See also Martin Shapiro, "The Faces of Justice and State Authority", Book Review, in *American Journal of Comparative Law*, 1987, vol. 35, p. 837 ("Nevertheless the two political variables often do help to 'explain' various similarities and differences between various national procedural systems at that intermediate level of explanation that is the best comparativists can usually hope to do and far better than they actually do most of the time"); Reimann, 1988, p. 205, see above note 334.

Damaška's strength is that he builds holistic, neutral and interpretive frameworks,[385] without lapsing into reductionism or oversimplification.[386] He himself has emphasised that his approach would be "predominantly analytical and interpretive",[387] and that his models were "meant to be used in seeking to understand the complex mixtures of arrangements, as means to analyze them in terms of their components, as one would study compounds in analytical chemistry".[388] Damaška's models bring to light aspects of legal process which tend to be overlooked because they do not meet the normative expectations of orthodox procedural models.[389] Thus,

[384] John D. Jackson and Máximo Langer, "Introduction: Damaška and Comparative Law", in Jackson, Langer and Tillers (eds.), 2008, p. 12, see above note 16; Richard S. Frase, "Sentencing and Comparative Law Theory", in *ibid.*, p. 356:

> Damaška's models were primarily designed to categorise, describe, and explain procedural systems at a given point in time, and gave little emphasis to modelling of change or evolution in these systems. Nevertheless, his models can be used to generate predictions about how systems of a given type (or tending to one pole or the other on each of his two dimensions) should evolve. For example, an essentially hierarchical system would be expected to maintain key features consistent with that model, while eliminating or softening procedures inconsistent with the model.

See also ZUO Weimin and FU Xin, "Legal Transplant in the Criminal Procedure Law of China: Experiences and Reflections", in Ackerman, Ambos and Sikirić (eds.), 2016, pp. 438 ff.; Toby S. Goldbach, "Why Legal Transplants?", in *Annual Review of Law and Social Science*, 2019, vol. 15, pp. 583–601.

[385] Jarinde P.W. Temminck Tuinstra, *Defence Counsel in International Criminal Law*, T.C.M. Asser Press, The Hague, 2009, p. 107.

[386] Harold Hongju Koh, "Mirjan Damaška: A Bridge Between Legal Cultures", in Jackson, Langer and Tillers (eds.), 2008, p. 31, see above note 16.

[387] Damaška, 1997, p. 3, see above note 261.

[388] Damaška, 1986, p. 12, see above note 32.

[389] Roberts, 2008, p. 302, see above note 215:

> First, the bridge to political theory constructed by Damaška provides an escape-route from the viciously circular logics of 'adversarial' and 'inquisitorial' conceptual models. Secondly, Damaška's intersecting axes are better able to encapsulate the complexities of real legal processes (albeit still in the relatively abstract conceptualisations of an idealised model) than one-dimensional versions of the adversarial-inquisitorial dichotomy. Thirdly, the modular structure of Damaška's basic conceptual building blocks facilitates modelling of relatively unusual combinations of features, which brings to light aspects of legal process which tend to be overlooked because they do not meet the normative expectations of orthodox procedural models. Fourthly, when set in comparative perspective, Damaška's models of legal process demonstrate the perspectival nature of all conceptualisations of legal procedure, which are shown to be relative to the standpoint of the observer. This is a novel inflection of the too-little respected methodological truism that concepts are always ideologically loaded; or, in the language I in-

for the purpose of systematisation, Damaška's models present a suitable blueprint, because he does not provide a specific (new) thesis but develops a systematic understanding of the process.[390] Thus, in line with the 'general jurisprudence' that is needed to systematise the ICC process, the ICC-*Processdogmatic*, he falls back on existing theories and distinguishes himself through the way in which he combines and applies them.[391]

4.4.4.4.2. Sociological or Empirical

The inclusion of sociological elements into the blueprint of a concept of how to systematise ICC procedure shifts the focus from legal rules to human interactions.[392] An approach that includes sociological elements sheds light on the *de facto* course of events, in contrast to a pure legal approach, that makes normative assumptions about which law should ideally be applied.[393] Recall the famous stories of YAN Ying, where in the King of Chu tried to humiliate (Master) YAN by indicating that a thief was a person from Qui. YAN replied with an analogy that became a famous Chinese proverb: The sweet oranges of the south become bitter oranges in the North.[394] Context is key[395] (reflecting the pragmatic understanding of

troduced earlier, subject-matter is partly defined by motivation. This section elaborates on each of these four strengths in turn.

390 Ronald J. Allen and Georgia N. Alexakis, "Utility and Truth in the Scholarship of Mirjan Damaška", in Jackson, Langer and Tillers (eds.), 2008, p. 332, see above note 16:

> In Faces of Justice, Damaška examines the procedure of common and civil law countries (in capitalist as well as socialist regimes) to develop a systematic understanding of how modern forms of justice manifest in different political contexts. This is not a truth-seeking endeavor. Damaška sets out to prove no specific thesis. He focuses his efforts on developing a 'distinctive analytical framework' that can be used to understand the interplay of legal systems and structures of governmental authority.

391 Sean McConville, "Book Review, International Relations and Politics", in *Annals of the American Academy of Political & Social Science*, 1988, vol. 497, p. 173.

392 John Griffiths, "The general theory of litigation - a first step", in *Zeitschrift für Rechtssoziologie*, 1983, vol. 4, no. 2, p. 145.

393 Max Weber, *Wirtschaft und Gesellschaft – Grundriss der verstehenden Soziologie*, Mohr Siebeck, Tübingen, 1922, pp. 181 ff.; see, in detail, Jens Petersen, *Max Webers Rechtssoziologie und die juristische Methodenlehre*, third edition, Morh Siebeck, Berlin, 2008, pp. 16–7. See also Lee, 2019, pp. 27-28, see above note 352.

394 Olivia Milburn, *The Spring and Autumn Annals of Master Yan,* Brill, Leiden, 2015, The Inner Chapters: Miscellaneous Tales, Number Six, p. 349.

395 In the same vein and in detail David Nelken, "Whose Best Practice? The Significance of Context in and for Transnational Criminal Justice Indicators", in Journal of Law and Society, 2019, vol. 46, pp. 31, 38 *et seq*. About context in (Rabel's) comparative legal research, David J. Gerber, "Sculpting the Agenda of Comparative Law: Ernst Rabel and the

terms)[396] but at the same time renders any categorisation somewhat arbitrary.

A sociological method that supplements the systematisation of ICC procedure is the recourse to 'ideal-types'. Ideal-types are social scientific constructions that select ideal or material elements found in the social world, and assemble them in a pure, internally consistent form so as to accentuate aspects of reality in a (consciously) one-sided manner.[397] They are 'ideal' in an analytical but not a normative sense,[398] combining abstract generalisation and the interpretation of motives.[399] An alternative name could be the 'nomological machine' Nancy Cartwright invented (albeit in relation to the laws of nature): "a fixed (enough) arrangement of components, or factors, with stable (enough) capacities that in the right sort of stable (enough) environment will, with repeated operation, give rise to the kind of regular behaviour that we represent in our scientific laws".[400]

An ideal-type does not imply an aspiration to mould reality to it.[401] As Appiah emphasised: "[A]n idealisation is just a kind of useful fiction".[402] Ideal-types are models that are selectively developed as aids to genetic explanation.[403] With regard to the analysis of a legal system, the

Facade of Language", in Annelise Riles (ed.), *Rethinking the Masters of Comparative Law*, Hart: Oxford, Portland, Oregon, 2001, p.190, 200.

396 See above note 91.

397 Max Weber, "'Objectivity' in Social Science and Social Policy", in Edward A. Shils and Henry A. Finch (trans. and eds.), *The Methodology of the Social Sciences*, Free Press, Glencoe, Illinois, 1949, pp. 49, 90.

398 *Ibid*.

399 David Zaret, "From Weber to Parsons and Schutz: the Eclipse of History in Modern Social Theory", in *American Journal of Sociology*, 1980, vol. 85, no. 5, pp. 1180–1201; Charles Ragin and David Zaret, "Theory and Method in Comparative Research: Two Strategies", in *Social Forces*, 1982–1983, vol. 61, p. 742.

400 Nancy Cartwright, *The Dappled World,* Cambridge University Press, Cambridge, 1999, p. 50. See also Kwame Anthony Appiah, *As If – Idealization and Ideals*, Harvard University Press, Cambridge, Massachusetts, London, 2017, p. 14.

401 Dhananjai Shivakumar, "The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology", in *Yale Law Journal*, 1995–1996, vol. 105, p. 1401.

402 Appiah, 2017, p. 73, see above note 400, italics omitted.

403 Ragin and Zaret, 1982–1983, pp. 741–742, see above note 399. Weber calls ideal-types "genetic concepts" because structural properties of ideal types are often closely related to specific genetic issues, see Max Weber, *The Methodology of the Social Sciences*, Free Press, New York, 1949, pp. 93, 106.

ideal-type "acts as a yardstick against which we might measure actual legal systems".[404] The identification of certain types and their comparison to the ideal-type, promotes rationality [405] and disregards irrational events. [406] In contrast to the ideal-type stands the average type (*Durchschnittstypus*), which has empirical-statistical value.[407]

A second distinction must be made between ideal-types and ideals. Whereas an ideal is something against which one evaluates reality, an ideal-type has "no connection at all with *value-judgments*, and it has nothing to do with any type of perfection other than a purely *logical* one".[408] An ideal-type is formed "by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct".[409] Additionally, MacDonald distinguishes three separate tools: strong ideal-types, weak ideal-types, and non-ideal-types.[410]

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404 Sanders, 2000, p. 1546, see above note 58:

> From the sociological point of view, perhaps the most important contributor to the early development of comparative law was that preeminent lawyer-social scientist, Max Weber. Weber's contribution was in three parts. First, he developed the device of an ideal type, a stylized construct that represents the perfect example of a phenomenon. The ideal type acts as a yardstick against which we might measure actual legal systems. Second, using ideal types, he provided a typology of legal systems classified by the formality and the rationality of their decision-making processes. Ideally, legal systems could be thought of as formal or substantive, rational or irrational. A legal system is formal to the extent that the norms it applies are intrinsic to the system itself. Substantive law, as the term was used earlier, should not be confused with the substantive dimension of Weber's typology. A legal system is substantive in Weber's sense to the extent that the source of the norms it applies is extrinsic to the legal system. For example, a legal system would be substantive if a court resolved disputes by reference to a religious rather than a legal code".

405 Petersen, 2020, p. 112, see above note 393.

406 See generally Bernhard Pfister, *Die Entwicklung des Idealtypus. Eine methodologische Untersuchung über das Verhalten von Theorie und Geschichte bei Schmoller und Max Weber*, Mohr Siebeck, Tübingen, 1928.

407 Weber, 1922, p. 10, see above note 393; Petersen, 2020, p. 117, see above note 393.

408 Weber, 1949, pp. 49, 97–98, see above note 397.

409 *Ibid*., p. 90. See generally Stuart Macdonald, "Constructing a Framework for Criminal Justice Research: Learning from Packer's Mistakes", in *New Criminal Law Review*, 2008, vol. 11, pp. 257–310.

410 Macdonald, 2008, p. 304, see above note 409:

Again, the most convincing models in this regard are those of Damaška. By creating ideal-types – an ideal-type of co-ordinate judiciary as opposed to a hierarchical one, and an ideal-type of conflict-solving justice as opposed to a policy-implementing one[411] – Damaška describes and explains the differences in culture, history and social traditions that account for the contrast between different legal systems or processes.[412] The hierarchical ideal-type is familiar to readers of Weber's theory on bureaucracy.[413] Some even see the combination of two independent sets of variables into four constellations as being borrowed from Weber.[414]

For Damaška, the shape of those processes is best explained as the result of socio-political factors, especially attitudes towards official power.[415] Surely, Damaška's connection between types of political States and

> A strong ideal-type is a theoretical construct. It may be used in empirical work for analysis and exposition, but, since it could not sensibly be regarded as a prescription of what to exist, is not apt to be used in evaluative work. A weak ideal-type is also a conceptual construct, but, as well as being used in empirical work, it may also be employed in evaluative work as an ideal. A non-ideal-type (such as the offensive approach to criminal law policy) is not a conceptual construct; it is a description of an actual strategy or approach. Like a weak ideal-type, it may be used in both empirical and evaluative work.
> [footnote omitted]

411 Alex Stein, "A Political Analysis of Procedural Law", in *Modern Law Review*, 1988, vol. 51, pp. 662–3.

412 James Q. Whitman, "No Right Answer?", in Jackson, Langer and Tillers (eds.), 2008, p. 389, see above note 16; Roberts, 2008, p. 300, see above note 215; Malcolm M. Feeley, "The Bench, The Bar, and the State: Judicial Independence in Japan and the United States", in Feeley and Miyazawa (eds.), 2002, pp. 69–70, see above note 81 ("One of the few contemporary theorists who has systematically explored the relationship between the nature of state authority and the law and the legal system is Mirjan Damaska").

413 See Max Weber, *Economy and Society*, University of California Press, Berkeley, Los Angeles, London, 1978, pp. 212–301; Stein, 1988, pp. 662–3, above note 411; Vogler, 2005, p. 9, above note 133; Kagan, 2003, p. 11, above note 18. In a similar vein (with a view to the ICC), Richard Clements, "From bureaucracy to management: The International Criminal Court's internal progress narrative", in *Leiden Journal of International Law*, 2019, vol. 32, pp. 149, 151.

414 See Max Weber, *Max Weber on Law in Economy and Society*, Max Rheinstein and Edward A. Shils (trans.), Simon and Schuster, New York, 1925/1954, pp. xlii–lii; see also Anthony Kronman, *Max Weber*, Stanford University Press, Stanford, 1983, p. 76. See generally Reimann, 1988, p. 205, above note 334.

415 Reimann, 1988, p. 205, see above note 334.; Stein, 1988, p. 662, see above note 411 ("It offers a political explanation of procedural arrangements and their variability, claiming that in most cases procedural systems are affected by prevailing political attitudes towards the legitimate functions of state authorities and their organisational structure").

types of legal processes is not a novel approach.[416] What is indeed new is the linking of two types of political goals of the legal process to modern political theory: his conflict-solving and policy-implementing types of States can be traced back to the opposition between liberal political conceptions versus anti-liberal conceptions of the State, an opposition that has been crucial for theoretical political debates to this day.[417] Damaška describes and explains the rules and practices of procedure by analysing the institutional environment and the political purposes of the administration of justice.[418] Moreover, he takes into account the 'law in minds' by including broader cultural attitudes toward governance and State authority.[419] As Damaška himself memorably put it, "[t]o consider forms of justice in monadic isolation from their social and economic context is – for many purposes – like playing *Hamlet* without the Prince".[420]

The criticism of Damaška's models is that their empirical dimension is rather stunted. Damaška is criticised in that he "presents relatively few data from a range spanning twenty centuries, half a dozen countries and a variety of procedural forms. These data are so sparse and eclectic, and so carefully selected from a huge, all-encompassing pool, that their support for Damaska's assumptions has little significance".[421] In fact, Damaška "never sought to fit all empirical data into his two-by-two grid".[422] However, his work is still empirical "at its core", because it "tells a sociological story linking the structure of legal procedure, and especially the trial, with the development of political authority and the goals of states".[423] For the purpose of this study Damaška's empirical dimension is sufficient, because the inclusion of more empirical data will eventually increase the complexity of its models. Despite the different views of some authors,

[416] See, for example, Charles de Montesquieu, *The Spirits of the Laws*, Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone (eds.), CUP, Cambridge, 1989.

[417] See, for example, John Rawls, *Political Liberalism*, second edition, Columbia University Press, New York, 2005; Stephen Holmes, *The Anatomy of Antiliberalism*, Harvard University Press, Cambridge, Massachusetts, 1993. Generally see Jackson and Langer, 2008, pp. 4, 23, 24, above note 384.

[418] Jackson and Langer, 2008, p. 5, see above note 384.

[419] Koh, 2008, pp. 29, 31, 32, see above note 386.

[420] Damaška, 1986, p. 6, see above note 32.

[421] Reimann, 1988, p. 207, see above note 334.

[422] Allen and Alexakis, 2008, p. 334, see above note 390.

[423] See Shapiro, 1987, p. 836, see above note 383.

who criticise Damaška for a lack of differentiation,[424] a systematisation of the ICC process calls for a general conceptualisation rather than models that strive to include all possible exceptions and peculiarities. Damaška's ideal-types lie exactly in-between the most general adversarial-inquisitorial dichotomy and an approach of six to eight models that try to grasp procedural values.

4.4.4.4.3. Comparative

Finally, and most importantly, a suitable blueprint to systematise the ICC process needs to be based on comparative research. This, again, requires some clarification on both such research generally and Damaška's contribution thereto specifically.

By using the term 'comparative law', I am referring to the systematic study of particular legal traditions and legal rules on a comparative basis.[425] This has to be distinguished from the term 'foreign law', which is the study of a foreign legal system without expressly comparing it to any other legal system.[426] Furthermore, comparative law is not a legal body of rules but a variety of methods analysing the law.[427] Thus, to avoid misunderstandings, I will use the term 'comparative law research'.

Comparative law research can have a variety of useful purposes.[428] First, it supplements an analysis of the cultural and legal origin of certain procedural rules.[429] In the words of Delmas-Marty:

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[424] *Ibid*. ("As indicated by these examples the model presented is not a rigid set of large pigeon holes. A particular nation's entire legal and political system need not be put neatly in three and only three boxes. A particular nation may choose to intervene actively in some segments of life and not in others and use a hierarchically organized bureaucracy as the instrument of some of its interventions and not others").

[425] Cf. de Cruz, 2007, p. 3, see above note 335; George Winterton, "Comparative Law Teaching", in *American Journal of Comparative Law*, 1975, vol. 23, p. 71.

[426] Winterton, 1975, p. 70, see above note 425. See also Max Rheinstein, "Teaching Comparative Law", in *University of Chicago Law Review*, 1938, vol. 5, p. 616; John R. Stevenson, "Comparative and Foreign Law in American Law Schools", in *Columbia Law Review*, 1950, vol. 50, p. 613.

[427] Otto Kahn-Freund, "Comparative Law as an Academic Subject", in *Law Quarterly Review*, 1966, vol. 82, p. 41; de Cruz, 2007, p. 5, see above note 335.

[428] Christian Starck, "Die Bedeutung der Rechtsdogmatik für die Rechtsvergleichung", in Frank Schorkopf and Christian Starck (eds.), *Rechtsvergleichung - Sprache - Rechtsdogmatik: Siebtes Deutsch-Taiwanesisches Kolloquium vom 8. bis 9. Oktober 2018 in Göttingen*, Nomos, Baden-Baden, 2019, p. 11. About the development, goals and methods of comparative criminal law, see the seminal study of Elbin Eser, "Strafrechtsvergleichung:

> In an ideal world, the architects of international criminal tribunals would draw upon the best examples of domestic institutional design from around the globe, suitably modified for the specialist task in hand. This, of course, is where Comparative Law should make its mark, not as the fountain of all wisdom, but as an indispensable contributor to an interdisciplinary conversation.[430]

Second, comparative law research can improve the understanding of law in context by explaining[431] reasons for differences and similarities.[432] Third, comparative law research can provide a tool of interpretation for judges,[433] since it is an important part of a broad contextual interpretation.[434] Fourth, comparative law research can facilitate a general jurisprudence,[435] and create a dogmatic, because it identifies the similarities of

Entwicklung – Ziele – Methoden", in Albin Eser and Walter Perron (eds.), *Strukturvergleich strafrechtlicher Verantwortlichkeit und Sanktionierung in Europa*, Duncker & Humblot, 2015, pp. 939–1112. For an instructive and comprehensive account of "comparative criminal justice" see Ambos, 2017, pp. 247–276, see above note 322. See also Burchard, 2017, pp. 277–313, see above note 20.

429 Cf. Malcolm M. Feeley, "Comparative Criminal Law for Criminologists: Comparing for What Purpose?", in David Nelken (ed.), *Comparing Legal Cultures*, Aldershot, Dartmouth, 1997, p. 93.

430 Mireille Delmas-Marty, "The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law", in *Journal of International Criminal Justice*, 2003, vol. 1, pp. 13–25.

431 For a discussion, strongly (and perhaps too exclusively) emphasising explanation as an essential objective of comparative studies, see John Henry Merryman, "Comparative Law and Scientific Explanation", in John N. Hazard and Wenceslas J. Wagner (eds.), *Law in the United States of America in Social and Technological Revolution*, Etablissements Emile Bruylant, Brussels, 1974, p. 81.

432 Esin Örücü, "Developing Comparative Law", in David Nelken and Esin Örücü (eds.), *Comparative Law – A Handbook*, Hart Publishing, Oxford and Portland, Oregon, 2007, pp. 53–4, 66; see also Walther Hug, "The History of Comparative Law", in *Harvard Law Review*, 1932, vol. 45, p. 1027.

433 Örücü, 2007, pp. 43, 55, see above note 432.

434 See above Section 4.4.3.

435 Cf. Röhl and Röhl, 2008, p. 9, see above note 180, with reference to Max Rheinstein, *Einführung in die Rechtsvergleichung*, second edition, C.H. Beck, Munich, 1987, p. 30 (the influence of Rheinstein on Comparative Legal Research and Law cannot be overstated, see Basil S. Markesinis, *Comparative Law in the Courtroom and Classroom*, Hart, Oxford, Portland, Oregon, 2003, p. 2 and *passim*). In a similar vein Lee, 2019, p. 27, see above note 352 ("Die Rechtsvergleichung dient einem ähnlichen Ziel, nämlich zwangsläufig der historisch-dogmatischen Rechtsmethodologie").

different legal systems.[436] For example, Röhl explicitly refers to the difference between common law and civil law,[437] and the challenges that come with Europeanisation and/or globalisation. Through comparative legal research, it is possible to establish a consistent meaning of legal terms or concepts.[438] Just as general jurisprudence does not reinvent the wheel and refers to existing theories, comparative law research encourages new courses of action that build on existing resources and potential.[439] Fifth, comparative law research facilitates the explanation of modes of thought.[440]

Consequently, the purpose of comparative law has an impact on its methods, which usually vary between "functional equivalence" and the "problem-oriented" approach, "model building" and "common core" studies, the "factual" approach and "method in action".[441] Because the purpose of comparative law is the understanding and explanation of differences and similarities, comparative method is an empirical and descriptive research design[442] that facilitates a general jurisprudence with regard to the systematisation of ICC procedure,[443] and eventually creates a Processdogmatic. It hopefully became clear by now that here comparative law research is being employed as an element of contextual interpretation and not a separate mode of interpretation.[444]

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436 Hans Nawiasky, *Allgemeine Rechtslehre als System der rechtlichen Grundbegriffe*, Benziger, Einsiedeln, 1948, p. 3.

437 Cf. Röhl and Röhl, 2008, p. 10, see above note 180.

438 Brugger, 1996, p. 237, see above note 313 ("If possible, legal terms or concepts should have consistent meanings in all the places where they are being used. At the very least, their meanings should not conflict! To the extent that social values are represented by these norms, legitimacy is also furthered").

439 Kagan, 2003, pp. 5–6, see above note 18.

440 Fikentscher, 2004, p. 44, see above note 377.

441 In detail Örücü, 2007, p. 48, see above note 432; Ambos, 2017, pp. 260–71, see above note 322.

442 *Ibid*.

443 William Twining has remarked that comparative lawyers are concerned "with description, analysis and explanation, rather than evaluation and prescription", see William Twining, *Globalisation and Legal Theory*, Butterworths, London, Edinburgh, Dublin, 2000, p. 185. For a "comparative contextual analysis" see Findlay, 2001, pp. 26, 31, above note 39.

444 Understood as a separate mode of interpretation, see Basil S. Markesinis, *Comparative Law in the Courtroom and Classroom*, Hart, Oxford, Portland, Oregon, 2003, p. 109 with further references.

Of all models, Damaška uses comparative law to the greatest extent and provides the most significant contribution to comparative justice studies in recent years.[445] His strength is that he combines the comparative law tradition of historical scholarship with a sociological analysis of contemporary justice.[446] His models provide a comparative tool for different procedural systems.[447] Damaška does not conduct a detailed study of different features of legal systems and therefore refrains from micro-comparison.[448] Instead, he conducts comparative modelling by creating "ideal-types",[449] that is, tools that are not systems themselves,[450] which I see as a certain type of macro-comparison.[451] Damaška found a way of highlighting the analytic and explanatory aspects of comparative law by creating models which entitle him to go beyond the usual "compare and contrast".[452] He moves the comparative debate "on to a search for what lies at the essence of the different systems and the underlying institutional

[445] Nijboer, 1997, pp. 125, 130–135, see above note 206; Feeley, 1997, pp. 93, 96, see above note 429; Eric G. Luna, "A Place for Comparative Criminal Procedure", in *Brandeis Law Journal*, 2003–2004, vol. 42, p. 285:

> The idea of comparative criminal procedure is certainly not new, nor is the summons for American academics to integrate the study of foreign penal practices into standard law school curriculum. During the 1970s, prominent legal scholars such as Mirjan Damaška, Abraham Goldstein, John Langbein, Rudolf Schlesinger, and Lloyd Weinreb were exploring the implications of a comparative approach to criminal procedure.

[446] Vogler, 2005, p. 8, see above note 133.

[447] Nijboer, 1997, p. 178, see above note 206.

[448] About micro-comparison see de Cruz, 2007, p. 233, see above note 335.

[449] Roberts, 2008, p. 300, see above note 215; see also Shapiro, 1987, p. 836, see above note 383 (Damaška "seeks to develop pure models for purposes of comparative analysis and so wishes to avoid creating two types of procedure labelled 'inquisitorial' and 'accusatorial.' He argues that those two labels have been too deeply infected with the actual practices of the Continent and the Anglo-American world to serve as tools of general comparative analysis").

[450] Nijboer, 1997, p. 178, see above note 206.

[451] Ragin and Zaret call this "Weberian comparison", see Ragin and Zaret, 1982–1983, p. 744, see above note 399 ("Recall that a key feature of the Weberian strategy is the goal of explaining diversity. [...] Invariant relationships between different causes and types of revolutions would be established by applying the method of agreement to each type and the indirect method of difference between types"). About macro- and micro-comparisons Lee, 2019, p. 34, see above note 352; Catherine Valcke, *Comparing Law: Comparative Law as Reconstruction of Collective Commitments*, Cambridge University Press, Cambridge, 2018, p. 213.

[452] Feeley, 1997, p. 95, see above note 429.

and political forces that divide them",[453] avoiding a mere "taxonomic" classification.[454]

Here emerges the inseparability of sociological methods and comparative law research: the comparison between ideal-types and empirical cases reveals adequate causes and aids the understanding of – in this case – legal or procedural systems.[455] By using Weberian ideal-types, Damaška followed Weber by recognising that the nature of a society's legal system is shaped by the individuals who dominate it.[456] Thus, he not only included the 'law in the books' and 'law in action', but also the 'law in minds', as comparative law research of criminal justice systems tend to overlook the actors involved in it and the society that forms the backdrop to these processes.[457] This approach of Damaška cannot be emphasised enough, since it may well be regarded as the essence of his work – the sociological, empirical, political and cultural dimension of his models that he developed to explain and describe a system becomes epistemologically valuable by Damaška's method of (macro)comparison. It is often overlooked that comparative analysis in the social sciences on the one hand and comparative analysis in the sociology of law on the other hand do not necessarily embrace the same analytical tools.[458] By creating ideal-types, Damaška acknowledged this and provided clear blueprints as analytical tools for his – as Feeley calls it – comparative sociolegal study.[459] This

[453] Jackson, 2008, p. 222, see above note 279.

[454] Shapiro, 1987, p. 837, see above note 383.

[455] Cf. Ragin and Zaret, 1982–1983, pp. 732, 748, see above note 399 ("Careful use of transhistorical propositions in formulating ideal types increases their heuristic value as middle-range concepts for comparative research"); Sanders, 2000, pp. 1544, 1552–3, see above note 58.

[456] Sanders, 2000, pp. 1546–7, see above note 58.

[457] Francis Pakes, *Comparative Criminal Justice*, fourth edition, Routledge Taylor & Francis, Oxford, 2019, pp. 4-5 ("Often history is important in order to understand how particular arrangements have come about in the first place. Criminal justice arrangements need to be contextualised so that we can understand how they work in relation to each other and how the nuts and bolts of arrangements fit together. We also need to find ways of deciding how criminal justice arrangements fit a country, a culture or a legal tradition").

[458] Feeley, 1997, p. 93, see above note 429.

[459] *Ibid*. ("Comparative lawyers bring their own understandings of the field when they embrace social science concerns, and social scientists do the same when they focus on law. But even within each field, even when there is conceptual clarity about scope, method and objective, there has been precious little scholarly, as opposed to practical, pay-off. Comparative sociolegal studies remain a problematic and ill-defined area of inquiry").

method even compensates for the empirical flaws of the system. In other words, because those flaws are inevitable when using a rather abstract concept, the empirical support for the veracity of the explanations of procedural forms is no longer weak but "vivid evidence of the models' functional utility: the discussion of procedural realities provides examples for the insights these tools can generate".[460] In this regard, Roberts cites Damaška's reference to Weber that such a world cannot be understood "without constructing analytical models through which to organise and interpret the empirical data which bombard our senses".[461] In conclusion, Shapiro evaluates the contribution of Damaška's works to comparative law research: "I do not see how anyone seriously interested in comparative law could avoid reading it".[462]

4.5. Summary

The most common labels and models that are employed to categorise the ICC's procedural system are the adversarial–inquisitorial and common law–civil law dichotomies respectively. I have shown how inconsistently those models are applied. Apart from the examples provided above, one last example of that inconsistent application is as follows: an ICTY President characterised the ICTY-RPE as "largely adversarial",[463] while others

[460] Reimann, 1988, p. 207, see above note 334. He continues: "In this regard, Damaska's achievement is impressive. Here the book fulfills its ambitious promise to lead the reader beyond the conventional perspectives".

[461] Roberts, 2008, p. 300, see above note 215.

[462] Shapiro, 1987, p. 837, see above note 383.

[463] Statement by the President Made at a Briefing to Members of Diplomatic Missions, UN Doc. IT/29 (1994), quoted in Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Transnational Publishers, Irvington-on-Hudson, New York, 1995, p. 650. Others agree with this characterisation, see Daniel D. Ntanda Nsereko, "Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia", in *Criminal Law Forum*, 1994, vol. 5, p. 508, stating that the ICTY "relied heavily on proposals from the U.S. government and from non-governmental organizations such as the U.S.-based Lawyers Committee for Human Rights"; Michael P. Scharf, "Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal", in *New York University Journal of International Law and Politics*, 1998, vol. 30, p. 171 and footnote 18, noting that a US draft provided the framework for ICTY rules. Fairlie follows from "party-driven proceedings" at the ICTY to a similar picture at the ICC through a staff-analysis:

> In 2009, for example, it was observed that 'a rather important number' of individuals working in the ICC's Office of the Prosecutor (OTP) had 'learned their skills during many years of ICTY or ICTR trial proceedings'. Since the same observations can be made of ICC defence counsel and the Court's judges, it stands to reason that this ad-

described them as continental in orientation.[464] Moreover, Kerper writes in all seriousness:[465] "Not all legal systems employ the adversary method of getting at the truth. In the Continental system of law, for example, the state is supposed to satisfy itself as to the guilt of the accused before it brings him to trial. Thus, when the trial begins he is presumed to be guilty, and must prove himself innocent".[466]

The consequences of this erroneous modelling are inconsistency and unpredictability of judgements and decisions – consequences that should not be underestimated. The reason for this is not that the 'adversarial-inquisitorial' and 'common-law–civil law' models are inadequate. In fact, it has become rather fashionable to reject the established dichotomy between inquisitorial and adversarial approaches altogether.[467] Yet, this division may in fact be useful in order to gain a better understanding of why certain procedural approaches are selected over others.[468] However, those who use these models have to clarify their meaning, as Langer did in the following example:

> In this sense, it is important to emphasize from the outset that I will use the expression 'adversarial system' as a descriptive category, not as a normative ideal. As a normative ideal, the expression is sometimes used in the United States to refer to a criminal procedure where the rights of the defendant are fully respected, see, e.g., Mirjan Damaska, Adversary System, 1 Encyclopedia of Crime and Justice 24, 25

versarial-oriented training has impacted how these individuals approach their work, as well as their views regarding how ICC trials ought to be conducted.

Megan A. Fairlie, "The Unlikely Prospect of Non-adversarial Trials at the International Criminal Court", in *Journal of International Criminal Justice*, 2018, vol. 16, p. 305 (footnote omitted).

464 See generally Diane Marie Amann, "Harmonic Convergence? Constitutional Criminal Procedure in an International Context", in *Indiana Law Journal*, 2000, vol. 75, pp. 843, 873.

465 Johannes Frederikus Nijboer, "The American Adversarial System in Criminal Cases: Between Ideology and Reality", in *Cardozo Journal of International & Comparative Law*, 1997, vol. 5, pp. 81, 96, remarks that this book was seriously used in law schools in the United States.

466 Hazel B. Kerper, *Introduction to the Criminal Justice System*, West Publishing, St. Paul, Minnesota, 1972, pp. 182–183.

467 See, for example, Sarah J. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, Hart Publishing, Oxford, 2007.

468 McGonigle Leyh, 2011, p. 69, see above note 41.

> (Sanford H. Kadish ed., 1983), and the epitome of the adversarial system is the trial by jury. However, in this Article, I will use the expression 'adversarial system' as a descriptive category through which I will explain the current features of American criminal procedure in opposition to the current features of criminal procedure in continental Europe and Latin America. Similarly, the expression 'inquisitorial system' is sometimes used in a negative way to refer to authoritarian conceptions of criminal procedure. But in this Article, I will use the expression 'inquisitorial system' only as a descriptive category.[469]

Unfortunately, such clear definitional remarks are rare. This results in the unreasonable depreciation (or preference) towards the other system or in the labelling of a system as 'hybrid', 'mixed' or '*sui generis*'. Both assumptions could be acceptable, if they were based on clarifications. Yet, they are mostly misleading as a descriptive matter, and of limited analytical use.[470] Thus, the use of those dichotomies should not be rejected altogether,[471] but is – at the same time – inadequate to model the ICC procedure.

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[469] Langer, 2004, p. 4 with footnote 20, see above note 112.

[470] Frase, 1998, p. 115, see above note 265 identifies a further disadvantage: "[T]hey tend to obscure the many points of underlying similarity shared by all modern systems of criminal justice".

[471] With regard to the undifferentiated refusal to use the adversarial-inquisitorial dichotomy (this refusal, by the way, is as unreasonable as the incorrect and undifferentiated use of those models), John D. Jackson, "The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?", in *Modern Law Review*, 2005, vol. 68, p. 746 makes an interesting remark:

> The real limitation in using 'adversarial' and 'inquisitorial' models as benchmarks for determining the extent to which systems are converging or diverging, however, is not that the models cannot encapsulate a wide variety of evidentiary processes evident across the common law and civil law divide, nor that there can be disagreements on how the terms 'adversarial' and 'inquisitorial' should be used and applied. There are difficulties endemic in any exercise which attempts to make cross-cultural comparisons between legal systems and so long as we are careful to explain what we mean by these terms, they can still be useful in analysing shifts in direction within and between systems. The limitation is that, however broadly we attempt to use the terms, they cannot claim to be comprehensive, all-inclusive categories and that by using them as though they were we may lose sight of certain processes at work which cannot be categorised as either 'adversarial' or 'inquisitorial' at all, no matter how broad or deep our perspective.

4.5.1. The Inquisitorial–Adversarial Dichotomy and Damaška's Concept

For this and other reasons, the appeal of the adversarial–inquisitorial distinction is decreasing and theoretical constructs designed to provide a broader perspective for procedural reforms are used instead.[472] After outlining those theoretical constructs above, Damaška's concept seems the most suitable for: a) the description of the ICC process; and b) to lay the foundation for a broad contextual interpretation. The strength of the model is that it allows for a holistic analysis or description of the criminal process, independent of its stages. Just because a procedural stage might appear in a certain setting (call it 'inquisitorial' or 'adversarial'), does not change the categorisation of the process as a whole. Quite the contrary, procedural stages are usually "assigned methodological subtasks" that differ from each other: "One stage can be devoted to the gathering and organization of relevant material, another to the initial decision, still another to hierarchical review, and so on, depending on the number of levels in the pyramid of authority".[473] *Prima facie*, this argument appears to resemble the familiar argument that different procedural stages may have different "objectives and procedural influences".[474] However, a procedural stage does not present some sort of autonomous, closed, Luhmannesque[475] system. Damaška too doubted the autonomy of procedural stages by acknowledging that a) in the hierarchical ideal, procedural stages are just part of a multi-layered hierarchy[476] (and are therefore – as already mentioned – assigned to "methodological *sub*tasks");[477] and b) the existence

[472] Damaška, 2001, p. 499, see above note 204; Nijboer, 1997, p. 178, see above note 206.

[473] Damaška, 1986, pp. 47–48, see above note 32.

[474] See, for example, Klamberg, 2013, p. 499, above note 142.

[475] See Niklas Luhmann, *Soziologische Aufklärung 1: Aufsätze zur Theorie sozialer Systeme*, eighth edition, Springer, Cham, 2009, p. 226; Gunther Teubner, *Recht als autopoietisches System*, Suhrkamp, Frankfurt, 1989; Niklas Luhmann, "Introduction to Autopoietic Law", in Niklas Luhmann (ed.), *Autopoietic Law: A New Approach to Law and Society*, De Gruyter, Berlin, 1988, pp. 1, 3; Niklas Luhmann, *Einführung in die Systemtheorie*, sixth edition, Carl-Auer, Heidelberg, 2011, p. 111.; Brian H. Bix, *Legal Theory*, OUP, Oxford, 2004, p. 18; Roger Cotterrell, "Law in Social Theory and Social Theory in the Study of Law", in Austin Sarat (ed.), *The Blackwell Companion to Law and Society*, Blackwell, Malden, 2007, pp. 16, 22; Clemens Mattheis, "The System Theory of Niklas Luhmann and the Constitutionalization of the World Society", in *Goettingen Journal of International Law*, 2012, vol. 4, no. 2, pp. 626 ff.

[476] Damaška, 1986, pp. 47–48, see above note 32.

[477] Emphasis added.

of procedural stages *per se* and the extent of their integration into the proceedings are already characteristics of a certain procedural model.[478] Thus, to treat procedural stages separately with regard to their objectives and characteristics is already constitutive of a certain procedural model. To do so would beg the question and only the application of an ideal-type model facilitates the prevention of such a circular argument.[479] I borrowed from legal theory or jurisprudence to choose a concept that is generally capable of creating a general jurisprudence for the ICC process, the Processdogmatic. Damaška provides such a concept.[480] His models provide a more differentiated picture than the adversarial-inquisitorial dichotomy does, but refrain from the attempt to increase comprehensibility by increasing the amount of models.[481] By including a great variety of elements, his concept is the closest to a general jurisprudence of the ICC procedure: he builds a bridge to political theory, is able to encapsulate the complexities of real legal processes,[482] and create models of relatively unusual combinations of features by using Weberian ideal-types.[483] His work is not a suggestion of what procedure should look like but how it could be modelled and analysed. He thus deviates from Burns, for example, whose concept is normative and highlights certain aspects of the trial that are only relevant for realising the practical intelligence of American juries in carefully qualified senses of that term.[484]

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478 Cf. Damaška, 1986, p. 57, see above note 32.

479 See below Section 4.5.2.

480 In a similar vein, Mitchel de S.-O.-l'E. Lasser describes Damaška's models as "unified field theory for comparative law", see Mitchel de S.-O.-l'E. Lasser, "On the Comparative Autonomy of Forms and Ideas", in Ackerman, Ambos and Sikirić (eds.), 2016, p. 303, see above note 21; Damaška, 1986, p. 73, see above note 32.

481 Jackson and Langer, 2008, p. 5, see above note 384 ("In addition, the combination of the organisation-of-authority and political-goal axes creates a bi-dimensional framework of analysis that offers a more nuanced and flexible alternative than the adversarial inquisitorial dichotomy").

482 Richard O. Lempert, "Anglo-American and Continental Systems: Marsupials and Mammals of the Law", in Jackson, Langer and Tillers (eds.), 2008, pp. 395, 413, see above note 16 ("Professor Damaška's great book, The Faces of Justice and State Authority, opened its readers' eyes to how Anglo-American and Continental legal procedures articulate with the societies in which they are found, and it alerted readers to issues that arise in considering this articulation").

483 Roberts, 2008, p. 299, see above note 215.

484 David J. Smigelskis, "Book Review: Realizing the Practical Intelligence of American Juries", in *Northwestern University Law Review*, 2000–2001, vol. 95, p. 1017; Ronald L.

Damaška's models embrace the differences of legal thought between common law and civil law. This demonstrates the aforementioned utility of those dichotomies, not as models in themselves, but as features of Damaška's ideal-types. The combination of sociological, empirical and political elements with the use of ideal-types allows an insight that the nature of a society's legal system is shaped by the kinds of individuals who dominate it.[485] This is the basis for a contextual interpretation incorporating the internal system of procedural rules.[486]

4.5.2. Predictability and Weberian Ideal-Types

There is an important connection between Weber's ideal-types on the one hand and the predictability of procedural decisions on the other. According to Weber, the creation of ideal-types and the comparison of certain events with this ideal-type, facilitates the rational assessment of those events as a whole[487] and the exclusion of irrational moments.[488] Applied to the analysis of a legal system: a legal system is rational if it yields results that are predictable from the facts of cases, that is, if case outcomes are determined by the reasoned analysis of action in light of a given set of norms.[489] In other words: Rationality is promoted by the Rule of Law[490]

Carlson, "A Theory of the Trial", Book Review, in *Justice Systems Journal*, 2001, vol. 22, p. 101.

485 Sanders, 2000, pp. 1546–7, see above note 58, giving the following example:

> On the European continent, in the absence of a powerful central court, domination fell into the hands of the university law faculties who strove, through the promulgation and interpretation of authoritative texts, to create and understand the legal system as a general and autonomous set of rules. The common law in England, on the other hand, grew under the tutelage of a small elite judiciary and an accompanying centralized bar, more concerned with pronouncing rules for the settlement of disputes than with developing generalized rules of law. In time, the differences in the legal systems created by these different sets of legal actors helped to spur interest in comparative legal systems.

486 Cf. Heinze, 2014, p. 200, see above note 23.

487 Max Weber, *Wirtschaft und Gesellschaft – Grundriß der verstehenden Soziologie*, fifth edition, Mohr, Tübingen, 1985, p. 2; Alexander von Schelting, "Die logische Theorie der historischen Kulturwissenschaft von Max Weber und im besonderen sein Begriff des Idealtypus", in *Archiv für Sozialwissenschaften und Sozialpolitik*, 1922, vol. 49, pp. 623–752.

488 Pfister, 1928, see above note 406; see also Petersen, 2020, pp. 110–111, see above note 393; Carlson, 2018, p. 76, see above note 9.

489 See already Oliver Wendell Holmes, "The Path of the Law", in *Harvard Law Review*, 1897, vol. 10, pp. 857–858: "Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system". On Holmes' insistence on this systemic ele-

and is a prerequisite for process legitimacy.[491] A legal system is irrational when outcomes are not predictable in this way.[492] In other words, the use of Weber's ideal-types shall ensure that similar cases are decided similarly.[493] Nevertheless, creating ideal-types is not only a reaction to my demand of predictability, but also reflects a contextual method of interpretation, since creating types has always been the challenge of legal methodology.[494] In contrast to a 'definition', where every requirement or element

ment see Jeremy Waldron, "'Transcendental Nonsense' and System in the Law", in *Columbia Law Review*, 2000, vol. 100, pp. 16, 26 (with footnote 41). See also Susan Haack, "The Pragmatist Tradition: Lessons for Legal Theorists", in *Washington University Law Review*, 2018, vol. 95, pp. 1049 ff. The restoration of law's predictability is one of the features of legal realism, see Dagan Hanoch, "Doctrinal Categories, Legal Realism, and the Rule of Law", in *University of Pennsylvania Law Review*, 2015, vol. 163, pp. 1889, 1896 with further references. I wish to emphasize, however, that my advocacy for an application of a contextual interpretation to ensure consistency and predictability is not a portrayal of the Realists' demand for predictability. In fact, it could not be farther away from it, since Realists "were concerned with prediction because of its practical significance for lawyers advising clients, not because they were advancing semantic claims about how we use words", see Brian Leiter, "Legal Realism", in Christopher Berry Gray (ed.), *The Philosophy of Law*, *Vol. II*, Garland, New York and London, 1999, pp. 720, 724.

490 In more detail Alexander Heinze, 2020, p. 657 *et seq.*, above note 300.

491 Alexandre Skander Galand, "A Global Public Goods Perspective on the Legitimacy of the International Criminal Court", in *Loyola of Los Angeles International and Comparative Law Review*, 2018, vol. 41, p. 125, 152.

492 Sanders, 2000, p. 1546, see above note 58.

493 *Ibid.*:

> A formally irrational system exists when the legal order produces results unconstrained by reason. Classic examples are judgments following consultation with an oracle or trial by ordeal. Substantive irrationality exists when lawmakers and finders do not resort to some dominant general norms but, instead, act arbitrarily or decide upon the basis of an emotional evaluation of a particular case. Weber apparently had in mind the justice dispensed by the Khadi, a Moslem judge who, at least as Weber saw him, sat in the marketplace and rendered judgment by making a free and idiosyncratic evaluation of the particular merits of each case.

494 Detlef Leenen, *Typus und Rechtsfindung – Die Bedeutung der typologischen Methode für die Rechtsfindung dargestellt am Vertragsrecht des BGB*, Duncker & Humblot, Berlin, 1971; see also Hassemer, 1968, pp. 109–148, see above note 76; Klaus-Dieter Drüen, "Typus und Typisierung im Steuerrecht", in *Steuer und Wirtschaft*, 1997, pp. 261–274; Martin Strahl, *Die typisierende Betrachtungsweise im Steuerrecht*, Arbeitskreis für Steuerrecht, Köln, 1996; Carl Gustav Hempel and Paul Oppenheim, *Der Typusbegriff im Lichte der neuen Logik*, A.W. Sijthoff's uitgeversmaatschappij n. v., Leiden, 1936; Hans Julius Wolff, "Typen im Recht und in der Rechtswissenschaft", in *Studium Generale*, 1952, vol. 5, pp. 195–205; Ingeborg Puppe, "Der Typusbegriff, eine Denkform?", in Roland Hefendehl, *et al.* (eds.), *Streitbare Strafrechtswissenschaft: Festschrift für Bernd Schünemann zum 70 Geburtstag am 1 November 2014*, Duncker & Humblot, Berlin, 2014, pp. 221 *et seq*.

has to be on hand,[495] a type is an "elastic framework of characteristics" (*elastisches Merkmalsgefüge*), to which a certain situation merely needs to correspond as a whole,[496] while it is not necessary that all elements have to be on hand.[497] Thus, what matters is not only the overall picture[498] but the reality aspect (Wirklichkeitsbezug): a type "transcends" the system.[499]

A final remark: it can hardly be denied that international criminal trials suffer from the shortcomings Jeremy Betham so famously – and certainly polemically – assigned to the common law: unpredictability, legal uncertainty and costliness.[500] Thus, the demand for consistency and predictability of ICC decisions is the overriding objective of this chapter. I have repeatedly stressed that *because* predictability and consistency is needed (the Rule of Law), a broad contextual interpretation is necessary. And *because* this interpretation is necessary, a concept to systematise the process is needed. This is obvious: it all relates to the demand for certainty, predictability and consistency. Admittedly, however, this is a *circulus vitiosus*: certainty, consistency and predictability are important features in both civil law and common law traditions. Yet, their role and the way those features are implemented in those traditions differ: in common law, many of the features are usually discussed in more functional terms and are elevated to the level of dogma.[501] They are also achieved by giving the force of law to judicial decisions, something theoretically forbidden in

[495] Karl-Heinz Strache, *Das Denken in Standards. Zugleich ein Beitrag zur Typologie*, Duncker & Humblot, Berlin, 1967; Lothar Kuhlen, *Typuskonzeptionen in der Rechtstheorie*, Duncker & Humblot, Berlin, 1977; *idem*, "Die Denkform des Typus in der juristischen Methodenlehre", in Hans-Joachim Koch (ed.), *Juristische Methodenlehre und analytische Philosophie*, Athenäum Verlag, Kronberg, 1976, pp. 53–69; Reinhold Zippelius, "Die Verwendung von Typen in Normen und Prognosen", in Paul Bockelmann (ed.), *Festschrift für Karl Engisch zum 70. Geburtstag*, Klostermann, Frankfurt, 1969, pp. 224–242; Reinhold Zippelius, "Der Typenvergleich als Instrument der Gesetzesauslegung", in *Jahrbuch für Rechtssoziologie und Rechtstheorie*, 1972, vol. 2, pp. 482–490.

[496] Karl Larenz, *Methodenlehre der Rechtswissenschaft*, sixth edition, Springer, Berlin, 1991, p. 200.

[497] Leenen, 1971, pp. 28, 34 ff., see above note 494.

[498] Larenz, 1991, p. 451, see above note 496; see generally Petersen, 2020, p. 122, above note 393.

[499] Hassemer, 1968, pp. 109–148, see above note 76.

[500] See, for instance, KWON O-Gon, "The Challenge of an International Criminal Trial as Seen from the Bench", in *Journal of International Criminal Justice*, 2007, vol. 5, pp. 360, 364 ff.; Swoboda, 2013, p. 391, see above note 75.

[501] For the example of "certainty", see Merryman and Pérez-Perdomo, 2019, pp. 48–56, see above note 41.

civil law.[502] In common law, consistency is usually achieved by precedent – a feature that in this form[503] exists neither in civil law nor at the ICC. Thus, the demand for certainty, consistency and predictability *as a dogma* implies *a priori* that the ICC process is shaped according to civil law. Rechtsdogmatik is inbuilt in the civil law tradition, it ensures coherence[504] and consistency – *nulla doctrina iurista sine prudens iurista*.[505] The way the classification of the criminal process is conducted is thus already indicative of a certain tradition or design. It renders classification somewhat arbitrary. To recall the remark of a former ICTY-judge mentioned at the outset of this chapter: "The conflict between civil and common law is overstated".[506]

4.5.3. Finding or Justification

Legal jurisprudence distinguishes between methods of interpretation that are directed at the 'finding' of the law (*Rechtsfindung*) and those that are directed at the justification of the law (*Rechtsbegründung*).[507] In more concrete terms, it is said that lawyers, especially judges, justify their decisions to the outside in order to appear to comply with the rule of law, but actually find (that is, reach) those decisions in another way, namely intuitively, instinctively, based on their sense of justice or on common

[502] *Ibid*., p. 49.

[503] Wolfgang Alschner and Damien Charlotin, "The Growing Complexity of the International Court of Justice's Self-Citation Network", in *European Journal of International Law*, vol. 29, 2018, p. 106 ("Adversarial common law systems rely heavily on the argumentative use of precedent, while inquisitorial civil law systems tend to use precedent more formalistically. International courts are an amalgamation of these traditions and can be placed somewhere in between argumentative and ritualistic extremes" (footnote omitted)). Samuel clarifies: "There is a temptation to view the notion of precedent as being as old as the common law itself. This is misleading because up until the 16th century the most important decisions were taken, in the common law courts, by the jury, who did not give reasons for their verdicts", see Geoffrey Samuel, *A Short Introduction to Judging and to Legal Reasoning*, Edward Elgar, Celtenham, Northampton, 2016, p. 26.

[504] It should be emphasised, though, that an uncritical demand for coherence leads – according to Schlag – to certain "side effects", see Schlag, 1988, p. 959, see above note 267.

[505] Lee, 2019, p. 39, see above note 352.

[506] See above note 15 and text thereto.

[507] However, see Scott J. Shapiro, *Legality*, The Belknap Press of Harvard University Press, Cambridge and London, 2011, p. 248: "The object of legal reasoning is the discovery of the law".

sense.[508] Accordingly, the justification of a decision has merely a secondary function, since it rationalises *a posteriori* a by itself irrational decision and, at its highest, performs a control function.[509] Ideally, the judge's justification of a decision constitutes a logically flawless conclusion.[510] According to Popper, methods of interpretation can only be directed at the justification of a decision, but never at its finding.[511] This differentiation between a finding and the justification of a decision has several shortcomings.[512] The greatest danger that may be caused by the artificial separation of a legal finding and legal justification are so-called pseudo-justifications (*Scheinbegründungen*).[513]

I would not like to delve deeper into the discussion of whether justification for and the legal finding of a decision can in fact be separated.[514] The answer to this question largely depends on whether the judge seeks

[508] See for example, Hermann Isay, *Rechtsnorm und Entscheidung*, Verlag Franz Vahlen, Berlin, 1929, pp. 56 ff.; Kargl, 2019, mn. 661, see above note 257: "[D]ie Wirklichkeit richterlicher Tätigkeit [beruht] zu einem guten Teil auch auf pragmatischen Handlungsmustern, die nicht nur auf der Ebene der Begründung der Entscheidung, sondern bereits im Zeitpunkt der Rechtsfindung wirksam sind"; about the justification of decisions, especially of factual determinations and value judgements, see Ingeborg Puppe, "Feststellen, zuschreiben, werten: semantische Überlegungen zur Begründung von Strafurteilen und deren revisionsrechtlicher Überprüfbarkeit", in *Neue Zeitschrift für Strafrecht*, 2012, 409–414.

[509] See, for example, Isay, 1929, pp. 177 ff., see above note 508.

[510] Puppe, 2012, p. 410, see above note 508. Puppe believes that the requirements imposed on the judge's justification differ with respect to factual judgements on the one hand and value judgements on the other hand: while a factual decision can be wrong or correct and is justified by giving evidence of that decision, a value judgement can be plausible or implausible and is justified by convincing another person of the judgement's accuracy: *ibid.*, p. 413.

[511] See Karl Popper, *Logik der Forschung*, eleventh edition, Mohr Siebeck, Tübingen, 2005, pp. 7–8.

[512] See Engisch, 2010, pp. 92 ff., see above note 327.

[513] See generally Fritz Brecher, "Scheinbegründungen und Methodenehrlichkeit im Zivilrecht", in Eduard Bötticher (ed.), *Festschrift für Arthur Nikisch*, Mohr, Tübingen, 1958, pp. 227–247; Wilhelm A. Scheuerle, "Finale Subsumtionen - Studien über Tricks und Schleichwege in der Rechtsanwendung", in *Archiv für die Civilistische Praxis*, 1967, vol. 167, p. 305; Martin Kriele, *Theorie der Rechtsgewinnung – entwickelt am Problem der Verfassungsinterpretation*, second edition, Duncker & Humblot, Berlin, 1976, pp. 218 ff.; Heinze, 2014, pp. 175–176, see above note 23.

[514] In favour of a separation see, for example, Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung*, second edition, Athenäum-Verlag, Frankfurt, 1970, pp. 132 ff., 175 ff. Against a separation see Engisch, 2010, pp. 92 ff., see above note 327. See also Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft*, third edition, Springer, Berlin *et al*., 1995, pp. 210–211.

the "right answer"" or only the "correct answer".[515] In his article "A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment",[516] Damaška explained that there was a reversible relationship between the nature of a legal system and patterns of legal education: "The Continental will seek the right solution; his counterpart will display a liberal agnosticism about 'right' answers, coupled with a procedural outlook. He will be primarily concerned about good arguments for a case".[517] This is why Weber denied the common law the rationality of finding a legal decision, and stated that the English finding of justice cannot be qualified as "applying the law", as the civil law does via logic.[518]

In a somewhat deconstructionist reading, it might well render attempts to solve the right answer or correct answer conundrum fruitless, if an author disregards his or her own legal background. Bix was aware of that, when he remarked:

> [M]y examples are all drawn from the American legal system, and I do not presume that they exemplify any (necessary or essential) aspect of all legal systems. I see no reason to believe that […] the dynamics within the structure (the criteria of evaluation used within the system that sometimes allow one to speak of there being more than one correct – or 'acceptable' – answer to a legal question) are present in all other, or even most other, legal systems. […] It is conceivable that someone could put forward an argument that systems which condone strong discretion by their decision makers, or that are structured in such a way that there are *not* always unique correct answers to legal problems, are not 'really' *legal* systems (or not legal systems 'in the fullest sense of the term').[519]

As a result, according to Whitman, Hart and Dworkin "have limited themselves to the Anglo-American tradition they know".[520] However, this

[515] In a similar vein, see Engisch, 2010, p. 95, see above note 327.

[516] Mirjan Damaška, "A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment", in *University of Pennsylvania Law Review*, 1968, vol. 116, pp. 1363–78.

[517] *Ibid*., p. 1375.

[518] Weber, 1985, p. 510, see above note 487. See also Petersen, 2020, p. 47, see above note 393.

[519] Brian H. Bix, Law, *Language and Legal Determinacy*, Clarendon Press, Oxford and New York, 1993, p. 95.

[520] Whitman, 2008, p. 371, see above note 412.

does not change the fact that the approach to that question is indeed dependent on the legal tradition. 'Approach' in this regard means that the question is not whether there *are* right or correct answers. The way to ensure certainty, consistency and predictability would be to create a legal system in which there are unique correct answers to all legal questions.[521] However, even authors from a civil law tradition have labelled this as rather naive.[522] Instead, the question is whether to *seek* right answers. As Whitman puts it:

> The Continental systems tend to seek answers that are not only *correct* but also *definitive*. They tend to treat the rule of law as requiring that all legal officials will generally produce the same answer to any given question. Other legal traditions, including the American, tend to devote themselves to the search for *correct* answers in a way that largely excludes the possibility that those answers could be *definitive*.[523]

This difference is not a mere theoretical one, but has large practical implications: it makes assertions about the extent of judicial authority;[524] the "grammar of law"[525] or structural concepts, respectively;[526] predicta-

[521] Cf. *ibid*., p. 374.

[522] *Ibid*., p. 377.

[523] *Ibid*., p. 371. See also Reinhard Zimmermann, "Civil Code or Civil Law – Towards a New European Private Law", in *Syracuse Journal of International Law & Commerce*, 1994, vol. 20, p. 218:

> This way of 'Europeanizing' our private law has been highly unsatisfactory so far. We are dealing with no more than fragments of uniform law, inserted rather inorganically, and in a 'higgledy-piggledy' fashion, into the various national legal systems. Rather than having gained in coherence, rationality, and predictability, the law has tended to become disjointed. Its application has not been streamlined, but has, instead, acquired a new dimension of complexity.

[524] Whitman, 2008, p. 378, see above note 412:

> Anglo-American philosophers give the impression of being far less concerned with the dangers of judicial authority. For Continentals, especially but not exclusively the French, the problem of right answers has always been, at base, the problem of limiting the scope of judicial decision-making authority. The Continental tradition presupposes a kind of sharp tension between rule of law and rule of men. Correspondingly, for Continentals, any maximalist understanding of judicial discretion smacks of philosophical radicalism. Anglo-American philosophers, by contrast, are generally relatively untroubled by judicial authority.

[525] Damaška, 1968, p. 1365, see above note 516.

[526] Whitman, 2008, pp. 371, 380, see above note 412 ("Indeed, Americans were 'sceptical at best of the usefulness of the curious conceptual structure[s]' of the Continent. Instead, they

bility;[527] certainty;[528] and the manner of decision-making.[529] What has already been mentioned by describing the different modes of thought of common and civil lawyers,[530] now has a reciprocal dimension: the *classification* of the criminal process before the ICC depends on the identification of certain inherent elements such as the serach for the right or correct answer , the manner of decision-making, and the commitment to certainty, predictability and consistency. The identification of these elements, in turn, depend on the classification of the system. In other words, while in domestic legal systems the method of legal thinking is rather fixed (because it is influenced by a legal tradition that has evolved over centuries and shaped the minds of the individuals), at the ICC, the method of legal thinking must be determined first (because a legal tradition has not grown over centuries but must be created). England, for instance, faces great difficulties under the Human Rights Act 1998, as English criminal law must now deal with Continental concepts of "legality" and "certainty" that have no place in its jurisprudence.[531] Furthermore, recall the quote of Merryman: "Thus, the desire for certainty is an argument in favor of *stare deci-*

devoted themselves to an argumentative mode, seeking the 'best arguments' for a given case. And panoramic views were nowhere to be found").

527 Kagan, 2003, p. 110, see above note 18:

> In all legal systems most civil cases are settled before trial, as the litigants, advised by their lawyers, come to recognize what their chances would be in court. The cases that go to adjudication are likely to be those in which litigants can't agree on the likely outcome. Hence in all countries the cases that reach adjudication involve a relatively large amount of legal uncertainty. Yet, it appears that legal unpredictability in the civil justice systems of the United States […] is greater than in many other economically advanced democracies.

528 According to Whitman, 2008, pp. 371, 382, see above note 412, Europeans are "far more committed than Americans to minimising uncertainty to the extent possible".

529 *Ibid*., p. 385:

> The American common law often looks a caricature of the common law tradition, and this is also true of our jurisprudence. American courts take the case-law approach utterly seriously: We are trained to decide the case before us using the most minimal possible jurisprudential means. […] The consequence of this American minimalism is that courts scrupulously avoid exploring all the issues presented by any particular area of law. Indeed, it is common for our Supreme Court to 'reserve' questions – that is, to refuse expressly to decide important questions raised by the case before the Court.

530 See above Section 4.2.1.

531 According to Whitman, 2008, pp. 371, 387, see above note 412.

sis in the common law tradition, whereas it is an argument against *stare decisis* in the civil law tradition".[532]

4.6. Conclusion

In sum, the systematisation of ICC procedure (using Damaška's models) not only specifies a contextual interpretation of certain procedural rules, but also determines whether it is permissible to interpret the rules differently, depending on which Chamber deals with them. Indeed, should the result be that such inconsistency is permissible, the implications a systematisation will have on a contextual interpretation lose their practical relevance. However, anything other than accepting those consequences would create the spirit of bias that inhabits the many quotes and decisions I have previously labelled as misleading taxonomies. It thus goes without saying that this chapter – and this cannot be emphasised enough – is not, or at least not only, a platform to highlight the superiority of Damaška's procedural models in providing a *Rechtsdogmatik* for the ICC process; it is first and foremost a reminder of what international criminal scholarship is about: candor and transparency. It might be unwise to close with a general critique of the state of international criminal (procedure) scholarship – even though the chapter started with the same. This is a topic for another chapter. Yet, when terms such as 'common law' and 'civil law' or 'inquisitorial' and 'adversarial' are used, the author must show transparency as to its assigned meaning and as to its own role. Let us call it definitional transparency and role transparency. The lack of the former may lead to a bad argument, since it questions the validity of the premise.[533] Without both, every attempt at classifying the ICC process by using terms such as 'common law' or 'civil law' is done as an end in itself, without any communicative value and superior goal. It is nothing more than a deconstructionist endeavour and might as well end there, given that anyone reading the words 'common law' and 'civil law' inevitably brings their "own underlying implicit assumptions to the interpretive process" and controls the meaning of those words.[534] As popular as this indeterminist and almost

[532] Merryman and Pérez-Perdomo, 2019, p. 49, see above note 41.

[533] See above note 268.

[534] Peter C. Schanck, "The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories", in *University of Kansas Law Review* (1988-1990), vol. 38, p. 815, 825; Stanley Fish, *Doing What Comes Naturally,* Duke University Press, Durham, 1989/1995, pp. 42-44; Jonathan Culler, *Dekonstruktion*, Rowohlt, Reinbek bei Hamburg, 1988, pp. 36 *et seq*., 81-86.

nihilist[535] view may be in postmodernist times,[536] when words themselves no longer signify any kind of objective reality, it defeats the purpose of international criminal discourse. Surely, especially on the international level words can hardly carry the claim of objectivity or even universality like Plato's *universalia ante rem*.[537] Subjectivity is a given in the pluralistic regime of international criminal justice.[538] where decision makers from different backgrounds and legal traditions decide hard cases. Yet, the terms used should at least be made sufficiently transparent to be fully grasped by the recipient of the communication.[539] As it has been emphasised throughout the paper, the transparency includes a) good and patient research to avoid missing how an argument is undermined "by an entire area of thought that the author ignores",[540] and to avoid emphasising the differences rather than similarities; b) an appreciation of other opinions and views; and c) a disclosure of methodology. Especially the emphasis of differences creates the temptation of using 'Common Law' and 'Civil Law' as false alternatives, as I called it, and thus using those categories for a strawman argument.

This transparency does of course not require extensive terminological elaborations – after all, time and space constraints are reign over any kind of discourse outcome. It is sufficient to consider the envisaged "interpretive community", a concept that postmodernist literary criticism that Stanley Fish promoted[541] - drawing on Peirce[542] and deviating from earli-

535 Paul D. Carrington, "Of Law and the River", in *Journal of Legal Education*, 1984, vol. 34, pp. 222, 227 *et seq*.; Owen M. Fiss, "The Death of the Law?", in *Cornell Law Review*, 1986, vol. 72, p. 1, 10; Schanck, 1988-1990, p. 825, see above note 534.

536 About post-modernism and comparative law Basil S. Markesinis, *Comparative Law in the Courtroom and Classroom*, Hart, Oxford, Portland, Oregon, 2003, pp. 51 *et seq*.

537 Felix Ekardt and Cornelia Richter, "Ockham, Hobbes und die Geburt der säkularen Normativität", in *Archiv für Rechts- und Sozialphilosophie*, 2006, pp. 552 *et seq*.

538 About pluralism of the international political system in general Alec Stone Sweet, "Constitutionalism, Legal Pluralism, and International Regimes", *Indiana Journal of Global Legal Studies*, 2009, vol. 16, pp. 621, 632 *et seq*.; Jean L. Cohen, "Constitutionalism beyond the State: Myth or Necessity? (A Pluralist Approach)", *Humanity,* 2011, pp. 127, 128-129.

539 Paul Horwitz, "Institutional Pluralism and the (Hoped-for) Effects of Candor and Integrity in Legal Scholarship", in *Marquette Law Review*, 2018, vol. 101, p. 925, 937.

540 Francis, 2018, p. 1035, see above note 205.

541 Fish, 1989/1995, pp. 25, 69, see above note 534; Stanley Fish, *Is there a text in this class*, Harvard University Press, Cambridge, Mass., 1980, pp. 14-15.

542 Charles Sanders Peirce, *Peirce on Signs: Writings on Semiotic*, edited by James Hoopes, University of North Carolina Press, Chapel Hill, 1991.

er deconstructionist views. *In concreto*, both decision makers and scholars are part of a certain (ideal type)[543] community of interpreters that curtails their subjective interpretations – as part of a cultural context[544] – and even obliges them to interpret legal terms in a certain way.[545] Thus, as done in this chapter, the search for the meaning of 'common law' and 'civil law' must start with a linguistic and cultural understanding of these words to discover their *Realdefinition*.[546] To determine the interpretive community,[547] the author must demonstrate role transparency: The requirements to definitional transparency are dependent on the author's role (that, in turn, determines the interpretive community). Concretely speaking, the extent an author is obliged to define terms such as 'common law' and 'civil law' is derived from the author's role as judge, attorney, academic, activist,

[543] William S. Blatt, "Interpretive Communities: The Missing Element in Statutory Interpretation", *Northwestern University Law Review*, 2001, vol. 95, p. 629, 641.

[544] Blatt, 2001, p. 664, see above note 543.

[545] Fish, 1989/1995, pp. 25 *et seq*., see above note 534; Stanley Fish, *Is there a text in this class*, Harvard University Press, Cambridge, Mass., 1980, pp. 14-15; Vera Willems, "International Courts and Tribunals and Their Linguistic Practices: A Communities of Practice Approach", in *International Journal for the Semiotics of Law,* 2017, vol. 30, p. 181, 183.

[546] *Cf.* Peter C. Schanck, "Understanding Postmodern Thought and its Implications for Statutory Interpretation", in *South California Law Review*, 1991-1992, vol. 65, p. 2505, 2590.

[547] There is a small but growing body of literature on *epistemic* communities in International (Criminal) Law, also known as the "invisible college" of international lawyers, see Claus Kress, "Towards a Truly Universal Invisible College of International Criminal Lawyers", *FICHL Occasional Paper Series No. 4* (2014); Hugh Thirlway, *The Sources of International Law*, second edition, Oxford University Press, Oxford, 2019, p. 146; Mikkel Jarle Christensen, "The Judiciary of International Criminal Law", in *Journal of International Criminal Justice*, 2019, vol. 17, p. 537, 540; Nora Stappert, "A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals", in *Leiden Journal of International Law*, 2018, vol. 31, p. 963, 966. A critical account is provided by Anthea Roberts, Is International Law International?, Oxford University Press, New York, 2017, pp. 6 et seq. and reviews by ZHU Lu in *Chinese Journal of International Law*, 2019, vol. 18, pp. 1009–1012 and Andrea Leiter in Melbourne Journal of International Law, 2018, vol. 19, pp. 413–422; Gleider Hernández, "E Pluribus Unum? A Divisible College?: Reflections on the International Legal Profession", in *European Journal of International Law*, 2018, vol. 29, pp. 1003–1022. From a gender-based perspective: Nienke Grossman, "Shattering the Glass Ceiling in International Adjudication", in Virginia Journal of international Law, 2017, vol. 56, pp. 340–406. Specifically tailored to the ICC, Nerlich introduces – borrowing from the US Supreme Court – the term 'audience', which seems to be a broader concept of 'interpretive community', see Volker Nerlich, "Audiences of the International Criminal Court", in International Criminal Law Review, 2019, vol. 19, pp. 1046–1056. Yet, Nerlich's approach lack's an engagement with existing concepts (such as epistemic and interpretive communities).

citizen etc. – and not only from the discourse's platform. That means – and here the chapter ends with a more or less subtle critique after all – that the requirements of candour and transparency are not only determined by the expected audience and thus the format of the publication as op-ed, tweet, article, book or judgment, but also by the role of the author.[548]

[548] See the detailed and instructive critiques by Horwitz, 2018, pp. 925 et seq., see above note 539 and Franz Josef Lindner, *Rechtswissenschaft als Metaphysik*, Mohr Siebeck, Tübingen, 2017, pp. 11 *et seq*.

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Power in International Criminal Justice

Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (eds.)

This book comprehensively explores the role and manifestations of power in international criminal justice. Twenty chapters discuss this topic in four main parts: power in international criminal justice institutions (Part I), representational power in international criminal justice (Part II), state power and autonomy in international criminal justice (Part III), and non-state power and external agents in international criminal justice (Part IV). The book invites the crystallisation of a sociology of international criminal justice, and argues that among its focuses should be the wielding of power within and over international criminal justice institutions, just as this is a feature of sociology of law within several countries.

The contributors to this anthology are Marina Aksenova, Mayesha Alam, Helena Anne Anolak, David Baragwanath, Morten Bergsmo, Mikkel Jarle Christensen, Marieke de Hoon, Djordje Djordjević, Gregory S. Gordon, Jacopo Governa, Alexander Heinze, Emma Irving, Mark Klamberg, Sarah-Jane Koulen, Kjersti Lohne, Christopher B. Mahony, Jolana Makraiová, Jackson Nyamuya Maogoto, Benjamin Adesire Mugisho, Tosin Osasona, Sara Paiusco, Barrie Sander, Joachim J. Savelsberg, Jacob Sprang, Chris Tenove and Sergey Vasiliev. The chapters draw on papers presented at a conference held in Florence in October 2017 co-organized by the Centre for International Law Research and Policy (CILRAP) and the International Nuremberg Principles Academy.

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candidate for Prosecutor at the end of their term.

252. The Experts recognise the difficulty of applying a new tenure system to staff already in the Court, so they suggest that the system be applied only to new recruitments for P-5 and Director-level positions as these come vacant. This would not preclude the Court from encouraging senior staff who have served in the Court for a long time to consider taking early retirement, including through offering financial packages.

253. Notwithstanding that this would not apply to existing staff, there is likely to be considerable resistance to the introduction of tenure in many parts of the Court (even if there is also some enthusiasm for this approach in other quarters). But it is th this is a measure essential to addressing effectively a r knesses of the Court. Not least it would bring fresh ap well as more dynamism into the Court across all its Organs.

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