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Integrity in International Justice

Morten Bergsmo and Viviane E. Dittrich (editors)

E-Offprint:

Alexander Heinze, "Private International Criminal Investigations and Integrity", in Morten Bergsmo and Viviane E. Dittrich (editors), *Integrity in International Justice*, Torkel Opsahl Academic EPublisher, Brussels, 2020 (ISBNs: 978-82-8348-190-7 (print) and 978-82-8348-191-4 (e-book)). This publication was first published on 19 November 2020.

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Front cover: *Sir Thomas More (1478-1535) painted by the German artist Hans Holbein the Younger (1497-1543) in the late 1520s. Sir Thomas More is discussed extensively in this book as a symbol of integrity in justice.*

17

Private International Criminal Investigations and Integrity

Alexander Heinze*

17.1. Introduction

Private investigators have always created a certain admiration and fascination. In fact, informed by famous writers such a Sir Arthur Conan Doyle, in the eyes of their readers – and the public in general – private investigators are the real heroes of crime novels, usually solving a case that eventually brings fame not to themselves but to the police detective they are working with. Thus, Inspector Lestrade has Sherlock Holmes and Leland Stottelmeyer has Adrian Monk. Not to forget all those private investigators who generally assist the local police, such as Jane Marple and Hercule Poirot. And then there are those who conduct 'investigations' in a broad sense, even though it seems counter-intuitive to classify them as private investigators: Bruce Wayne aka Batman; John Shaft; the A-Team; Christian Wolff aka "The Accountant"; Tintin, the young Belgian reporter; Mikael Blomkvist, journalist and the main character in Stieg Larsson's Millennium series; and April O'Neil, anchor-woman for Channel 6 News in the 1987-1996 animated Teenage Mutant Ninja Turtles series.

The appeal of private investigations has now reached the field of international criminal justice. For instance, the work of the Commission for International Justice and Accountability ('CIJA') has attracted some attention, also in connection with recent universal jurisdiction cases concerning Syria. Of course, investigatory work done by private non-State agencies is

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not novel as there are countless non-governmental organisations ('NGOs') and inter-governmental organizations ('IGOs') who collect evidence to be used before international(ised) criminal tribunals ('ICTs') or before a national court trying international crimes. Investigative staff at the International Criminal Court ('ICC') and other ICTs are dependent on the fieldwork undertaken by human rights monitors as fact-finders, employed by IGOs, NGOs, and, in some cases, by governmental agencies.[1] Especially, personnel "not serving with a belligerent party" proved valuable to the investigative staff of ICTs and were sometimes later called to testify at trial.[2] Private investigations are indispensable at the international level, and privately funded international human rights organisations have been crucial to hold perpetrators of international crimes accountable.[3]

Considering the importance of private investigators for the administration of ICTs, the potential dangers of such cooperation easily take a backseat in a car that is driven by the anti-impunity agenda. Prosecutors of both national courts and ICTs become taciturn when confronted with illegal

1 See, for instance, ICC, Office of the Prosecutor, Nineteenth report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011), 5 May 2020, para. 35 (https://www.legal-tools.org/doc/6z4snc/): "The Office also benefits from assistance provided by a range of international and regional organisations, civil society groups, and private individuals. As always, the Office invites submissions from any group or individual in possession of credible and reliable information pertaining to the alleged commission of Rome Statute crimes in Libya since 15 February 2011. The Office regularly receives such submissions of information from a variety of sources". See generally Morten Bergsmo and William H. Wiley, "Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes", in Norwegian Centre for Human Rights (ed.), *Manual on Human Rights Monitoring – An Introduction for Human Rights Field Officers*, 2008, p. 1 (https://www.legal-tools.org/doc/8362d5/); Barry de Vries, "Could International Fact-Finding Missions Possibly Render a Case Inadmissible for the ICC?: Remarks on the Ongoing Attempts to Include International Criminal Law in Fact-finding", in *Journal of Conflict and Security Law*, 2019, vol. 24, p. 600; Marina Aksenova, Morten Bergsmo and Carsten Stahn, "Non-Criminal Justice Fact-Work in the Age of Accountability", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Fact-Finding*, second edition, TOAEP, Brussels, 2020, pp. 9–12. For an instructive overview of the practicalities of NGO fact-finding see Wolfgang Kaleck and Carolijn Terwindt, "Non-Governmental Organisation Fact-Work: Not Only a Technical Problem", *ibid*., pp. 417 ff. Generally, about the cooperation of international organisations and NGOs Wolfgang Graf Vitzthum, "Begriff und Geltung des Völkerrechts", in Wolfgang Graf Vitzthum and Alexander Proelß (eds.), *Völkerrecht*, 8th edition, De Gruyter, Berlin, 2019, mn. 19.

2 Bergsmo and Wiley, 2008, p. 12, see above note 1.

3 Beth Stephens, "Accountability for International Crimes: The Synergy between the International Criminal and Alternative Remedies", in *Wisconsin International Law Journal*, 2003, vol. 21, p. 527 (528).

behaviour by their most important aids. At most, they refer to their supervision and the fact that all witness statements have to be repeated in front of them anyway, let alone that evidence collected by private investigators is merely used as lead evidence. Yet, once the cooperation between an ICT and private individuals[4] in the collection of evidence becomes public, which is usually the case when something went wrong, reality speaks a different language. In the *Lubanga* case before the ICC, the suspicion arose that certain so-called intermediaries had bribed various persons to prepare false evidence for alleged former child soldiers. In another instance, in the same case, the Office of the Prosecutor ('OTP') was supposed to use certain material as lead evidence only, but did the opposite.

This chapter is about these instances; it is about illegal conduct of private investigators; and it is eventually about the proposal of a compass for private investigators.

The chapter is structured into four main sections. It starts with a stocktaking endeavour, describing the occurrence of private investigations in the former Yugoslavia and Rwanda, in Kosovo, Sierra Leone, Cambodia and, especially, Syria (17.2.). Following a brief delineation of the advantages of private investigations (17.3.) and some terminological remarks (17.4.), the focus turns to the main section on private investigations as a matter of ethics and integrity (17.5.).

The chapter will demonstrate that the idea of the 'integrity' or 'legitimacy' of the trial as a distinctive kind of legal process can serve as an important, if not the only compass for private conduct in the collection of evidence. Concretely, let us suppose a private investigator offers money to a witness in return for information about a suspect and his or her criminal activities.[5] After all, it has become public that the OTP of the Special Court for Sierra Leone had an extensive practice of paying both informants and

[4] I prefer the term 'individual' over 'actor', since the focus of this chapter is on *private* conduct. I use the term 'actors' to describe agents acting for or on behalf of certain institutions and organisations. 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).

[5] Other examples, convened by Robertson for the context of interviews: leading questions, "brainwashing" the witness, persuasion, the private investigator is a national of the State under investigation, see Geoffrey Robertson, "Human Rights Fact-Finding: Some Legal and Ethical Dilemmas", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Fact-Finding*, second edition, TOAEP, Brussels, 2020, pp. 491–507.

witnesses in return for information and statements.[6] The scenario is thus real and can be transferred to the private level. Or even more extreme: a person tasked with investigating tortures that witness to get the desired information. Does 'integrity' provide a guideline for this investigator to refrain from his or her activities?

The term 'integrity' will be approached as a semantic concept in the first place, and only secondarily as a philosophical concept. It will unfold in three perspectives: object, subject and context. Using these perspectives, the analysis will focus on illegally obtained evidence. Integrity, as an element and value in the different decisions about illegally obtained evidence by private individuals, may lead to several consequences. For the sake of better following the arguments, I will single out the example of the exclusion of evidence as a consequence of a violation of the integrity element (in whatever form). Exclusion is understood broadly, encompassing both the exclusion of material *per se* and its nullity.[7] Rules regulating such an exclusion may safeguard individual rights, protect the integrity of procedures, achieve reliable fact-finding, and deter police misconduct.[8] Other consequences will be described at the end of the chapter.

There are different investigatory contexts when private individuals collect evidence that may eventually be used before an ICT: the inter-investigatory context (international investigation – domestic investigation); the intra-investigatory context (internal investigation by a private individual); and the extra-investigatory context (collection of evidence by a private individual outside any investigation). I will raise the question whether the procedural regime, especially exclusionary rules, may be applicable in these three contexts. The inter-investigatory context is the least problematic. In the intra-investigatory context, there is an attribution of the private individual to an organ of the ICT (usually, the OTP) that may occur rather openly through the utilisation of the individual in the collection process, that is, *ab initio*, or through an *ex post*-attribution, when the individual acted in the interest of the organ. In the latter, a person acts independently of

[6] In detail the eye-opening account of Wayne Jordash, "Insiders: The Special Court for Sierra Leone's Dirty Laundry", *Justiceinfo.net*, 30 April 2020.

[7] About the semantic difference between those two in more detail, albeit misleadingly described as "linguistics", Dimitrios Giannoulopoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law*, Hart, Oxford, 2019, pp. 6–7.

[8] Sabine Gless and Laura Macula, "Exclusionary Rules – Is It Time For Change?", in *IUS Gentium*, 2019, vol. 74, p. 349 (350).

an ICT-organ and outside an investigation. It is the extra-investigatory context that is the neuralgic point of exclusionary rules applied before ICTs. What seems to be a rather simple question – do exclusionary rules apply in this setting? – will unfold into an analysis that enters the depth of procedural law theory. Through norm-theory (Dan-Cohen) and systems theory (Luhmann and Teubner), combined with procedural theory (Packer), the playing field of the rather wide-ranging controversy about the addressees of procedural rules will be entered. I will render the common bipolar legislator-addressee relationship fruitless, and approach the process as a system instead.

Finally, integrity will be identified in the remedies of exclusion, a stay of proceedings, integrity testing and integrity units.

17.2. The Occurrence of Private Investigations in International Criminal Justice

17.2.1. Historical Observations

Both the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR') relied heavily upon materials published by IGOs and NGOs.[9] They have provided the prosecutors' offices with 'background information' on the commission of international crimes, and on the willingness of States to investigate or prosecute alleged crimes.[10] They have also shifted the focus from state responsibility to individual criminal responsibility, which had a considerable impact on the way evidence was collected and eventually handled.[11]

17.2.1.1. The Former Yugoslavia and Rwanda

More concretely, Human Rights Watch ('HRW') placed a 'permanent representative' in the former Yugoslavia during the conflict,[12] and reported

[9] Bergsmo and Wiley, 2008, p. 9, see above note 1.

[10] Mark S. Ellis, "The contribution of non-governmental organizations to the creation of international criminal tribunals", in Bartram S. Brown (ed.), *Research Handbook on International Criminal Law*, Edward Elgar, Cheltenham, 2011, p. 143 (156).

[11] De Vries, 2019, p. 602, see above note 1.

[12] Ellis, 2011, p. 143, see above note 10. See also William Korey, *NGOs and the Universal Declaration of Human Rights*, Palgrave, New York, 1998, p. 320: "[HRW] had at least one or more staffers present in Bosnia and other parts of Former Yugoslavia throughout all of 1992 and 1993. These virtually full-time representatives of the New York-based NGO had maintained contacts with local human rights activists and a variety of sources within the various levels of governments and media in the area".

human rights abuses in the region by conducting investigations and interviewing witnesses.[13] In 1992, HRW published "War Crimes in Bosnia-Herzegovina," its first report on violations of the laws of war[14] and a "call for action, for accountability",[15] followed by a second report that was used by the ICTY.[16] HRW's investigatory agenda was certainly underlined by its report "Prosecute Now!", where Helsinki Watch, a division of HRW, presented "summaries of eight cases that, with immediate investigation, will be strong candidates for prosecution".[17]

The report provided the "legal basis and potential evidence necessary to prosecute those first cases before the Tribunal".[18] And indeed, despite separate investigations by the ICTY-Prosecution, the eight cases selected by HRW and Helsinki were among the very first cases that the Office investigated.[19]

Apart from HRW, Physicians for Human Rights ('PHR') conducted "multiple mass grave investigations across the former Yugoslavia in the 1990s for the Tribunal",[20] which provided important. PHR called those persons "investigators" that "exhumed and identified remains in several large mass graves and gathered evidence showing the victims were executed".[21] They established "teams of forensic scientists to locate mass gravesites, exhume bodies, conduct autopsies and report the evidence and findings to

[13] Emma Daly, "Beyond Justice: How the Yugoslav Tribunal Made History", in *Human Rights Watch*, 19 December 2017 (available on its web site). See also Ellis, 2011, p. 143, see above note 10.

[14] Human Rights Watch, "War Crimes in Bosnia-Hercegovina", 1 August 1992 (available on its web site).

[15] Daly, 2017, see above note 13.

[16] Ellis, 2011, p. 143, see above note 10; Korey, 1998, p. 322, see above note 12.

[17] Helsinki Watch, *Prosecute Now!*, 1 August 1993.

[18] Ellis, 2011, p. 144, see above note 10.

[19] Korey, 1998, p. 325, see above note 12.

[20] Physicians for Human Rights ('PHR'), "Bosnian Serb Commander Ratko Mladic Convicted of Genocide, War Crimes, Crimes Against Humanity", 22 November 2017 (available on its web site).

[21] PHR, "Mass Grave Investigations | Mass Crimes in Srebrenica", undated (available on its web site).

the tribunals".[22] The Former Director of the PHR's International Forensic Program, William Haglund, testified in the trial of Radovan Karadzic.[23]

NGOs, IGOs and the media also played an important part in the initial investigations into the genocide that occurred in Rwanda in 1994. It is no exaggeration to contend that the creation of the ICTR was also – amongst other factors – the result of their work on the ground.[24] As former ICTR Prosecutor Jallow states:

> Reports from NGOs proved very helpful in enabling the OTP to gather pertinent, substantiated data. Though NGOs are not in essence investigatory bodies the extent of the investigations underlying these reports and the level of analysis they achieved indicated a true effort and genuine commitment by many such organizations to produce verifiable facts. Witness interviews, for instance, were very useful not only for learning about the incidents they described but also for corroborating other events and reports.[25]

17.2.1.2. Kosovo

In Kosovo, too, evidence about the forced expulsion, arbitrary killings, torture and sexual assault of the Albanians was gathered by NGOs.[26] Journalists and human rights researchers have investigated, documented and reported many individual accounts of human rights violations taking place in Kosovo.[27]

PHR and the Program on Forced Migration and Health of Columbia University's Joseph L. Mailman School of Public Health designed a study to "establish patterns of human rights violations among Kosovar refugees by Serb forces using a population-based approach".[28] The study "randomly

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22 Ellis, 2011, p. 156, see above note 10.

23 PHR, "Forensic science is applied in nearly every area of our work and is crucial to document mass crimes", undated (available on its web site).

24 In the same vein, see Hassan B. Jallow, "Challenges of Investigating and Prosecuting International Crimes", in Emmanuel Decaux, Adama Dieng and Malick Sow (eds.), *From Human Rights to International Criminal Law*, Martinus Nijhoff, Leiden, Boston, 2007, p. 437 (438).

25 *Ibid*., p. 438.

26 Ellis, 2011, p. 156, see above note 10.

27 PHR, "War Crimes in Kosovo – A Population-Based Assessment of Human Rights Violation Against Kosovar Albanians", 1 August 1999, p. 1 (available on its web site).

28 *Ibid*.

sampled 1,209 Kosovar refugees in 31 refugee camps and collective centers in Albania and Macedonia between April 19, 1999 and May 3, 1999. The survey assessed human rights abuses among 11,458 household members while living in Kosovo".[29] Furthermore, the Independent Law Commission asked the American Bar Association's Central European and Eurasia Initiative ('ABA-CEELI') to "establish a team of experts to review this information and compile data from other NGOs concerning the human rights violations in Kosovo".[30] ABA-CEELI conducted comprehensive statistical studies to add clarity and precision to the potential evidence.[31] ABA-CEELI established the Kosovo War Crimes Documentation Project (led by Executive Director Mark Ellis)[32] to interview refugees and provide victim statements to the ICTY, collaborating with a coalition of Albanian NGOs called the Center for Peace Through Justice to gather critical refugee interviews.[33] Between April and October 1999, ABA-CEELI volunteers in Albania, Macedonia, Kosovo, Poland, and Ft. Dix, New Jersey, worked with translators and local investigators to assemble accounts of Kosovar refugees.[34] Apart from NGOs such as the previously mentioned HRW and PHR, the American Association for the Advancement of Science ('AAAS') – with members of the Human Rights Data Analysis Group ('HRDAG') – wrote several reports on the conflict.[35] Employing the statistical expertise of the AAAS and HRDAG, NGO-investigations collected evidence of ethnic cleansing against Kosovar Albanians.[36] In its report "Political Killings in Kosova/Kosovo, March-June 1999", ABA-CEELI and the Science and Human Rights Program of the AAAS concluded that "approximately 10,500 Kosovar Albanians were killed between March 20 and June 12, 1999, with a 95 percent confidence interval from 7,449 to

29 *Ibid*.

30 Ellis, 2011, p. 156, see above note 10.

31 See, for instance, American Bar Association and Central and East European Law Initiative ('ABA-CEELI'), *An Introduction to the Human Trafficking Assessment Tool*, December 2005 (available on its web site). See also Ellis, 2011, p. 156, see above note 10.

32 ABA-CEELI, American Association for the Advancement of Science ('AAAS'), *Political Killings in Kosova/Kosovo*, *March-June 1999*, 2000, p. xi (available on its web site).

33 Ellis, 2011, p. 157, see above note 10; ABA-CEELI, AAAS, 2000, p. xi, see above note 32.

34 *Ibid*.

35 See Human Rights Data Analysis Group ('HRDAG'), "Kosovo" (available on its web sitehttps://hrdag.org/kosovo/).

36 Ellis, 2011, p. 157, see above note 10.

13,627".[37] This analysis was used by the ICTY-OTP in the trial of Slobodan Milošević to refute the argument that the killings were simply a consequence of battles between the Kosovo Liberation Army and Serbian forces.[38]

17.2.1.3. Sierra Leone, Cambodia, Liberia, MH17

In Sierra Leone, No Peace Without Justice ('NPWJ') initiated a Conflict Mapping Program, namely

> the reconstruction of the chain of events during the ten-year war through the scrupulous selection and debriefing of key individuals throughout the country whose profession, role in their community or in the forces involved in the conflict, placed them in a position to follow events as they unfolded.[39]

NPWJ's analysis was "based on testimonial and other data overlaid with order of battle and command structures of the various forces as they evolved over time and space".[40] The mapping aimed at establishing the "chain of command within the armed forces operating in Sierra Leone and assembling these disparate pieces of information to create the bigger picture of the decade-long conflict in Sierra Leone" to demonstrate "direct and command responsibility for crimes committed during the conflict".[41]

As in Kosovo, in 1999, the ABA established a Sierra Leone War Crimes Documentation Project aimed at contributing to the documentation of the war crimes committed in Sierra Leone between 1991 and 2002, and,

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37 ABA-CEELI, AAAS, 2000, p. xi, see above note 32.

38 The International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Slobodan Milosevic*, Transcript, IT-02-54, 14 March 2002, p. 2256:

> During the break, I checked some assertions that you denied, and I would like to ask you a few questions about this. Namely, I asked about your cooperation and adjustment of data to the data of the International Crisis Group, and you said that was not true. However, on the website of your AAA association, and that is website hrdataaas.org/kosovo/index/html [as interpreted], titled "Political Killings in Kosovo from March to June 1999," in the column called "Statistical Analysis of Data," it says: The method of killing people in Kosovo coincides with migrations, and this claim corresponds to the data obtained from the International Crisis Group; and then others are enumerated as well.

39 No Peace Without Justice ('NPWJ'), "Conflict Mapping in Sierra Leone: Violations of International Humanitarian Law 1991 to 2002", Preface, p. III (available on its web site).

40 *Ibid*., p. VII.

41 *Ibid*., p. VIII.

thereby, strengthening the ongoing truth and reconciliation process.[42] In Cambodia, the International Crisis Group, in partnership with NPWJ[43] and the Documentation Centre of Cambodia,[44] has created similar successful documentation projects for the Extraordinary Chambers in the Courts of Cambodia ('ECCC').

In Liberia, the Swiss NGO Civitas Maxima and the Global Justice and Research Project had documented crimes allegedly committed by Martina Johnson and the National Patriotic Front of Liberia of Charles Taylor.[45] The information collected by both organisations was eventually used by Belgian authorities in the arrest and prosecution of Johnson. Last but not least, a major breakthrough of the Dutch-led Joint Investigation Team in the investigation into the downing of flight MH17 was the identification of a key suspect by the research and investigation network Bellingcat.[46]

17.2.2. Special Focus: Private International Criminal Investigations in Syria

Despite growing expectation, the international criminal community has remained largely unable to stop the alleged commission of international crimes in Syria. Russia vetoed 12 UN Security Council resolutions regarding the conflict. As a result, alternative ways to bring perpetrators to justice were pursued, *inter alia*:

First, the Organisation for the Prohibition of Chemical Weapons installed a fact-finding mission[47] and decided

> that the Secretariat shall put in place arrangements to *identify the perpetrators* of the use of chemical weapons in the Syrian Arab Republic by identifying and reporting on all information

[42] AAAS, "Partnership 8: Surveying Human Rights Abuses in Sierra Leone" (available on its web site).

[43] See International Crisis Group, *Reality Demands: Documenting Violations of International Humanitarian Law in Kosovo 1999*, 27 June 2000 (available on its web site); Ellis, 2011, p. 157, see above note 10.

[44] See Documentation Centre of Cambodia, "Documentation" (available on its web site).

[45] See Civitas Maxima, "Our Work" (available on its web site).

[46] See Bellingcat, "Key MH17 Figure Identified As Senior FSB Official: Colonel General Andrey Burlaka", 28 April 2020 (available on its web site).

[47] See Organisation for the Prohibition of Chemical Weapons, "Fact-Finding Mission" (available on its web site). In more detail Rebecca Barber, "Uniting for Peace Not Aggression: Responding to Chemical Weapons in Syria Without Breaking the Law", in *Journal of Conflict and Security Law*, 2018, vol. 24, no. 1, p. 74.

> potentially relevant to the origin of those chemical weapons […].[48]

Second, Syrian civil society organisations and a few innovative NGOs have been working to document and build cases against those most responsible in Syria.[49] Third, a test of a completely new and unique form of international criminal investigations was put in place: after the Security Council remained inactive, to ensure accountability for international crimes committed in the war in Syria, on 21 December 2016, the UN General Assembly ('UNGA') created the "International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011" ('IIIM') with Resolution 71/248.[50] The Syria Mechanism is a subsidiary organ of the UNGA and not a prosecutorial body but "quasi-prosecutorial", meaning that it is required to

> prepare files to assist in the investigation and prosecution of the persons responsible and to establish the connection between crime-based evidence and the persons responsible, directly or indirectly, for such alleged crimes, focusing in particular on linkage evidence and evidence pertaining to mens rea and to specific modes of criminal liability.[51]

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48 Organisation for the Prohibition of Chemical Weapons, Addressing the threat from Chemical Weapons Use, 27 June 2018, C-SS-4/DEC.3, para. 10 (https://www.legal-tools.org/doc/lmqyd4/).

49 Ingrid Elliott, "'A Meaningful Step towards Accountability'? A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, p. 240; Michael P. Scharf, Milena Sterio, and Paul R. Williams, *The Syrian Conflict's Impact on International Law*, Cambridge University Press, Cambridge, 2020, pp. 4 ff.

50 United Nations General Assembly, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/RES/71/248, 11 January 2017 (https://www.legal-tools.org/doc/fecaf0/). See also Christian Wenaweser and James Cockayne, "Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, pp. 211–230; Elliott, 2017, pp. 239–256, see above note 49; Alex Whiting, "An Investigation Mechanism for Syria. The General Assembly Steps into the Breach", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, pp. 231–237.

51 United Nations General Assembly, Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Commit-

It is headed by Catherine Marchi-Uhel, former Judge at the ECCC and former Senior Legal Officer and Head of Chambers at the ICTY.[52] In general, at the UN-level, the following measures have been taken to investigate international crimes: UN Fact-Finding Missions ('FFMs'), Commissions of Inquiry ('CoIs'), and the mentioned novel investigative mechanisms.[53] These bodies do not only include legal advisers and coordinators but also (partly experienced) investigators – despite the fact that they are not always perceived to have a criminal accountability mandate.[54]

In addition, CIJA is collecting information that could eventually be used to hold perpetrators of international humanitarian law violations accountable. CIJA's private actions amidst the ongoing conflict in Syria represent a departure from the practice of conducting international criminal investigations under the aegis of public institutions. Burgis-Kasthala calls this "entrepreneurial justice".[55] CIJA has developed organisationally into a not-for-profit that is funded by a number of States and organisations, including the United Kingdom, the European Union, Canada and Germany.[56] CIJA "has 130 specialist personnel investigating, gathering and preserving evidence, analysing and building case files and indictments against those most responsible in Syria (and Iraq in terms of Da'esh crimes)".[57] It "combines international expertise with local on the ground capacity building

ted in the Syrian Arab Republic since March 2011, UN Doc. A/71/755, 19 January 2017 (https://www.legal-tools.org/doc/a0cd85/). See also Elliott, 2017, pp. 239–256, see above note 49.

52 United Nations, "Secretary-General appoints Catherine Marchi-Uhel of France to head International Impartial Independent Mechanism Investigating Serious Crimes in Syria", 3 July 2017, SG/A/1744-BIO/4979-DC/3720 (available on the UN's web site); Nick Cumming-Bruce, "Ex-judge chosen by U.N. to Gather Evidence of Syria War Crimes", *The New York Times*, 4 July 2017.

53 An instructive overview can be found on the UN Human Rights Council's website: https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx.

54 Sareta Ashraph and Federica D'Alessandra, "Structural Challenges Confronted by UN Accountability Mandates: Perspectives from Current and Former Staff (Part II)", *OpinioJuris*, 14 October 2020.

55 Michelle Burgis-Kasthala, "Entrepreneurial Justice: Syria, the Commission for International Justice and Accountability and the Renewal of International Criminal Justice", in *European Journal of International Law*, 2020, vol. 30, no. 4, pp. 1174 ff. with a very detailed and instructive account of CIJA, its protagonists and work on pp. 1176 ff.

56 Melinda Rankin, "Investigating Crimes against Humanity in Syria and Iraq: The Commission for International Justice and Accountability", in *Global Responsibility to Protect*, 2017, vol. 9, no. 4, pp. 400–401.

57 Elliott, 2017, p. 245, see above note 49.

which effectively develops a local Syrian civil society response. CIJA works with trained and mentored Syrian investigators with access to areas across Syria".[58]

Even though CIJA is not meant to replace public institutions involved in criminal investigations, but rather complement them, it symbolises a trend of the international criminal community towards private investigations, once political leaders display a lack of will to officially investigate the commission of core international crimes.

17.3. Advantages of Private International Criminal Investigations

The advantages of investigations conducted by private entities in the international field are obvious – even when there is, at a later moment, an official investigation. Members of those entities are often among the first persons to view crime scenes. Investigators of Prosecutor's Offices of ICTs rarely have the opportunity to inspect a crime scene until well after the underlying conduct has been perpetrated.[59] Consequently, in the 2016-2018 Strategic Plan, the ICC OTP explains:

> Preliminary examinations are critical to the Office in its determination of whether to open an investigation. They also greatly facilitate the Office's investigative work in various ways, such as: e.g. by systematically capturing and exploiting open source data; and building networks of cooperation partners and contacts for handover for investigative activities; and identifying potential cases for future investigations.[60]

As an interesting side note, the reference to open-source[61] data disappeared in the 12019-2021 Strategic Plan.[62] Furthermore, the OTP declared that it

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58 *Ibid*.

59 Bergsmo and Wiley, 2008, p. 4, see above note 1.

60 ICC Office of the Prosecutor ('OTP'), *Strategic Plan 2016-2018*, 16 November 2015, p. 20 (https://www.legal-tools.org/doc/2dbc2d/).

61 Stressing its importance: Nikita Mehandru and Alexa Koenig, "ICTs, Social Media & the Future of Human Rights", in *Duke Law & Technology Review*, 2019, vol. 17, no. 1, pp. 129–145; for a nuanced and differentiated account, weighing advantages and risks of open source information in international fact finding, see Yvonne McDermott, Daragh Murray and Alexa Koenig, "Digital Accountability Symposium: Whose Stories Get Told, and by Whom? Representativeness in Open Source Human Rights Investigations", *OpinioJuris*, 19 December 2019. The authors are part of a larger team that initiated the project "Using open source research to transform the discovery and documentation of Human Rights Violations", see OSR4Rights, "Using open source research to transform the discovery and documentation of Human Rights Violations" (available on its web site).

"will also react promptly to upsurges or serious risks of violence by reinforcing its early interaction with States, international, regional organisations and NGOs in order to fine-tune its assessment and coordinate next steps".[63] In its current Strategic Plan, the OTP explicitly observed that "more individuals and civil society actors are collecting relevant information as events unfold".[64] Last but not least, according to Article 44(4) of the ICC Statute, the ICC

> may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or nongovernmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor.

Bergsmo and Wiley also identify "preliminary analysis of open-source materials, operational planning and liaison with personnel employed by IGOs, NGOs, governmental and other organisations who have prepared reports of particular interest to the investigative body" as one of their four broad phases of investigation services of international criminal jurisdictions:.[65] As to the components of an investigation, they highlight especially two: "(a) the work to establish the so-called crime base of the case; and (b) the process to develop information on the link between the suspect and the actual perpetration of the crimes in question".[66]

CIJA has preserved and analysed over 600,000 pages of original documentation, including regime military and intelligence documents,[67] and focused on the linkage evidence in order to build leadership cases and indictments.[68] As Elliott describes, "it has a 'names database' with over one million entries, and three indictments or pre-trial files against 25 top regime officials including Assad, and a further three indictment or case files against over 35 Da'esh operatives in Syria and Iraq". The explicit purpose

62 ICC OTP, *Strategic Plan 2019-2021*, 17 July 2019 (https://www.legal-tools.org/doc/7ncqt3/).

63 ICC OTP, 2015, p. 21, see above note 60.

64 ICC OTP, 2019, p. 21, see above note 62.

65 Bergsmo and Wiley, 2008, pp. 12–13, see above note 1.

66 *Ibid*., p. 8.

67 Seema Kassab, "Justice in Syria: Individual Criminal Liability for Highest Officials in the Assad Regime", in *Michigan Journal of International Law*, 2018, vol. 39, no. 2, p. 283 (287); Elliott, 2017, p. 239, see above note 49.

68 Kassab, 2018, p. 287, see above note 67.

of CIJA is to assist national and international prosecutions.[69] This assistance proved to be quite effective in Germany: as the weekly magazine *Der Spiegel* reported on 8 June 2018, the German Federal Prosecutor issued an internationalised arrest warrant for Jamil Hassan, head of Syria's Air Force Intelligence Directorate on charges of war crimes and crimes against humanity.[70] On 29 October 2019, the German Federal Prosecutor announced that it charged two Syrians, Anwar R. and Eyad A., whom he believed to be former secret service officers, with crimes against humanity.[71] The European Center for Constitutional and Human Rights ('ECCHR'), by their own account an "independent, non-profit legal and educational organization",[72] supported witnesses whose testimony led, among other things, to the charging decision of the German Federal Prosecutor.[73] In a decision of 6 March 2020, the Higher Regional Court of Koblenz confirmed the charges and committed Anwar R. and Eyad A. for trial.[74] The start of the trial on 23 April 2020 was viewed by observers as a "historic step" towards accountability of perpetrators in Syria.[75]

Where an initial threshold of suspicion is met, and the case has some link to Germany, German authorities will open a so-called '*Strukturverfahren*' or a background investigation.[76] As the ECCHR describes,

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69 See Chris Engels, Written Testimony before the Commission on Security and Cooperation in Europe, 22 September 2016; Elliott, 2017, p. 245, see above note 49.

70 See Jörg Diehl, Christoph Reuter, and Fidelius Schmid, "Die Jagd", in *Der Spiegel*, 8 June 2018, pp. 40–42; Boris Burghardt, "Endlich! – Erster Haftbefehl gegen einen ranghohen Vertreter des syrischen Assad-Regimes", in *Völkerrechtsblog*, 11 June 2018.

71 Generalbundesanwalt, "Anklage gegen zwei mutmaßliche Mitarbeiter des syrischen Geheimdienstes wegen der Begehung von Verbrechen gegen die Menschlichkeit u.a. erhoben", 29 October 2019 (available on its web site). See also Philip Oltermann and Emma Graham-Harrison, "Germany charges two Syrians with crimes against humanity", *The Guardian*, 29 October 2019 (available on its web site).

72 See European Center for Constitutional and Human Rights ('ECCHR'), "Who we are" (available on its web site).

73 ECCHR, "With the Frist Criminal Trial Worldwide on Torture in Syria, German Courts to Set International Precedent", 29 October 2019 (available on its web site).

74 Oberlandesgericht Koblenz, Beschluss v. 6.3.2020, 1 StE 9/19.

75 See, for instance, Amnesty International, "Syria: Torture trial in Germany a 'historic step' towards justice", 22 April 2020. See the instructive comment of Elisabeth Baier, "A puzzle coming together – The henchmen of Assad's torture regime on trial in Germany", in *Völkerrechtsblog*, 23 April 2020.

76 See the recent account of Christian Ritscher, "Aktuelle Entwicklung in der Strafverfolgung des Generalbundesanwalts auf dem Gebiet des Völkerstrafrechts", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2019, pp. 599 ff.

> [t]hese proceedings qualify as investigations as defined in the German Code of Criminal Procedure and can thus involve criminal justice mechanisms such as the hearing of witness testimony. They are comparable to 'situations' under scrutiny at the ICC. Over the course of these proceedings, individual suspects may be identified. Further investigations are then pursued against these suspects in separate proceedings.[77]

While early *Strukturverfahren* focused – among other things – on Rwanda and Congo, it has now centred to a great extent on Syria, Iraq and Sri Lanka.[78] The strong suspicion that the suspects had carried out the alleged crimes is based – to a considerable extent – on evidence that has been collected by private individuals and entities. First, the photographs taken by "Caesar", the code name of a former Syrian military photographer who brought over 50,000 photographs out of the country, 28,000 of which show detainees in Syrian prisons killed by torture, outright execution, disease, malnutrition or other ill-treatment.[79] Second, the assistance of the ECCHR, which provided the testimony from six survivors of torture in Al Khatib detention centre in Damascus.[80] Third, CIJA, who provided documentary evidence against one of the two former secret service officers.[81] Nerma Jelačić, CIJA's Deputy Director, announced on Twitter: "#CIJA is proud to have supported the #German prosecutor's investigation and arrest of the first high-ranking Syrian regime official".[82]

In addition, an earlier call for an international criminal trial in Germany was made in November 2016, when six German lawyers filed a criminal complaint against the Syrian President Bashar al-Assad for his involvement in the commission of war crimes and crimes against humanity

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77 ECCHR, *Universal Jurisdiction in Germany? – The Congo War Crimes Trial: First Case under the Code of Crimes against International Law*, 8 June 2016, p. 7 (available on its web site).

78 Cf. Christian Ritscher, "'Foreign Fighters' und Kriegsvölkerstrafrecht", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2016, vol. 11, pp. 807 (807 f.); Ritscher, 2019, p. 600, see above note 76; Kai Ambos, *Internationales Strafrecht*, fifth edition, C.H. Beck, München, 2018, § 6 mn. 40.

79 See Sara Afshar, "Assad's Syria recorded its own atrocities. The world can't ignore them", *The Guardian*, 27 August 2018; Ritscher, 2019, p. 600, see above note 76.

80 See Nick Cumming-Bruce, "Germany Arrests Syrian Intelligence Officers Accused of Crimes Against Humanity", *The New York Times*, 13 February 2019.

81 See Diehl, Reuter and Schmid, 2018, p. 41, see above note 70.

82 Nerma Jelačić, "Tweet", *Twitter*, 13 February 2019.

between 26 April and 19 November 2016 in the Syrian town of Aleppo.[83] The evidence was mainly collected by NGOs such as Amnesty International, HRW and Physicians for Human Rights. A reporter of the weekly magazine *Die Zeit* argues that Germany is the appropriate place to hold a trial against Assad, since the country has accepted over half a million Syrian refugees within the last six years, the highest number in Europe.[84] These refugees could be used as potential witnesses.[85] As to the quality of CIJA's work, Stephen Rapp, who led the prosecutions at the ICTR and in Sierra Leone, claimed that CIJA's documentation was "much richer than anything I've seen, and anything I've prosecuted in this area".[86]

17.4. Terminological Remarks

In national jurisdictions, private investigations are nothing unusual, as I have demonstrated elsewhere.[87] Nevertheless, it is hard to find a comprehensive definition of private investigators, probably due to their diverse occurrence.[88]

The term "investigator" has roots in the Latin noun *vestigium*, meaning 'sole of the foot', 'footprint' or, more figuratively, 'something lost' or 'that has passed before'.[89] Gill and Hart therefore conclude: an investigator is "someone who "tracks" or "traces out" something that is missing; something that has occurred, or something that was or is known by someone but remains hidden"; and a private investigator is someone who "either runs or is employed by a business which provides investigative services for a fee".[90] An even broader definition seems to be employed by Bockemühl, who implicitly defines 'private investigation' as every investigation not

[83] Reported in Kristin Helberg, "Der Kriegsverbrecher Assad gehört vor Gericht", *Zeit Online*, 28 November 2016.

[84] *Ibid*.

[85] *Ibid*.

[86] Ben Taub, "The Assad Files", *The New Yorker*, 18 April 2016 (available on its web site). See also Kassab, 2018, p. 289, see above note 67.

[87] Alexander Heinze, "Private International Criminal Investigations", in *Zeitschrift für internationale Strafrechtsdogmatik*, 2019, pp. 173–174.

[88] *Ibid*., p. 174.

[89] Martin Gill and Jerry Hart, "Exploring Investigative Policing: A Study of Private Detectives in Britain", in *The British Journal of Criminology*, 1997, vol. 37, no. 4, p. 550 with fn. 1.

[90] *Ibid*.

conducted by the prosecution.[91] Thus, these broad definitions are subject to all sorts of qualifications and refinements. Prenzler uses "private investigators", "inquiry agents" and "private agents" interchangeably.[92] In his view, "[t]he term 'private investigator' has both generic and specific legal definitions. In its broadest terms it relates to any person who conducts enquiries for a customer or employer. This may include serving summonses after locating a person, as well as repossessing property".[93] Button blames the diversity of the branch for the impossibility to define private investigators: "[T]here are other occupations that compete with and undertake similar activities".[94] Fraud investigations, for instance, can be conducted by private investigators but also by "accountants" and "specialized forensic accountants".[95] Who can tell the difference between an accountant and a private detective after having watched "The Accountant", starring Ben Affleck, a movie about the forensic accountant Christian Wolff, who – living with a high functioning form of autism – discovers that 61 million dollars have been embezzled from the company who hired him? Investigative journalists and solicitors are also performing acts that could be assigned to a private investigator,[96] not to mention corporate compliance and internal investigations,[97] which include the screening of documents; the monitoring of

[91] Jan Bockemühl, *Private Ermittlungen im Strafprozeß*, Nomos: Baden-Baden, 1996, pp. 15 ff., reviewed by André Klip, "Private investigations in criminal proceedings, a contribution to the concept of inadmissible evidence (in German)", in *European Journal of Crime, Criminal Law and Criminal Justice*, 1998, vol. 6, p. 83.

[92] Tim Prenzler, *Private Investigators in Australia: Work, Law, Ethics and Regulation*, Report to the Criminology Research Council, 2001, p. 5 (available on the web site of the Australian Criminology Research Council).

[93] *Ibid*., p. 7. See also Johnston, "Private Investigation", in Tim Newburn, Tom Williamson and Alan Wright (eds.), *Handbook of Criminal Investigation*, Willan Publishing, Abingdon and New York, 2007, p. 278.

[94] Mark Button, "Beyond the Public Gaze — The Exclusion of Private Investigators from the British Debate over Regulating Private Security", in *International Journal of the Sociology of Law*, 1998, vol. 26, no. 1, p. 2.

[95] *Ibid*., p. 2.

[96] *Ibid*.

[97] See, generally, Laura Christiane Nienaber, *Umfang, Grenzen und Verwertbarkeit compliancebasierter unternehmensinterner Ermittlungen*, Schriften zu Compliance, vol. 14, Nomos, Baden-Baden, 2019. Internal investigation can be defined as "an inquiry performed by a company or its agent after the company is made aware of a serious and reasonably plausible allegation of corporate misconduct", see Abraham Gitterman, "Ethical Issues and Practical Challenges Raised by Internal Investigations in the Life Sciences Industry", in *Defense Counsel Journal*, 2013, vol. 80, no. 4, p. 374. They are especially employed in the context of Deferred Prosecution Agreements, where the company shares interview memoranda and

snail mail and email communication, and of phone conversations; and the audio-visual observation of the work place.[98] Internal investigators regularly even conduct 'interviews' with employees of the company.[99] The list of those resembling activities – store detectives, solicitors and even psychics – is long.[100] George and Button, therefore, use a more complex definition, reproduced by Johnston: private investigators are

> [i]ndividuals (whether in house or contract) and firms (other than public enforcement bodies) who offer services related to the obtaining, selling or supplying of any information relating to the identity, conduct, movements, whereabouts, associations, transactions or character of any person, groups of persons or association, or of any other type of organization.[101]

The narrowest definition would reduce private investigators to "work either for the victim or for the defendant or his attorney in criminal proceedings".[102] Dörmann provides a slightly broader definition:

> Usually, private investigators working in the criminal justice field do so on behalf of the defence, checking the accuracy of police evidence and looking for witnesses who might undermine the case for the prosecution. By contrast, criminal investigations for private companies usually aim to establish the causes of loss and of any guilt associated with such loss.[103]

The difficulty to define the term 'private investigator' or 'private investigations' is increased on the international level. Here, too, many actors carry out the work of investigators, such as journalists or the media in general, as the above-mentioned 'Caesar' photos illustrate.[104] But even when

other materials generated in an internal investigation, see Federico Mazzacuva, "Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US Systems of Criminal Justice", in *Journal of Criminal Law*, 2014, vol. 78, no. 3, p. 258.

98 Werner Leitner, "Unternehmensinterne Ermittlungen im Konzern", in Klaus Lüderssen *et al.* (eds), *Festschrift für Wolf Schiller: zum 65 Geburtstag am 12 Januar 2014*, Nomos, Baden-Baden, 2014, p. 433.

99 *Ibid*.

100 Button, 1998, p. 2, see above note 94.

101 Bruce George and Mark Button, *Private Security*, vol. 1, Palgrave MacMillan, London, 2000, p. 88.

102 Rory J. McMahon, *Practical Handbook for Private Investigators*, CRC Press, Boca Raton, London, New York, Washington, DC, 2001, p. 22.

103 Johnston, 2007, p. 285, see above note 93.

104 Afshar, 2018, see above note 79.

the term 'private investigator' is narrowed down to IGOs or NGOs, the nature of these organisations is often unclear. Thus, any definition would be arbitrary.[105] The only suggestion I would make is to dispense of the term 'private', since it is too broad and seems to be rather occupied by a domestic understanding. I also recommend avoiding the term 'human rights', since agencies such as CIJA do investigative work without human rights monitoring. Therefore, the best term to use would therefore be 'third party investigations', which goes back to Bergsmo and Wiley's description of personnel "not serving with a belligerent party".[106]

17.5. Private Investigations: A Matter of Ethics and Integrity

17.5.1. The Ethical Problem with Private Investigations

Lawyers are expected to abide by laws, professional rules, and informal professional norms, and in many jurisdictions, they are also required to abide by a professional code of conduct.[107] Professional legal ethics involve recognising that lawyers are often confronted with ethical dilemmas. Criminal lawyers, in particular, face "conflicting values, aims and interests".[108] They are expected, however, to separate the "morality of the[ir] representation" from the "morality of the client's cause".[109] A criminal lawyer is expected to vigorously argue for her side of the case, whether as a defence lawyer or a prosecution lawyer, and whether or not she thinks that she in fact has the most compelling argument. But this vigour remains limited by ethical constraints, such as the moral requirement to respect the dignity of all persons involved in a criminal trial, and the moral prohibition of lying to advance a client's interests. While a defence lawyer may have less control over criminal justice proceedings other than determining how best to advocate for his client, a prosecutor has additional ethical obliga-

[105] In the same vein for the national level, see Johnston, 2007, p. 278, see above note 93.

[106] Bergsmo and Wiley, 2008, p. 12, see above note 1.

[107] See Donald Nicolson, "Making Lawyers Moral? Ethical Codes and Moral Character", in *Legal Studies*, 2005, vol. 25, no. 4, pp. 601–26; Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process*, fifth edition, Oxford University Press, 2019, pp. 60 ff.

[108] Richard Young and Andrew Sanders, "The Ethics of Prosecution Lawyers", in *Legal Ethics*, 2004, vol. 7, no. 2, pp. 190–209.

[109] David Luban, *Legal Ethics and Human Dignity*, Cambridge University Press, 2007, p. 20.

tions due to her ability to select defendants for trial and determine the scope of the criminal justice process.[110]

The normative foundations of prosecutorial ethics consist of two main concepts: a prosecutor's general duty to seek justice,[111] and the moral theories that inform the corresponding, specific ethical obligations of the prosecutor. In both adversarial and inquisitorial systems of law,[112] regardless of other specific duties, the prosecutor is expected to seek justice.[113] While the particular features of what constitutes justice vary between, and sometimes within, criminal legal systems, it is always tied to the concept of fairness.[114]

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[110] This of course applies more to the criminal justice process in the legal tradition of the common law than to a civil law criminal process, cf. Alexander Heinze, *International Criminal Procedure and Disclosure*, Duncker & Humblot, Berlin, 2014, pp. 107 ff. See also Alexander Heinze and Shannon Fyfe, "Prosecutorial Ethics and Preliminary Examinations at the ICC", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher ('TOAEP'), Brussels, 2018, pp. 5–6 (https://www.legal-tools.org/doc/dff594/).

[111] See Fred C. Zacharias, "Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?", in *Vanderbilt Law Review*, 1991, vol. 44, no. 1, pp. 45 ff.

[112] About the meaning of terms 'inquisitorial' and 'adversarial' in more detail, see Heinze, 2014, pp. 117 ff., see above note 110; 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*, TOAEP, Brussels, 2017, pp. 27, 28 ff. (https://www.toaep.org/ps-pdf/9-bergsmo).

[113] Shawn Marie Boyne, *The German Prosecution Service: Guardians of the Law*, Springer, Berlin, Heidelberg, 2014, p. 5 ("[P]rosecutors possess an ethical obligation to pursue justice"). The fact that the search for truth in inquisitorial systems is a constitutive feature (Heinze, 2014, p. 107, see above note 110) does not render justice as an ethical obligation of the prosecutor less relevant. In inquisitorial systems too truth is a means to the end of justice, as Karl Peters famously pointed out in his seminal work about the German criminal process (Karl Peters, *Strafprozeß*, C.F. Müller, Heidelberg, 1985, p. 82 ("Das Strafverfahren kann das Ziel der Gerechtigkeit nur erreichen, wenn es die Wahrheit findet").) In the same vein, see Theodore L. Kubicek, *Adversarial Justice: America's Court System on Trial*, Algora, New York, 2006, p. 37 with further references. See also Barton L. Ingraham, *The Structure of Criminal Procedure*, Greenwood Press, New York *et al*., 1987, p. 13.

[114] See, for example, ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 37 ('Lubanga, 2006') (http://www.legal-tools.org/doc/1505f7/): "Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be

Deontological constraints are especially well suited to play the primary role in shaping prosecutorial or investigatory ethics and promoting fair trials. Danner has argued that prosecutorial decisions, for instance, will be both legitimate and perceived as such if they are taken in a principled, reasoned, and impartial manner.[115] The ICC's OTP has adopted this approach in several policy papers. The duty to treat every individual as an end in him- or herself and, thus, apply the same rules without bias or concern about outcomes lends itself to ensuring procedural fairness. The prosecutor is constrained by "rules which apply in an all-or-nothing, categorical manner without reference to the particular context or consequences of the prohibited or required behaviour".[116] The impartiality demanded by deontological constraints applies "separately to every relation between persons", which means that no one's rights may be violated, even if the violation could be "offset by benefits that arise elsewhere" in the justice system.[117]

This is not the place to go too deep into the matter of prosecutorial ethics, I have done this elsewhere with Shannon Fyfe.[118] One aspect of the procedural fairness mentioned above is that investigative staff employed by international criminal jurisdictions are ethically bound to search for inculpatory as well as exculpatory evidence from the start of an inquiry.[119] It is doubtful whether staff employed by CIJA abides by the same ethical obligations. This does not mean that NGOs or IGOs can never be trusted to comply with certain ethical obligations. In fact, human rights organisations are more concerned with issues of monitoring[120] and protection through

held, the object of the judicial process is frustrated and the process must be stopped". See also Catherine S. Namakula, "The Human Rights Mandate of a Prosecutor of an International Criminal Trial", in *International Criminal Law Review*, 2017, vol. 17, no. 5, pp. 935, 936. About the meaning of fairness in that context Heinze and Fyfe, 2018, pp. 6–8, see above note 110.

115 Allison M. Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", in *The American Journal of International Law*, 2003, vol. 97, no. 3, pp. 536–37.

116 Nicolson, 2005, p. 606, see above note 107.

117 Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*, Princeton University Press, New York, 2010, p. 7.

118 Heinze and Fyfe, "The Role of the Prosecutor", in Kai Ambos *et al*. (eds.), *Core Concepts in Criminal Law and Justice*, vol. 1, Cambridge University Press, 2020, pp. 344 ff.; Heinze and Fyfe, 2018, pp. 3 ff., see above note 110.

119 Bergsmo and Wiley, 2008, p. 2, see above note 1.

120 A definition of human rights monitoring is provided in Anette Faye Jacobsen (ed.), *Human Rights Monitoring*, Martinus Nijhoff, Leiden, Boston, 2008, p. 1:

advocacy.[121] The problem lies in entities, such as CIJA, which do mainly investigatory work and have donors at the same time.[122] Here, concerns about the substantive outcomes of investigations and criminal trials, the overall performance or record of an investigator or prosecutor, or the social and political impacts of criminal trials, will likely involve more consequentialist considerations.[123] From a psychological perspective, competition in that sense regularly leads to role-induced bias or what Simon *et al.* labelled the "myside bias".[124]

This is most visible at the national level. In meeting the needs of their clients, private investigators pursue instrumental ends.[125] As Johnston describes:

> Unlike police detectives, who collect evidence for constructing cases within a system of public justice, private investigators aim only to minimize the economic, social or personal losses of their clients. Instrumentalism is driven by a proactive, risk-based mentality, the object of which is to anticipate, rec-

> Human rights monitoring can be defined as the systematic collection, verification, and use of information to address human rights problems or compliances. The compiled data will have to be analyzed against agreed standards. These standards primarily entail the human rights obligations and commitments that the State is a party to, and thus has committed itself to live up to; as well as additional human rights provisions which have come to be recognized as customary law applicable to all authorities regardless of the State's formal acknowledgement […].

121 Bergsmo and Wiley, 2008, p. 2, see above note 1.

122 See also Burgis-Kasthala, 2020, p. 1173, see above note 55.

123 Frédéric Mégret, "International Prosecutors: Accountability and Ethics", in *Leuven Centre for Global Governance Studies*, Working Paper No. 18, 2008, p. 8. Surely, consequentialist considerations also play an important role in prosecutorial decision making, especially at the ICC, as I have argued – together with Kai Ambos – in *amicus curiae* observation, see ICC, *Situation in the Islamic Republic of Afghanistan*, Written Submissions in the Proceedings Relating to the Appeals Filed Against the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" Issued on 12 April 2019 (ICC-02/17-33) and Pursuant to "Decision on the participation of amici curiae, the Office of Public Counsel for the Defence and the cross-border victims" Issued on 14 October 2019 (ICC-02/17-97), 14 November 2019, *Ambos and Heinze*, ICC-02/17-108 (https://www.legal-tools.org/doc/5v8d2b/) and Annex (https://www.legal-tools.org/doc/7m3bj2/).

124 Dan Simon *et al*., "The Adversarial Mindset", in *Psychology, Public Policy, and Law*, 2020, vol. 26, pp. 354 ff.

125 Johnston, 2007, p. 280, see above note 93.

> ognize and appraise risks and, having done so, to initiate actions that will help to minimize their impact on clients.[126]

Prenzler, in his previously mentioned study, found that "the large majority [of interviewees] also felt that anecdotal reports of misconduct were of sufficient gravity to justify greater control and scrutiny of the industry by government".[127] The investigators he interviewed particularly nominated "privacy as the area where their profession posed the greatest danger to the public".[128] Privacy is especially problematic in the case of social media evidence. Take, for instance, the investigations in Myanmar, where the Human Rights Council recently created another investigative mechanism.[129] Human Rights Council resolution 34/22 mandated the Mission

> to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State, including but not limited to arbitrary detention, torture and inhuman treatment, rape and other forms of sexual violence, extrajudicial, summary or arbitrary killings, enforced disappearances, forced displacement and unlawful destruction of property, with a view to ensuring full accountability for perpetrators and justice for victims.[130]

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126 *Ibid*.

127 Prenzler, 2001, p. 6, see above note 92.

128 *Ibid*., p. 36.

129 Global Justice Center, "Statement on the Creation of the IIIM for Myanmar", press release, 27 September 2018 (available on its web site); International Commission of Jurists, "Myanmar: creation of UN mechanism a step toward accountability", 27 September 2018 (available on its web site). See generally Neriah Yue, "The 'Weaponization' of Facebook in Myanmar: A Case for Corporate Criminal Liability', in *Hastings Law Journal*, 2020, vol. 71, pp. 816 ff.; Emma Palmer, *Adapting International Criminal Justice in Southeast Asia: Beyond the International Criminal Court*, Cambridge University Press, Cambridge, 2020, pp. 159 ff.; Derek Tonkin, "Mission Creep Untrammelled: The UN Fact-Finding Mission on Myanmar", FICHL Policy Brief Series No. 102 (2020), Torkel Opsahl Academic EPublisher, Brussels, 2020 (http://www.toaep.org/pbs-pdf/102-tonkin).

130 Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2, 17 September 2018, para. 4 (https://www.legal-tools.org/doc/0c0c69/). See also https://iimm.un.org/mandate-and-establishment/. In more detail Heinze, 2019, pp. 171–172, see above note 87; Aksenova, Bergsmo and Stahn, 2020, pp. 10 ff., see above note 1, with a list of "International Fact-Finding Mandates 1992-2020" at pp. 32–44. Generally about fact-finding by the Special Procedures of the Human Rights Council Martin Scheinin, "Improving Fact-Finding in Treaty-Based Human Rights Mechanisms and the Special Procedures of the United Nations Human Rights Council", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Fact-*

Apart from 875 in-depth interviews the mission conducted,[131] it also emphasised the important role of social media information.[132] It reported, among other things:

> The Mission has seen a vast amount of hate speech across all types of platforms, including the print media, broadcasts, pamphlets, CD/DVDs, songs, webpages and social media accounts. For example, the Mission encountered over 150 online public social media accounts, pages and groups that have regularly spread messages amounting to hate speech against Muslims in general or Rohingya in particular.[133]

In another study, Prenzler and King reported that according to "one-third of the respondents, non-compliance [with ethical boundaries] was fairly widespread", while others felt that instances of non-compliance were rather isolated.[134] Button describes that "there are many examples of illegal and unethical behaviour. There have been many alleged and reported incidents of private investigators bugging premises, breaking and entering, kidnapping or gaining confidential information from the police".[135]

As previously remarked, investigators are expected to separate the "morality in their representation" from the "morality of the client's cause".[136] This may lead to a moral dilemma when investigators who comply with ethical standards are asked by their clients to ignore these. Gill and Hart describe that "there is a demand for services that can only be considered to be of dubious legitimacy".[137] All investigators interviewed

Finding, second edition, Brussels, TOAEP, 2020, pp. 75 ff. About the question whether information collected by human rights bodies and "human rights investigators" can generally be admitted as direct evidence at ICTs, see Lyal S. Sunga, "Can International Criminal Investigators and Prosecutors Afford to Ignore Information from United Nations Human Rights Sources?", *ibid*., pp. 409 ff.

131 *Ibid*., para. 19.

132 *Ibid*., paras. 515, 744. See also Emma Irving, "The Role of Social Media is Significant: Facebook and the Fact Finding Mission on Myanmar", *Opinio Juris*, 7 September 2018.

133 Human Rights Council, 2018, para. 1310, see above note 130.

134 Timothy Prenzler and Michael King, *The Role of Private Investigators and Commercial Agents in Law Enforcement, Australian Institute of Criminology*, August 2002, p. 5 (available on the repository of Griffith University).

135 Button, 1998, p. 10, see above note 94. See also Johnston, 2007, see above note 93.

136 Luban, 2007, p. 20, see above note 109.

137 Martin Gill and Jerry Hart, "Private Security: Enforcing Corporate Security Policy Using Private Investigators", in *European Journal on Criminal Policy and Research*, 1999, vol. 7, p. 255.

> could cite instances when clients, including members of the legal profession, had directly asked them to perform illegal or unethical actions. While some cited occasions when they had been asked to organise a serious offence, such as murder or serious assault, these most commonly included gaining unlawful access to confidential information, such as criminal records, medical histories and bank account details.[138]

Similar ethical problems are expected at the international level. Leaders and members of NGOs have private interests, such as financial interests, the increase of group membership, personal career motivations, or simply personal relationships.[139] Entities such as CIJA investigate and collect material without the permission of the UNSC or an international treaty body.[140] Thus, the investigations undertaken by third parties have not only been applauded.[141] It comes to no surprise that tribunals often impose limits upon investigatory NGOs. For example, the ICTY-OTP has cautioned NGOs not to conduct in-depth interviews with potential witnesses and have established strict guidelines for collecting evidence.[142]

Of course, it is emphasised that "CIJA adheres to international standards of ethical conduct and evidence management".[143] Rankin, however, paints a too optimistic picture when she remarks: "CIJA's objectives require an extraordinary degree of individual responsibility at all ranks of the organisation, for example many Syrian investigators share a personal responsibility to collect the material in an effort to establish the truth, and share a sense of public duty to investigate".[144] The question is thus how evidence that was obtained by private individuals who, in whatever form, acted illegally or unethically, is and should be treated.

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138 Gill and Hart, 1999, p. 255, see above note 137.

139 Michael J. Struett, "The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court", in Steven C. Roach (ed.), *Governance, Order, and the International Criminal Court*, Oxford University Press, 2009, p. 115.

140 Rankin, 2017, p. 414, see above note 56.

141 Cheryl Hardcastle for instance, Windsor-Tecumseh Minister for Canadian Parliament, highlighted: "We do know in the international community that some people have criticized the privatizing of international criminal investigations", cited in *ibid*., p. 405, fn. 39.

142 See Danner, 2003, p. 532, see above note 115; Ellis, 2011, p. 156, see above note 10.

143 Rankin, 2017, p. 414, see above note 56.

144 *Ibid*.

17.5.2. Integrity as the Central Value for Private Investigators

To view the work of private investigators solely from a perspective of fairness and truth does not grasp the complexities of the matter. Instead, it is the idea of the 'integrity' or 'legitimacy' of the trial as a distinctive kind of legal process that should be focused on.[145] The question is: can integrity be the value that provides guidance for a private individual conducting an investigation? To be concrete, let us suppose that a private investigator offers money to witness in return for information about a suspect and his or her criminal activities. Does 'integrity' provide a guideline for this investigator to refrain from such activities?

17.5.2.1. Integrity Defined

Integrity as a jurisprudential concept has roots that reach into the nineteenth century. There are countless English cases that recur to integrity in relation to personal or professional honesty, good character or witness credibility.[146]

To define integrity, I will do what seems methodologically superficial and consult – at least initially – a dictionary. To be clear, this does have a methodological reason. Integrity as a term shall first and foremost be defined pragmatically,[147] that is, how it *is* used,[148] and not so much how it *should* be used or can be used (the latter semantic dimension does a play a role, though). Thus, I approach integrity as a semantic concept in the first place, and only secondarily as a philosophical concept. The reason for this methodological decision is twofold: First, integrity especially as an evidentiary concept has a strong pragmatic connotation. In other words, decision-makers expect a certain degree of practicability from a definition of integrity, despite its apparent vagueness. Second, integrity as a philosophical concept is covered elsewhere in this volume – in manifold ways and by scholars who could do it better than I ever could.

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[145] Antony Duff *et al*., *The Trial on Trial: Volume 3, Towards a Normative Theory of the Criminal Trial*, Hart, Oxford and Portland, Oregon, 2007, p. 108.

[146] Paul Roberts *et al*., "Introduction: Re-examining Criminal Process Through the Lens of Integrity", in Paul Roberts *et al*. (eds.), *The Integrity of Criminal Process*, Hart, Oxford and Portland, 2016, p. 4 with further references.

[147] About the pragmatical turn in textual interpretation, see Umberto Eco, *Die Grenzen der Interpretation*, Hanser, München, 1992, pp. 350 ff.

[148] About the usage of words see already Wittgenstein, *Philosophische Untersuchungen*, posthum second edition, Blackwell, Malden, 1958, reprint 1999, p. 20.

According to a lexical definition, integrity is "[t]he condition of having no part or element taken away or wanting; undivided or unbroken state; material wholeness, completeness, entirety".[149] In addition, integrity is also equated with "soundness", meant "[i]n a moral sense", as an "[u]nimpaired moral state; freedom from moral corruption; innocence, sinlessness".[150] Last but not least, from a lexical perspective, 'integrity' is understood as "[s]oundness of moral principle; the character of uncorrupted virtue, esp. in relation to truth and fair dealing; uprightness, honesty, sincerity".[151] The different lexical definitions underline the different perspectives 'integrity' can be viewed from: a) from the perspective of the suspect or witness ("having no part or element taken away or wanting"); b) from the perspective of the investigator ("soundness", "the character of uncorrupted virtue, esp. in relation to truth and fair dealing; uprightness, honesty, sincerity"; and c) from the perspective of the entire process ("undivided or unbroken state"; "material wholeness, completeness, entirety"). I call those the 'object', 'subject' and 'context' perspectives of integrity. It goes without saying that the perspectives do not unfold in a vacuum but are somewhat intertwined.

17.5.2.1.1. Integrity from the Perspective of the Person Interrogated or Interviewed: The Object Perspective

Let us start with integrity as "[t]he condition of having no part or element taken away or wanting; undivided or unbroken state; material wholeness, completeness, entirety".[152] During an interrogation or an interview, suspects have certain rights: the right not to be physically or mentally injured or otherwise mistreated, the privilege against self-incrimination and a number of ancillary procedural rights, such as the right to consult a lawyer.[153] This rather cursory description must suffice at this point, I will return to the rights question in due course. The integrity of the individual is a cornerstone of these rights.[154] The physical and mental integrity of the sus-

[149] John A. Simpson and Edmund S.C. Weiner, *The Compact Oxford English Dictionary*, Clarendon Press, Oxford University Press, Oxford, 1989 and 2002, p. 860 [1066].

[150] *Ibid*., p. 860 [1066].

[151] *Ibid*.

[152] *Ibid*.

[153] Adrian A.S. Zuckerman, "Coercion and the Judicial Ascertainment of Truth", in *Israel Law Review*, 1989, vol. 23, no. 2-3, p. 357.

[154] *Ibid*.

pect must not be violated.[155] Here, the notion of integrity is closely connected to human dignity,[156] as enshrined in various human rights instruments.[157] Understood this way, integrity is often equated with autonomy, individuality, independence, responsibility, and self-knowledge.[158] As Gerald Dworkin puts it: "Individuals have the right to be treated as persons, as masters of their own body, as responsible for their decisions, as makers of choices".[159] The Kantian footprint (namely: Kant's Categorical Imperative)[160] is obvious here. This supreme principle of ethics aims at the motivation (or reasons) for acting; any consideration of external behaviour is absent.[161] Kant's Categorical Imperative illustrates that dignity is "intrinsic, deontological and non-negotiable (replaceable), it is the basis of the individuality and the mutual recognition (inter-personal relationship) of the members of a society".[162] By contrast, the principle of Kant's legal philos-

[155] Israel, Supreme Court, *Abu Midjam v. State of Israel*, 1980, P.D. 34(4) 533, p. 539 – about the case, see Rinat Kitai Sangero and Yuval Merin, "Israel: The Supreme Court's New, Cautious Exclusionary Rule", in Stephen C. Thaman (ed.), *Exclusionary Rules in Comparative Law*, Springer, Dordrecht, 2013, p. 105. See also Eliahu Harnon, "Criminal Procedure and Evidence", in *Israel Law Review*, 1990, vol. 24, no. 3-4, p. 592 (603).

[156] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, OJ L. 180/60, Article 13 ('Procedures Directive') (https://www.legal-tools.org/doc/7ijsc2/).

[157] See, for instance, Charter of Fundamental Rights of the European Union, 14 December 2007, 2007/C 303/01, Article 1 (https://www.legal-tools.org/doc/715d2e/). See also Galina Cornelisse, "Protecting human dignity across and within borders: the legal regulation of international migration in Europe", in Logi Gunnarsson, Ulrike Mürbe, and Norman Weiß (eds.), *The Human Right to a Dignified Existence in an International Context: Legal and Philosophical Perspectives*, Nomos, Baden-Baden, 2019, pp. 97–98.

[158] Gerald Dworkin, *The Theory and Practice of Autonomy*, Cambridge University Press, 1988 and 1997, p. 6.

[159] *Ibid*., p. 103.

[160] "I ought never to act except in such a way that I could also will that my maxim should become a universal law", Immanuel Kant, *Groundwork of the Metaphysics of Morals*, Mary J. Gregor (ed., trans.), Cambridge University Press, 1997, p. 15 [402].

[161] Luke J. Davies, "A Kantian Defense of the Right to Health Care", in Reidar Maliks and Andreas Føllesdal (eds.), *Kantian Theory and Human Rights*, Routledge, London, 2014, p. 82; Wilfried Küper, "Das Strafgesetz ist ein kategorischer Imperativ: Zum 'Strafgesetz' in Kants Rechtslehre", in Michael Hettinger and Jan Zopfs (eds.), *Wilfried Küper – Strafrechtliche Beiträge zu Rechtsgeschichte und Rechtsphilosophie*, Mohr Siebeck, Tübingen, 2017, pp. 397 ff.

[162] Marie E. Newhouse, "Two Types of Legal Wrongdoing", in *Legal Theory*, 2017, vol. 22, no. 1, pp. 59 ff.; Ulfried Neumann, "Das Rechtsprinzip der Menschenwürde als Schutz elementarer menschlicher Bedürfnisse: Versuch einer Eingrenzung", in *Archiv für Rechts- und*

ophy, the Universal Principle of Right,[163] "transposes the categorical imperative to the sphere of external action".[164] Freedom referred to by the Universal Principle of Right is "external freedom", it "bars considerations of internal motivation".[165] The distinction between external and internal freedom is Kant's

> most profound statement on the relationship between an autonomous morality and political practice. By reconstructing Kant's arguments in favor of their distinction, we see the dynamics behind his theory of justice: The pure practical reason of morality (inner freedom) informs – and thereby subordinates – the structure of outer freedom and the political reality with which it is associated.[166]

Taking Kant's Categorical Imperative and the Universal Principle of Right as a basis, the 'object perspective' is not only a semantic description but at the same time an evaluation, since the infringement of the suspect's rights turns this suspect into an object,[167] up to a dehumanisation.[168]

Sozialphilosophie, 2017, vol. 103, no. 3, p. 293; Julian A. Sempill, "Law, Dignity and the Elusive Promise of a Third Way", in *Oxford Journal of Legal Studies*, 2018, vol. 38, no. 2, p. 228.

163 Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law. See Immanuel Kant, *The Metaphysics of Morals*, Mary J. Gregor (trans.), Cambridge University Press, 1991, p. 57 [231] (http://www.legal-tools.org/doc/cb8e1e/). See also Kai Ambos, "Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law", in *Oxford Journal of Legal Studies*, 2013, vol. 33, no. 2, pp. 293, 305.

164 Benedict Vischer, "Systematicity to Excess – Kant's Conception of the International Legal Order", in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds.), *System, Order, and International Law*, Oxford University Press, Oxford, 2017, p. 306: "[W]hile the categorical imperative requires the universalizability of the voluntary maxim, the principle of right merely demands that the action – irrespectively of the agents' motive – conforms to a universal law". About the different interpretations of Kant's external action, see Dietmar von der Pfordten, "On Kant's Concept of Law", in *Archiv für Rechts- und Sozialphilosophie*, 2015, vol. 101, no. 2, pp. 193 ff.

165 Davies, 2014, p. 82, see above note 161.

166 Antonio Franceschet, *Kant and Liberal Internationalism*, Palgrave Macmillan, New York, 2002, pp. 23–24.

167 Cf. Jacob Bronsther, "Torture and Respect", in *Journal of Criminal Law and Criminology*, 2019, vol. 109, no. 3, p. 423 (431, albeit with regard to "penal rape").

168 Peters, 1985, p. 82, see above note 113.

17.5.2.1.2. Integrity from the Perspective of the Interrogator or Interviewer: The Subject Perspective

As previously mentioned, according to a lexical definition, integrity is understood as "[s]oundness of moral principle; the character of uncorrupted virtue, esp. in relation to truth and fair dealing; uprightness, honesty, sincerity".[169] In the words of Roberts: "integrity conveys the impression of being almost unequivocally laudable, right and good".[170] In this way, integrity is connected to authenticity, reliability, constancy, fair dealing and sound judgement.[171] For Roberts: "A person of integrity treats others in accordance with her deepest enduring convictions about how people ought to be treated; she is true to her values and true to herself".[172] This definition illustrates that integrity and acting according to one's perceived moral duties are not necessarily the same. What about a person leading a terror regime (Nazi perpetrators, for instance)? Killing hundreds of thousands of people as a perceived act of self-defence of an allegedly higher race might comply with his or her perceived moral duties. Yet, is this person eligible for ascriptions of integrity?[173] The same example could be construed around a private investigator who offers money to his or her only witness so this witness provides the necessary proof that may lead to the prosecution of warlord X or Y. For Lenta, the same even holds true "of individuals whose moral beliefs are not wicked but are unreasonable or unintelligible".[174] As a result, McFall distinguishes between *personal* integrity and *moral* integrity: personal integrity "requires that an agent (1) subscribe to some consistent set of principles or commitments and (2), in the face of temptation or challenge, (3) uphold these principles or commitments, (4) for what the agent takes to be the right reasons".[175] To have moral integrity, by contrast, "it is natural to suppose that one must have some lower-order moral commitments; that moral integrity adds a moral requirement to personal integrity".[176] Thus, there are cases "in which we would want to grant

[169] Simpson and Weiner, 1989 and 2002, p. 860 [1066], see above note 149.

[170] Roberts *et al*., 2016, p. 10, see above note 146.

[171] *Ibid*.

[172] *Ibid*.

[173] In the same vein, see Patrick Lenta, "Freedom of Conscience and the Value of Personal Integrity", in *Ratio Juris*, 2016, vol. 29, no. 2, pp. 247–248.

[174] *Ibid*.

[175] Lynne McFall, "Integrity", in *Ethics*, 1987, vol. 98, no. 1, p. 5 (9).

[176] *Ibid*., p. 14.

that someone had *personal* integrity, even if we were to find his ideal morally abhorrent".[177] In reaction to this, it is questioned whether personal integrity has value whatsoever. In Lenta's words: "One might think that personal integrity is valueless since an individual's possessing personal integrity is compatible with his being wicked. In the case of the genocidal Nazi who possesses personal integrity it may well be better if he lacked personal integrity".[178]

The integrity of those who collect evidence has long been recognised as a central value and qualification. Take, for instance, the Oath of Honor of the International Association of Chiefs of Police: "On my honor, I will never betray my badge, my integrity, my character, or the public trust. I will always have the courage to hold myself and others accountable for our actions. I will always uphold the Constitution, my community, and the agency I serve".[179] Similarly, prosecutors "are meant to hold their professional integrity" and expected to have an "ethical compass".[180] Corrigan goes even further: "The first, best, and most effective shield against injustice for an individual accused [person], or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor".[181] The ICC, per its Statute, requires the staff of the OTP and Registry to have "the highest standards of efficiency, competency and integrity".[182]

17.5.2.1.3. Integrity from the Perspective of the Process: The Context Perspective

As previously mentioned, according to a lexical definition, 'integrity' also means "undivided or unbroken state"; "material wholeness, completeness, entirety". Integrity, thus, also implies normative coherence juxtaposed to fragmentation. For the current purpose, this refers to the "material whole-

[177] *Ibid*. (emphasis in the original).

[178] Lenta, 2016, p. 248, see above note 173.

[179] The International Association of Chiefs of Police ('IACP'), "The Oath of Honor" (available on its web site). See also Joycelyn M. Pollock, *Ethical Dilemmas and Decisions in Criminal Justice*, tenth edition, Cangage, Boston, 2019, p. 129.

[180] Brent E. Turvey and Craig M. Cooley, *Miscarriages of Justice*, Elsevier, Amsterdam *et al*., 2014, p. 286.

[181] Carol A. Corrigan, "On Prosecutorial Ethics", in *Hastings Constitutional Law Quarterly*, 1986, vol. 13, no. 3, p. 537.

[182] Rome Statute of the International Criminal Court, 17 July 1998, Article 44(2) ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

ness, completeness, entirety" of the criminal process.[183] One proponent of the integrity as coherence of the criminal process is Andrew Ashworth, labelling it the "unity of the criminal justice system".[184] For Ashworth, a bribe by an interrogator does not only put in question the interrogator's integrity (depending on the definition of integrity, see above); it would also damage the integrity of the criminal justice system "if the courts were to act on the fruits of that investigation".[185] Criminal justice "must carry moral authority and legitimacy, and this would be significantly compromised if courts were able to convict citizens for acts which originated in an official error or other official misconduct".[186] In a chameleonic fashion, integrity from a 'context perspective' takes several forms here, and might appear as legitimacy, moral authority or, "integrity as integration". The latter was proposed by Duff *et al.*:

> Integrity as moral coherence is the principle that a criminal justice system which lacks moral coherence will lack the standing to call the defendant to account for his conduct. Integrity as integration is the idea that, in assessing the standing of the criminal process to call the defendant to answer the charge and account for his conduct, different parts of the criminal process cannot be isolated from each other. In particular, the criminal trial cannot claim that its moral integrity is intact in isolation, where there have been failings at an earlier stage in the criminal process.[187]

I will return to 'integrity as integration', as it will become a pillar of the reaction to illegally obtained evidence.[188]

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[183] David Dixon, "Integrity, Interrogation and Criminal Justice", in Paul Roberts *et al*. (eds.), *The Integrity of Criminal Process*, Hart, Oxford and Portland, 2016, p. 79.

[184] Andrew Ashworth, "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice", in Stephen Shute and Andrew P. Simester, *Criminal Law Theory: Doctrines of the General Part*, Oxford University Press, 2002, p. 308.

[185] *Ibid*., p. 309.

[186] *Ibid*.

[187] A. Duff *et al*., 2007, p. 226 see above note 145. See also See Andrew Ashworth, "Exploring the Integrity Principle in Evidence and Procedure", in Peter Mirfield and Roger Smith (eds.), *Essays for Colin Tapper*, LexisNexis, London, 2003, pp. 113–115.

[188] See below Section 17.5.2.3.2.3.

17.5.2.2. The Role of Integrity in Illegally Obtaining Evidence in an Official Investigation

Wrongfully obtained evidence could potentially undermine the "fairness of the proceedings," bring "the administration of justice into disrepute," or damage "the integrity of the proceedings".[189] As mentioned at the outset,[190] the exclusion of that evidence is the focus of the chapter, albeit not the only possible consequence.

Let us first assume that a *State actor* illegally obtains evidence during an *official investigation*. In such a situation, what role does integrity play?

Illegally obtained evidence is of concern for the person who obtains it, the person from it is obtained and for the process as a whole. As Ambos puts it:

> [P]rohibitions of evidence have not only an *individual component* – safeguarding individual rights and vindicating their violation by the exclusion of illegally obtained evidence against the accused. They also possess a *collective dimension* – upholding the *constitutional integrity* of the legal order, especially through the guarantee and realization of a fair trial.[191]

Various rationales have been advanced with respect to the question of how to address procedural violations committed in the pre-trial phase of criminal proceedings: the 'reliability' rationale, the 'disciplinary' rationale, the 'protective' (or 'remedial') rationale, and the 'integrity' rationale(s).[192]

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[189] HO Hock Lai, "Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis", in Darryl K. Brown *et al*. (eds.), *The Oxford Handbook of Criminal Process*, Oxford University Press, 2019, p. 834.

[190] See above Section 17.1.

[191] Kai Ambos, "The Transnational Use of Torture Evidence", in *Israel Law Review*, 2009, vol. 42, no. 2, p. 366 (emphasis in the original, fn. omitted).

[192] Kelly Pitcher, *Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings*, Asser Press, Springer, Berlin, Heidelberg, 2018, p. 185; John Jackson, "Human Rights, Constitutional Law and Exclusionary Safeguards in Ireland", in Paul Roberts and Jill Hunter (eds.), *Criminal Evidence and Human Rights*, Hart, Oxford and Portland, Oregon, 2012, p. 119 (121). For reviews of the various rationales, see Peter Mirfield, *Silence, Confessions and Improperly Obtained Evidence*, Clarendon Press, Oxford, 1997, chaps. 2 and 6; Ian H. Dennis, *The Law of Evidence*, seventh edition, Sweet & Maxwell, Thomson Reuters, London, 2020, mn. 3-041–3.046; Paul Roberts and Adrian Zuckerman, *Criminal Evidence*, second edition, Oxford University Press, Oxford, 2010, pp. 179 ff.

17.5.2.2.1. Integrity from the Subject Perspective: The Deterrence Theory

One of the most common rationales for exclusionary rules is the deterrence theory (also known as the "disciplinary rationale"),[193] a policy-based, and forward-looking[194] theory that justifies exclusion in terms of its impact on future police behaviour.[195] The US Supreme Court, for instance, emphasised the deterrent effect of excluding wrongfully obtained evidence ("policing the police").[196] In *Terry v. Ohio*, for instance, it remarked:

> Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. […] Thus, its major thrust is a deterrent one, […] and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that, without it, the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of word'.[197]

As LIU reports, Japanese courts too relied on the deterrence theory as a rationale for excluding evidence.[198] Furthermore, the exclusionary rule of the fruit of the poisonous tree is established based on the deterrence theory.[199] On this rationale, "the effect and purpose of exclusion coincide. But,

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193 Peter Duff views the deterrence rationale (calling it "disciplinary rationale") as part of the "integrity of the process", see Peter Duff, "Admissibility of Improperly Obtained Physical Evidence in the Scottish Criminal Trial: The Search for Principle", in *Edinburgh Law Review*, 2004, vol. 8, no. 2, p. 152 (160).

194 Roberts and Hunter, 2012, p. 121, see above note 192 ("Another argument often advanced is that the prohibition on the use of evidence serves as a deterrent to investigators and prosecutors from repeating their improper conduct in the future"); Adrian A.S. Zuckerman, "Illegally-Obtained Evidence—Discretion as a Guardian of Legitimacy", in *Current Legal Problems*, 1987, vol. 40, no. 1, pp. 56–57.

195 HO, 2019, p. 824, see above note 189; Roberts and Zuckerman, 2010, p. 185, see above note 192.

196 Stephen C. Thaman and Dominik Brodowski, "Exclusion or Non-Use of Illegally Gathered Evidence in the Criminal Process: Focus on Common Law and German Approaches", in Kai Ambos *et al*. (eds.), *Core Concepts in Criminal Law and Justice*, vol. 1, Cambridge University Press, 2020, p. 458.

197 United States, Supreme Court ('US SC'), *Terry v. Ohio*, 1968, 392 US 1, p. 12. See also US SC, *Mapp v. Ohio*, 1961, 367 US 643, p. 655.

198 LIU Jingkun, *The Exclusionary Rule of Illegal Evidence in China*, Springer, Law Press China, Beijing, 2019, p. 44.

199 *Ibid*.

conceptually, the two are distinct. In many other jurisdictions, deterrence is not the (primary) purpose of exclusion".[200]

As the prominence of the deterrence grew, so did the criticism against this rationale of excluding wrongfully obtained evidence. With regard to the theory itself, Duff *et al*. pointed out that "the relevant comparator in terms of deterrent effect is not failing to respond to the wrong, but rather using alternative sanctions for the wrong".[201] Especially in the eyes of the public, the rationale has an ironic connotation. It at least requires an extensive line of justification why citizens should be protected from police misconduct by letting the (alleged) guilty go free.[202] The criticism of a lack of correlation between the exclusionary rule and the purpose to discipline the State actor is well known.[203]

The strongest objection is – this probably applies to every deterrence argument within the realm of criminal justice – that there is no valid empirical research at present.[204] A possible assessment of how law enforcement officials respond to exclusionary rules is difficult to make and past studies "have asserted that empirical data has been unable to substantiate or refute a deterrent effect".[205] Second, there are other forms to 'police the police', such as disciplinary proceedings or criminal prosecution of law enforcement officials.[206] It is doubtful whether the exclusion of evidence is really the best vindication for police wrongdoing, especially when the individual officer is more concerned with his or her own safety,[207] the expectations of peers,[208] or in making an arrest and/or has no personal interest in a convic-

[200] HO, 2019, p. 824, see above note 189.

[201] A. Duff *et al*., 2007, p. 228, see above note 145.

[202] Zuckerman, 1987, p. 59, see above note 194; Roberts and Zuckerman, 2010, p. 27, see above note 192; P. Duff, 2004, p. 161, see above note 193: "are we really justified in letting the guilty go free in order that we can protect the public from the police?".

[203] See, for example, Luis Greco, "Warum gerade Beweisverbot? Ketzerische Bemerkungen zur Figur des Beweisverbots", in Ulrich Stein *et al*. (eds.), *Systematik in Strafrechtswissenschaft und Gesetzgebung, Festschrift für Klaus Rogall zum 70. Geburtstag am 10. August 2018*, Duncker & Humblot, 2018, pp. 485–515 (507 ff.).

[204] HO, 2019, p. 825, see above note 189; Gless and Macula, 2019, p. 355, see above note 8.

[205] Gless and Macula, 2019, p. 355, see above note 8.

[206] As it the case in Germany, Thaman and Brodowski, 2020, p. 458, see above note 196.

[207] Zuckerman, 1987, p. 59, see above note 194.

[208] *Ibid*.

tion.[209] Third, in many criminal justice systems, officials who violate an exclusionary rule never learn whether or not the evidence they obtained is excluded.[210] A fourth point is made by HO:

> To deter the police from breaking rules on evidence gathering, they must know what the rules are. It is questionable whether they do possess adequate knowledge. Exclusion will have little signaling and disincentivization impact if there is no communication channel that keeps the police in the loop every time the court rejects the evidence that they have collected.[211]

Ambos would not go so far to reject the deterrence rationale altogether but downgrade it to a "positive side-effect".[212]

17.5.2.2.2. Integrity from Object Perspective: The Theory of Remedies

The theory of remedies (also known as the "rights thesis",[213] 'vindication', 'remedial' or 'protective' theory[214]) focuses on the person interrogated and – more specifically – on his or her rights. Evidence ought to be excluded because legal (subjective) rights have been infringed.[215] The idea behind this rationale is that trials can and should protect citizens against the arbitrary exercise of State power.[216] If rights have been violated, the victim of the violation is entitled to a remedy (hence the name).[217] Human rights in the structure of criminal procedure vest the accused with legal rights which he or she can use to oppose State repression in the investigation and prosecution of a crime.[218] This defensive role is denoted in legal theory as the shield function of human rights law.[219] A criminal trial has a particularly

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209 Thaman and Brodowski, 2020, p. 458, see above note 196; Gless and Macula, 2019, p. 355, see above note 8; Zuckerman, 1987, p. 59, see above note 194.

210 Gless and Macula, 2019, p. 355, see above note 8.

211 HO, 2019, p. 825, see above note 189 (fn. omitted). In the same vein, albeit with regard to search and seizure, see Zuckerman, 1987, p. 59, see above note 194.

212 Ambos, 2009, p. 366, see above note 191.

213 A. Duff *et al*., 2007, p. 230, see above note 145.

214 Zuckerman, 1987, pp. 56–57, see above note 194; P. Duff, 2004, p. 164, see above note 193.

215 About the "rights perspective" in general Campbell, Ashworth, and Redmayne, 2019, p. 46, see above note 107; see also P. Duff, 2004, p. 155, see above note 193.

216 A. Duff *et al*., 2007, p. 227, see above note 145.

217 *Ibid*., p. 230.

218 Krešimir Kamber, *Prosecuting Human Rights Offences*, Brill, Leiden, 2017, p. 7.

219 *Ibid*.

negative effect for the (alleged) offender's rights such as his or her reputation, financial position, personal liberty, and even life.[220] Thus, human rights protection ensures that the individual is shielded from the State's abuse of the *ius puniendi*.[221] Of course, human rights law also mandates the State to criminalise, investigate, prosecute and, if appropriate, punish criminal attacks on human rights.[222] This role can be descriptively denoted as the sword function of human rights law.[223] If failing to convict the defendant "where there is a powerful epistemic case against him is a serious abrogation of responsibility by the state, it will need powerful justification in terms of deterrence, a justification which we suspect will not be forthcoming".[224]

Duff *et al*. integrate this shield function of human rights in a trial into a more general communicative theory of the criminal trial.[225] In the spirit of this communicative theory of the trial, "state power must be justified to the defendant through the appropriate kind of communicative process, treating him as a responsible agent".[226] The combination of the remedy rationale and communicative theory is particularly appealing for international investigations, as I will demonstrate below.[227]

The remedial theory "is rights-based, and backward-looking, and defends exclusion as a direct response to the specific wrong committed by the police in getting the evidence".[228] Yet, unlike the deterrence theory, which

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220 Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005) pp. 6 ff. ("An individual's reputation, financial position, personal liberty, even life […] is at stake"); Julia Geneuss, "Obstacles to Cross-fertilisation: The International Criminal Tribunals' 'Unique Context' and the Flexibility of the European Court of Human Rights' Case Law", in *Nordic Journal of International Law*, 2015, vol. 84, no. 3, pp. 410–411.

221 Geneuss, 2015, pp. 410–411, see above note 220.

222 Inter–American Court of Human Rights, *Case of Velásquez Rodríguez v. Honduras,* Merits, Judgment, 29 July 1988, Series C, No. 4, para. 176:

> The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.

223 Kamber, 2017, p. 7, see above note 218.

224 A. Duff *et al*., 2007, p. 229, see above note 145.

225 *Ibid*., p. 227.

226 *Ibid*.

227 See below Section 17.5.2.3.2.3.1.

228 HO, 2019, p. 824, see above note 189.

focuses on deterring the police's illegal behaviours, the theory of remedies concentrates on the vindication of rights of defendants suffered from an illegal investigation.[229] It is thus an all-or-nothing theory that leaves considerable room for balancing.[230] Furthermore, the remedy rationale has a correlation problem: critics argue that there is no correlation between the wrongdoing (police misconduct) and its legal consequence (exclusion of evidence up an acquittal of the accused).[231] It is argued that other remedies seem more convincing: disciplinary measures against the public official, the application of substantive criminal law to the person who violated the right of the suspect,[232] and so on.[233]

17.5.2.2.3. Integrity from Context Perspective: The Integrity of the Process

When evidence is wrongfully obtained, its exclusion is also justified by reference to integrity, with increasing popularity[234] (at least amongst common law systems). In the words of Peter Duff: "the justification for excluding improperly obtained evidence cannot – and should not – be based on 'internal' concerns about the reliability of the evidence but must be based on 'external' concerns relating to the integrity of the process and the broader public interest".[235] However, the utilisation of integrity varies.

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229 Roberts and Hunter, 2012, p. 121, see above note 192. See especially Andrew Ashworth, "Excluding Evidence as Protecting Rights", in *Criminal Law Review*, 1977, p. 723.

230 LIU, 2019, p. 50, see above note 198.

231 Zuckerman, 1987, p. 58, see above note 194:

> In a criminal trial exclusion of evidence of guilt amounts to a contribution towards the acquittal of a person who may be guilty. It is by no means self-evident that acquittal of the guilty is an appropriate response to earlier police transgressions. Nor is a blanket exclusion capable of achieving a balance between the seriousness of the infringement and the benefit to the accused.

232 "There are far stronger grounds for punishing an officer who deliberately broke the rules or tricked the accused than where there has been mere inadvertence", P. Duff, 2004, p. 161, see above note 193.

233 See also *ibid*., p. 164.

234 *Ibid*., p. 171.

235 *Ibid*., p. 159.

17.5.2.2.3.1. Integrity as Moral Authority of the Verdict and Integrity as Legitimacy

One argument is that wrongfully obtained evidence endangers the moral authority of the verdict.[236] It is concerned with the "determination of moral blame, as well as of legal liability, which may in turn justify the infliction of suffering and humiliation on an individual".[237] The argument usually appears under different names: it may also be labelled the theory of fair trial or (moral) legitimacy[238] of the trial.[239] Legitimacy, in this sense,

> refers to a larger concept, of which factual accuracy is a major part, but which includes additional notions of moral authority and expressive value. In essence, legitimacy signifies an aspiration that an adjudicative decision should as far as possible be factually accurate and also consistent with other fundamental moral and political values embedded in the legal system. The objective is that the decision should claim not only to be factually accurate, thus fulfilling the truthfinding aim of the legal process, but also to be morally authoritative, and to express the value of the rule of law.[240]

I will address these elements in detail in the course of this chapter. One aspect of this argument is the hypothesis that the public would hold a critical attitude towards the fairness of the trial, and argue that the courts fail to uphold procedural justice if wrongfully obtained evidence would be admitted in every case and without scrutiny.[241] This is, at the same time, the legitimacy aspect of the argument: the government "is to have legitimacy in the sense of drawing (and being deserving of) public confidence and respect".[242] This legitimacy argument has been the driving force behind exclusionary rules in the US prior to the advancement of the deterrence theo-

[236] Roberts and Hunter, 2012, p. 121, see above note 192.

[237] Zuckerman, 1987, p. 56, see above note 194.

[238] In detail, see Dennis, 2020, mn. 2-022, see above note 192.

[239] LIU, 2019, p. 46, see above note 198.

[240] Dennis, 2020, mn. 2-022, see above note 192.

[241] Zuckerman, 1987, p. 56, see above note 194; Roberts and Zuckerman, 2010, p. 16, see above note 192; LIU, 2019, p. 45, see above note 198; P. Duff, 2004, p. 155, see above note 193: "[M]ost people would agree that it would not reflect well upon a criminal justice system if it were prepared to admit incriminating statements which had been tortured out of the accused by the police".

[242] HO, 2019, p. 830, see above note 189.

ry.[243] As HO puts it: "To preserve judicial legitimacy, and to avoid being tainted by the executive's dirty hands, the court has to renounce and disassociate itself from the police illegality by refusing to accept and act on the product of the illegality".[244] In the Rothman case before the Supreme Court of Canada,[245] Judges Laskin and Estey stated in their dissent:

> The basic reason for the exclusionary confession rule is a concern for the integrity of the criminal justice system. The support and respect of the community for that system can only be maintained if persons in authority conduct themselves in a way that does not bring the administration of justice into disrepute.[246]

The consideration of the public attitude is a double-edged sword: it appears doubtful that the public, especially the victims, would accept the decision of excluding key evidence only due to a relatively minor violation of legal procedure. Thus, the argument of legitimacy allows for a considerable exercise of balancing. The theory of fair trial is an important basis of the exclusionary rule in England. Section 78 (1) of the Police and Criminal Evidence Act 1984 stipulates that

> In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Amongst the rationales of exclusionary rules, the moral legitimacy rationale receives increasing popularity,[247] while it carries some inherent dangers: "public opinion in these matters is likely to mirror the 'populist

[243] *Ibid*.

[244] *Ibid*., with further references.

[245] Canada, Supreme Court, *Rothman v. The Queen*, [1981] 1 SCR 640 (available on its web site).

[246] *Ibid*., p. 642.

[247] P. Duff, 2004, p. 173, see above note 193: "A further response might be that the moral legitimacy rationale provides a better explanation of what it is that the courts actually do, even if they do not always fully recognise or articulate their reasoning".

punitiveness' expressed in the tabloid press and by 'law and order' politicians".[248]

17.5.2.2.3.2. Integrity as Reliability

The rational that provides most flexibility is the reliability theory: evidence may be unreliable because of how it was obtained.[249] See, for instance, Section 76(2)(b) of the Police and Criminal Evidence Act of 1984 reads:

> If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained […] in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.[250]

Two aspects render the reliability rationale an integrity concept: First, excluding evidence that has been wrongfully obtained would advance the search for truth, since the use of unreliable evidence "increases the risk of error in fact-finding".[251] As previously argued, the search for truth is a means to the end of justice and thus a vital part of the integrity of a trial. Second, a guilty verdict that is based on unreliable evidence is an unfair verdict.[252] An unfair verdict lacks – as already mentioned – legitimacy. Accordingly, the reliability and legitimacy theory are intertwined. The connection between reliability and fairness is also underlined by the European

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[248] *Ibid*., p. 175, citing Ashworth, 2003, p. 111, see above note 187. P. Duff borrows the term "public punitiveness" from Anthony Bottoms, "The philosophy and politics of punishment and sentencing", in Chris Clarkson and Rod Morgan (eds.), *The Politics of Sentencing Reform*, Clarendon Press, Oxford, 1995, pp. 39–41.

[249] Roberts and Hunter, 2012, p. 121, see above note 192.

[250] UK, Police and Criminal Evidence Act 1984, 31 October 1984, s. 78 (https://www.legal-tools.org/doc/b52ec0/). Emphasis added.

[251] HO, 2019, p. 828, see above note 189; P. Duff, 2004, p. 154, see above note 193: "The first reason for excluding evidence is the fear that it may adversely affect the accuracy of the outcome of the trial. This may be because the evidence is, quite simply, inherently unreliable or because the evidence, even if factually accurate, is likely for other reasons to distort the decision-making process, thus affecting the reliability of the outcome".

[252] HO, 2019, p. 832, see above note 189.

Court of Human Rights in the *Gäfgen* case, where evidence was obtained by way of torture:[253]

> [T]he quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker.[254]

17.5.2.2.3.3. Integrity as Rule of Law

Especially in legal systems relying on the civil law tradition, one of the main rationales for excluding or not admitting evidence is the rule of law principle. Displaying all the different meanings of this principle goes beyond the scope of this chapter. One of the earlier and more prominent definitions[255] is provided by Dicey, who assigns to the rule of law "at least three distinct though kindred conceptions":[256] First,

> that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[257]

Second,

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253 European Court of Human Rights, *Gäfgen v. Germany*, Judgment, 1 June 2010, 22978/05; John D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence*, Cambridge University Press, Cambridge *et al*., 2012, p. 158; Jamil Ddamulira Mujuzi, "The Admissibility of Confessions and Real Evidence Obtained in Violation of Human Rights in Criminal Trials in European Countries: Analysing the Jurisprudence of the European Court of Human Rights", in *European Criminal Law Review*, 2019, vol. 9, no. 3, pp. 340–345.

254 *Gäfgen v. Germany*, 2010, para. 164, see above note 253.

255 It should be stressed, though, that the concept of a Rule of Law goes back to Plato and Aristotle, see in more detail the account of Erhard Denninger, "Rechtsstaat", in *id*. and Klaus Lüderssen (eds.), *Polizei und Strafprozeß im demokratischen Rechtsstaat*, Suhrkamp, Frankfurt a.M., 1978, pp. 67–72.

256 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, tenth edition, MacMillan, London, 1886 (reproduced in 1979), pp. 188 ff.

257 Dicey, 1886 and 1979, p. 188, see above note 256.

> that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.[258]

The two elements described so far can certainly be named as the two main elements of the rule of law, independent of the legal system.[259] The third element is one that needs to be read against the historical context:

> There remains yet a third and a different sense in which the 'rule of law' or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts […].[260]

Defining the rule of law principle is not only beyond the scope of this chapter, but it is also methodologically questionable.[261] I follow MacCormick, student of H.L.A. Hart, in his seminal account of the meanings of the terms 'rule of law' and '*Rechtsstaatsprinzip*':[262] Every attempt to define terms like this is problematic, since they are neither open to a descriptive analysis nor a conventional determination. Instead, such an attempt needs to take account of the historical context, translated into a normative princi-

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[258] *Ibid*., p. 193.

[259] Erhard Denninger, "'Rechtsstaat' oder 'Rule of Law' – was ist das heute?", in Cornelius Prittwitz *et al*. (eds.), *Festschrift für Klaus Lüderssen*, Nomos, Baden-Baden, 2002, p. 43.

[260] Dicey, 1886 and 1979, p. 193, see above note 256.

[261] See also Matthias Klatt, "Der Begriff des Rechtsstaats", in Eric Hilgendorf and Jan C. Joerden (eds.), *Handbuch Rechtsphilosophie*, J.B. Metzler, Stuttgart, 2017, pp. 390 ff.; Eberhard Schmidt-Aßmann, "§ 26 – Der Rechtsstaat", in Josef Isensee and Paul Kirchhof (ed.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Bd. II: Verfassungsstaat*, C.F. Müller, Heidelberg 2004, mn. 1.

[262] Neil MacCormick, *Questioning Sovereignty*, Oxford University Press, Oxford, 1999-2002, p. 43. About the difference between rule of law and Rechtsstaatsprinzip Oliver Lepsius, *Verwaltungsrecht unter dem Common Law. Amerikanische Entwicklungen bis zum New Deal*, Mohr Siebeck, Tübingen, 1997, pp. 207 ff. Denninger stresses that Rule of Law and *Rechtsstaatsprinzip* have conceptually different roots: While the Rule of Law is political, the *Rechtsstaatsprinzip* is apolitical. In England, for instance, subjective rights have always been closely connected to a functioning process of democratic political participation. The roots of the *Rechtsstaatsprinzip*, by contrast, are a reaction to the failed attempt at democracy in 1848 and 1849 and are thus apolitical and individualistic, Denninger, 1978, p. 68, see above note 255.

ple.[263] The rule of law could thus well be categorised as what Popper famously labelled as one of the "mere puzzles arising out of the misuse of language".[264]

A central idea of the rule of law is that the government should be subject to and accountable under the law.[265] A core value for achieving this is the separation of powers.[266] In Germany, for instance, any State activity infringing the rights of citizens requires a clear statutory legal basis.[267] The criminal trial is an important platform in this system. The court's role is to scrutinise unlawfulness on the part of the executive – eventually to preserve the integrity of the criminal process.[268] Courts make sure that the truth in a criminal trial is not sought at any price but that there are legal limitations on ascertaining it with the constitutional rights being protected. Truth has an integrity component.[269] Thus, the executive must be prevented

[263] Neil MacCormick, "Der Rechtsstaat und die rule of law", in *Juristenzeitung*, 1984, p. 65 (67) (author's translation). As a result, Denninger expressly emphasizes that he attempts to "describe" the essential, i.e. functional-necessary elements of the "invention" rule of law, which is supposed to be ahistorical, see Denninger, 2002, p. 43, see above note 259 ("Der folgende Versuch einer Beschreibung der 'wesentlichen', das heißt funktionsnatwendigen Elemente der ‚Erfindung' rule of law ist also auf die Bewältigung gegen— wärtiger und absehbarer zukünftiger Probleme gerichtet. Er ist damit bewusst „unhistorisch" […]."). Klatt recognises three phases of the development of a Rechtsstaat-definition, see in more detail Klatt, 2017, pp. 390 ff., see above note 261.

[264] Karl Popper, *Unended Quest*, Routledge, London and New York, 2005, p. 11.

[265] Friedrich August von Hayek, *The Road to Serfdom*, Dymock's Book Arcade, Sydney, 1944, p. 54; Roberts and Zuckerman, 2010, p. 17, see above note 192.

[266] Ralf Dreier, "Der Rechtsstaat im Spannungsverhältnis zwischen Gesetz und Recht", in *Juristenzeitung*, 1985, vol. 40, no. 8, p. 353.

[267] See German Federal Constitutional Court, Judgment of 12 Apr. 2005 – 2 BvR 581/01 = BVerfGE 112, 304, 315 for the area of criminal procedure, and generally German Federal Constitutional Court, Judgment of 21 Dec. 1977 – 1 BvL 1/75, 1 BvR 147/75 = BVerfGE 47, 46, 78–9; Thaman and Brodowski, 2020, p. 429, see above note 196.

[268] See Pitcher, 2018, p. 117, see above note 192.

[269] Richard L. Lippke, "Fundamental Values of Criminal Procedure", in Darryl K. Brown *et al*. (eds.), *The Oxford Handbook of Criminal Process*, Oxford University Press, Oxford, 2019, p. 31:

> I believe that it is useful to identify two subsidiary values in the service of truth. The first is integrity, according to which the various state agents tasked with arresting, investigating, and charging individuals with crimes, and seeing to the adjudication of charges, must respect and consistently abide by procedures that are reliable and evidence-driven.

"from using evidence that it had acquired unlawfully to support a criminal prosecution".[270]

Ideally, the 'law' in 'rule of law' incorporates the integrity rationale: that is, the moral authority of the verdict, legitimacy, fair trial and reliability. As Finnis famously pointed out, the rule of law "is to secure to the subjects of authority the dignity of self-direction and freedom from certain forms of manipulation. The rule of law is thus among the requirements of justice or fairness".[271] Hence, when the Court of Appeals in England and Wales held that a criminal prosecution should have been stayed when the accused had been entrapped by State agents into committing the offence for which he or she was standing trial, the rationale resembles the rationales mentioned above:

> [T]he judicial response to entrapment is based on the need to uphold the rule of law. A defendant is excused, not because he is less culpable, although he may be, but because the police have behaved improperly. Police conduct which brings about, to use the catch-phrase, state-created crime is unacceptable and improper. To prosecute in such circumstances would be an affront to the public conscience […]. In a very broad sense of the word, such a prosecution would not be fair.[272]

The main similarity between the rule of law and integrity, however, is coherence.[273] Thus, when the separation of powers is identified as the most prominent element of the rule of law, it merely describes the means to an end, that is, the coherence of the law and its application.[274] At the same time, integrity complements the rule of law. An authoritarian regime that makes sure that the law is applied correctly, basically ensures legality, but not the rule of law. As MacCormick rightly points out, the rule of law can never be fully implemented by positive law.[275] MacCormick's reasons as follows: First, the rule of law is the formal guideline ("*formale Leitlinie*")

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[270] See, for example, HO Hock Lai, "The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence", in *Criminal Law and Philosophy*, 2016, vol. 10, no. 1, p. 109; HO, 2019, p. 833, see above note 189.

[271] John Finnis, *Natural Law and Natural Rights*, second edition, Oxford University Press, 2011, p. 273.

[272] United Kingdom, House of Lords ('UK HL'), *R v. Looseley*, [2001] UKHL 53, [2001] WLR 2060.

[273] See also Klatt, 2017, pp. 391–392, see above note 261, with further references.

[274] See already MacCormick, 1984, p. 69, see above note 263.

[275] *Ibid*. (author's translation).

of a rational practice of law on both the level of legislation and adjudication. This guideline is the direct result of the demand that legal norms are both enacted and applied according to the requirement of 'reasonableness', regardless of the acceptance of their actual content.[276] Second, the rule of law is closer to the natural law[277] than to the positive law and is thus customary law.[278] This interpretation of the rule of law might be the result of MacCormick's affinity for the common law tradition, what he admits when referring to Dicey's elements of the rule of law mentioned above. The natural law dimension of the rule of law principle is indeed a neuralgic point that caused some controversy.[279] For the purpose of this chapter, it suffices to say that this dimension is in fact due to the element of integrity that lies within the rule of law. Consequently, a positivist understanding of the rule of law,[280] or at least the full rejection of its naturalistic connotation, is hard to reconcile with the element of integrity as I defined it earlier (coherence, moral authority, legitimacy, fairness). In this vein, Denninger opines that 'law' in the rule of law is comprised of the two elements, rationality and normativity,[281] which corresponds with Fuller's "inner morality of law". The "inner morality of law" is defined by the "congruence between official action and the law".[282] The element of congruence is the common denominator of morality and integrity. Thus, Fuller explains:

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[276] *Ibid*.: "Zum einen sind sie [die Prinzipien der Rechtsstaatlichkeit] formale Leitlinien einer vernünftigen Rechtspraxis auf Gesetzes- und Rechtsanwendungsebene; sie gebe der Forderung Ausdruck, daß Rechtsnormen unabhängig von der Akteptabilität ihrer Inhalte in Übereinstimmung mit den Erfordernissen von formal verstandener 'reasonableness' erlassen und angewandt werden müssen" (author's translation).

[277] In fact, MacCormick uses the term "überpositives Vernunftrecht". About the difference between Naturrecht and überpositivem Recht, Frank Dietrich, "Rechtsbegriffe", in Eric Hilgendorf and Jan C. Joerden (eds.), *Handbuch Rechtsphilosophie*, J.B. Metzler, Stuttgart, 2017, p. 2 (6).

[278] MacCormick, 1984, p. 69, see above note 263: "Zum anderen sind diese Prinzipien eher dem überpositiven Vernunftrecht als dem geschriebenen Recht zugehörig – einem Vernunftrecht, wie es die Rechtsphilosophie und Staatslehre im Laufe der Jahrhunderte in kritischer Auseinandersetzung mit bestehenden Rechtsordnungen entwickelt haben. Insofern sind sie gewohnheitsrechtlich verankert" (author's translation).

[279] For references see *ibid*.

[280] In this vein, see Denninger, 2002, pp. 44–45, see above note 259: "'Recht', und das heißt in einer entwickelten industriellen und postindustriellen Gesellschaft fast ausschließlich: gesetztes, 'positiviertes', damit auch änderbares Recht, also 'Gesetz'".

[281] *Ibid*., p. 46.

[282] Lon L. Fuller, *The Morality of Law*, revised edition, Yale University Press, New Haven, 1969, p. 81.

> This congruence may be destroyed or impaired in a great variety of ways: mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive toward personal power.[283]

Fuller also explicitly mentions integrity as fairness:

> Just as the threats toward this congruence are manifold, so the procedural devices designed to maintain it take, of necessity, a variety of forms. We may count here most of the elements of 'procedural due process,' such as the right to representation by counsel and the right of cross-examining adverse witnesses.[284]

In addition to Fuller's account, MacCormick adds – among other things – "reasonable consistency among laws (for contradictory laws afford no real guidance)".[285] Applied to actors such as the police or prosecutors, there is thus "an expectation of consistency in the attitudes" they display.[286] Fuller's eight principles of the rule of law are developed further by Finnis and Raz, including the principle of proportionality.[287]

Finally, the formal understanding of the rule of law (consistency, coherence, and so forth) is supplemented by a substantive element.[288] As MacCormick points out with reference to Kelsen:

> Where there is a constitutional separation of powers, with checks and controls on arbitrary discretion, and a requirement that government be conducted under clear and pre-announced laws, and above all when these laws include a justiciable catalogue of fundamental rights that limit governmental power, the *Rechtsstaat* in a substantive, not merely a formal sense, exists.[289]

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[283] *Ibid*.

[284] *Ibid*.

[285] MacCormick, 1999 and 2002, p. 45, see above note 262.

[286] HO, 2016, pp. 119–120, see above note 270.

[287] Joseph Raz, *The Authority of Law – Essays on Law and Morality*, Oxford University Press, 1979, pp. 208 ff.; Finnis, 2011, pp. 270 ff., see above note 271; Klatt, 2017, pp. 391–392, see above note 261; Schmidt-Aßmann, 2004, mn. 4, see above note 261.

[288] Cf. Hasso Hofmann, "Geschichtlichkeit und Universalitätsanspruch des Rechtsstaats", in *Der Staat*, 1995, vol. 34, no. 1, p. 1 (12); Schmidt-Aßmann, 2004, mn. 19, see above note 261; Klatt, 2017, p. 391, see above note 261.

[289] MacCormick, 1999 and 2002, p. 43, see above note 262.

In other words, the rule of law incorporates basic civil and political rights.[290] It protects the dignity, integrity and moral equality of persons and groups.[291] Dworkin's theory of law as 'integrity' goes into the same direction, reflecting a broad and substantive conception of the rule of law,[292] so does Habermas' *Diskurstheorie*.[293] Thus, the substantive element of the rule of law combines the two dimensions of integrity: the systemic dimension and the deontological. It also includes the remedy rationale of exclusionary rules.[294]

17.5.2.2.4. Intermediate Conclusion

In this section, I have displayed the rationales for the exclusion of evidence illegally obtained by State officials to answer the question whether integrity should be the value that provides guidance for a private individual conducting an investigation. Within these rationales, I have identified the role of integrity and connected it to the three perspectives of integrity introduced at the outset of the section. The 'remedy rationale' corresponds with the 'object perspective', the 'deterrence rationale' with the 'subject perspective' and the 'integrity of the process rationale' with the 'context perspective'. The latter has three variants: integrity as moral authority of the verdict and integrity as legitimacy; integrity as reliability; and integrity as the rule of law. Integrity as the rule of law may incorporate all other elements

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290 *Ibid*., p. 46. Critically Raz, 1979, pp. 208 ff., see above note 287; Ernst-Wolfgang Böckenförde, "Grundrechte als Grundsatznormen – Zur gegenwärtigen Lage der Grundrechtsdogmatik", in Ernst-Wolfgang Böckenförde (ed.), *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht*, Suhrkamp, Frankfurt a. M., 1991, pp. 190, 197 ff.

291 Martin Krygier, "Rule of Law (and *Rechtsstaat*)", in James R. Silkenat, James E. Hickey, Jr., and Peter D. Barenboim (eds.), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, Springer, Cham, 2014, p. 52.

292 Ronald Dworkin, *Law's Empire*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 1986, 176 ff. See also T.R.S. Allan, "Freedom, Equality, Legality", in James R. Silkenat, James E. Hickey, Jr., and Peter D. Barenboim (eds.), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, Springer, Cham, 2014, p. 155 (169). In the same vein, see Jürgen Habermas, *Faktizität und Geltung*, fourth edition, Suhrkamp, Frankfurt am Main, 1994, p. 272: "Denn der Gesichtspunkt der Integrität, unter dem der Richter das geltende Recht rational rekonstruiert, ist Ausdruck einer rechtsstaatlichen Idee, die die Rechtsprechung zusammen mit dem politischen Gesetzgeber dem Gründungsakt der Verfassung und der Praxis der am Verfassungsprozeß beteiligten Staatsbürger *bloß entlehnt*" (emphasis in the original).

293 *Ibid*., p. 250.

294 See above Section 17.5.2.2.2.

of the 'context perspective', namely, the moral authority of the verdict, legitimacy (fair trial) and reliability. The natural law dimension of the rule of law is crucial for this umbrella function.

17.5.2.3. The Role of Integrity in Illegally Obtaining Evidence in a Private Investigation

The distinction between the various perspectives mentioned above – put differently: the individual-collective approach[295] – can be upheld on the international level, albeit not without a determination of preceding issues. Those issues are the nature of investigations under consideration in this chapter and the different notions of fairness.

17.5.2.3.1. Investigatory Contexts

It lies within the nature of international criminal proceedings that the roots of certain pieces of information can be traced back to other investigatory contexts. This investigatory context can be non-existent – this is the situation this chapter is about: a private individual collects evidence that is then offered to an ICT. The evaluation of the context as 'non-existent' stems from the (albeit semantic, not necessarily conceptual) premise that an investigation is always conducted by State authorities, while a private person could only conduct an 'examination'[296] or make an 'inquiry'.[297] What seems to be a tempting way to separate already, through semantics and taxonomy, the collection of evidence by a State actor on the one hand, and by a private person on the other hand, is problematic in two ways. First, the solution of conceptual puzzles through semantics and taxonomy has always an arbitrary after taste. In other words, the problem is merely shifted to another level. Second, as I will demonstrate, a systemic understanding of 'in-

[295] Ambos, 2009, p. 366, see above note 191.

[296] In this vein, see Nienaber, 2019, pp. 47–48, see above note 97.

[297] In this vein, see Ulrich Eisenberg, *Beweisrecht der StPO – Spezialkommentar*, tenth edition, C.H. Beck, München, 2017, mn. 395 ("Nachforschungen"). De Vries provides a rather broad interpretation of term 'investigation' that seems to be based on the functional reading of decisions of regional human rights courts, albeit ignoring the procedural context of the decisions, see De Vries, 2019, p. 605, see above note 1 ("capable of leading to the identification and punishment of those responsible"). For a definition of the term "fact-finding" – albeit from an epistemological perspective and not from an institutional one – Simon De Smet, "Justified Belief in the Unbelievable", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Fact-Finding*, second edition, TOAEP, Brussels, 2020, pp. 83 ff. Several forms of fact-finding exercises are listed by Robertson, 2020, pp. 480–482, see above note 5.

vestigation' can and even must include the conduct of everyone acting within that system, namely, both State and private actors.

Moreover, the context can also be a domestic investigation, for example, evidence obtained legally under domestic law would be obtained illegally under the law of the ICT; entrapment by a law enforcement official of another jurisdiction[298] – or even an international investigation, where a third party working for an organ of the respective ICT (UN peacekeeping forces, for instance) obtains evidence through illegal means. I will call these contexts the inter-investigatory context (international investigation – domestic investigation); the intra-investigatory context (internal investigation by a private individual or another third actor); and the extra-investigatory context (collection of evidence by a private individual outside any ICT-investigation). Spatial restrictions dictate a dietary approach to those contexts.

17.5.2.3.1.1. The Inter-Investigatory Context

The inter-investigatory context has indeed been dealt with by ICTs in the past when national authorities obtained evidence in violation of the suspect's rights applicable before the Tribunals. In one instance, at the trial against *Mucić*, the Defence contended that Austrian authorities denied then suspect Mucić the right to counsel, the right to remain silent, and induced him to make a confession.[299] At that time, Austrian law did not provide for a right to counsel during questioning, which the ICTY evaluated as "not strange and not in violation of fundamental human rights or the European Convention on human rights".[300] I will go into the relevant provisions on a possible exclusion or admission of the evidence in a moment. Right now, for the description of the inter-investigatory context it suffices to say that the ICTY felt – unsurprisingly – that it was not bound by the law of a different investigatory context.[301] It is in the discretion of the Chamber, though, whether it "may apply such rules".[302] As a result, the Trial Cham-

298 A. Duff *et al*., 2007, p. 242, see above note 145.

299 ICTY, *Prosecutor v. Delalić et al*., Trial Chamber, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 September 1997, IT-96-21-T, para. 8 ('Delalić *et al*.') (https://www.legal-tools.org/doc/afbced/). See also the analysis in Pitcher, 2018, p. 289, see above note 192.

300 Delalić *et al*., 1997, para. 46, see above note 299.

301 *Ibid*., para. 49: "The Trial Chamber is not bound by national rules of evidence – Sub-rule 89(A)".

302 *Ibid*.

ber held that the Austrian procedure was in breach of the right to counsel according to Article 18(3) ICTY Statute and therefore the statement before the police was inadmissible at trial.[303] A similar situation occurred before the ICTR. On 15 April 1996, the authorities of Cameroon arrested and detained Barayagwiza and several other suspects on suspicion of having committed genocide and crimes against humanity in Rwanda in 1994.[304] Barayagwiza later argued that his pre-trial detention in Cameroon was excessive and that he was not promptly informed of the charges brought against him. This rendered his otherwise lawful arrest unlawful and constituted an obstacle to the Tribunal's personal jurisdiction on the basis of the "abuse of process doctrine".[305]

In the ICC Statute, the inter-investigatory context was taken into account via Article 69(8): "When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law". The provision clarifies a rather simple insight: that the ICC is supposed to apply its own law when deciding upon the admissibility of evidence.[306] Article 69(8) is thus a concretisation of Article 10: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute". On its face, the provision applies to Part 2 of the Statute, namely, Articles 5–21.[307] Nevertheless, the drafting process of the provision indicates that it may also apply to Articles outside Part 2.[308] And since it includes Article 21, it certainly applies when internationally recognised human rights are concerned. Even though Article 10 exists to clarify that the Statute does not bar outside development, it cuts both ways and also stresses the differences between the text in the Statute and other instruments, including national law.[309] The purpose of Article 10 appears as a kind of reservation clause and clarifies that all articles in Part 2 are limited

[303] *Ibid*., para. 52.

[304] International Criminal Tribunal for Rwanda ('ICTR'), *Prosecutor v. Barayagwiza*, Decision, 3 November 1999, ICTR-97-19-AR72, Introduction, para. 5 ('Barayagwiza decision') (https://www.legal-tools.org/doc/ee7411/).

[305] *Ibid*., Introduction, paras. 13 *et seq*.

[306] Pitcher, 2018, p. 325, see above note 192.

[307] Alexander Heinze, "Article 10", in Kai Ambos (ed.), *Rome Statute of the International Criminal Court – A Commentary*, fourth edition, C.H. Beck, Hart, Nomos, München *et al*., 2021, p. 775, mn. 16.

[308] *Ibid*., mn. 12.

[309] *Ibid*., p. 655, mn. 16.

to the purpose of building an agreement between the States Parties and shall have no binding effect going beyond the subject matter and the scope of the Statute and the State Party's agreements.[310] The Statutes for the ICTY and the ICTR are without a corresponding regulation.

The inter-investigatory context at the ICC played a role in the case against *Katanga and Ngudjolo*: the Defence argued that one of Katanga's statements was taken in violation of his right to remain silent, "insofar as it is alleged that Mr Katanga was not informed of his right to have counsel present during the interrogation" and pointed out "that Mr Katanga had such a right under the Statute, under existing norms of internationally recognized human rights and under the Constitution of the DRC".[311] As a result, the Defence claimed that "the admission of the *procès-verbal* would be antithetical to, and would seriously damage, the integrity of the proceedings".[312] Drawing on Article 69(7) , the Chamber emphasised "that the provisions of the DRC Constitution cannot apply in the context of admissibility decisions" and that

> the violation has to impact on international, as opposed to national, standards on human rights. [...] Therefore, evidence obtained in breach of national procedural laws, even though those rules may implement national standards protecting human rights, does not automatically trigger the application of Article 69(7) of the Statute.[313]

17.5.2.3.1.2. The Intra-Investigatory and Extra-Investigatory Context

Evidence collected by private individuals that enters a trial before ICTs may involve both the intra-investigatory and the extra-investigatory contexts. In the former, there is a perceived attribution of the private individual to an organ of the ICT (usually the OTP). That may occur rather openly through the utilisation of the individual in the collection process, that is, *ab initio*; or through an *ex post*-attribution, when the individual acted in the

310 *Ibid*., p. 648, mn. 6.

311 ICC, *Prosecutor v. Katanga and Ngudjolo*, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, para. 55 (fn. omitted) ('Katanga and Ngudjolo, 2010') (https://www.legal-tools.org/doc/7710b6/).

312 *Ibid*., para. 56 (fn. omitted, emphasis in the original).

313 *Ibid*., para. 58 (fn. omitted).

interest of the organ.[314] In the latter, the person acts independently of a tribunal organ and outside an investigation. As described at the outset of this chapter, the extra-investigatory context is of relevance for the purpose of the chapter.[315]

17.5.2.3.1.2.1. Procedural Rules and the Extra-Investigatory Context

The particularity here lies in the lack of an investigatory context and the ensuing lack of rules that regulate the collection of evidence in such a context. But let us pause for a moment here: the lack of investigatory rules in an extra-investigatory context is not as clear as it seems at first sight. First, as already mentioned,[316] legislators may decide to regulate private conduct in an extra-investigatory context. Second, the inapplicability of procedural rules to private conduct requires an explanation. It goes to nothing less than the question of whom procedural rules are addressed to. The source of exclusionary rules can be constitutions, codes or case law, and, in the words of Thaman and Brodowski, "can be formulated in absolute terms, strictly requiring the exclusion of any evidence gathered in violation of 'the law' or of certain constitutional or fundamental rights, or can be formulated so as to allow judges discretion in deciding whether to admit or exclude illegally gathered evidence".[317] Take, for instance, § 136a(3) cl. 2 of the German Code of Criminal Procedure (*Strafprozessordnung*, 'StPO'), barring the use of evidence obtained through prohibited methods of examination (such as "physical interference, administration of drugs, torment, deception or hypnosis").

Already in 1952 the German Higher Regional Court (*Oberlandesgericht*, 'OLG') of Oldenburg decided that § 136a StPO only addressed State organs.[318] This is also the prevailing view in German legal litera-

[314] German scholars want to apply exclusionary rules when the private investigation was initiated by a state organ, see Martina Matula, *Private Ermittlungen*, Kovac, Hamburg, 2012, p. 101 with further references.

[315] About the intra-investigatory context: P. Duff, 2004, pp. 163–164, see above note 193, with case examples from Scotland.

[316] See above Section 17.5.1.

[317] Thaman and Brodowski, 2020, p. 437, see above note 196 (fn. omitted).

[318] Higher Regional Court (*Oberlandesgericht*, 'OLG') Oldenburg, in *Neue Juristische Wochenschrift*, 1953, p. 1237; Matula, 2012, p. 97, see above note 314. The German Code of Criminal Procedure is available in the ICC Legal Tools Database (https://www.legal-tools.org/doc/wc2l2a/).

ture.[319] Illegally obtained evidence by private individuals can generally be admitted and is not automatically excluded.[320] The German Federal Court of Justice (*Bundesgerichtshof*, 'BGH') confirmed this view.[321] Once a private individual obtains evidence and hands it over to a State agency, the Federal Court of Justice sees no reason to exclude that evidence.[322] The Court justifies this with reference to the search for truth.[323] It does not even suggest that the illegally obtained evidence may be treated with caution or may have lower probative value, as the OLG of Oldenburg did.[324]

The question of whom procedural rules are addressed to is crucial. If addressed merely to State organs but not individuals, the exclusion of illegally obtained evidence by private individuals is harder to justify than in the latter case. Thus, it is at least surprising how quickly German courts came to the conclusion that § 136a StPO is not addressed to private individuals.

17.5.2.3.1.2.2. Addressees of Procedural Rules

The question of who is addressed by a legal text is first and foremost a question of definition. Strictly speaking, the drafters of the text determine its addressees. Yet, laws are rarely very informative when it comes to the addressees. In fact, they are rather vague. Thus, it is left to the addressees themselves to determine whether they are indeed addressed by a certain law. Unsurprisingly, attempts to determine the addressee of a law in general terms remain controversial: from the "interested lay person" (Krüger),[325] to the person affected by the law (Noll, probably the broadest category of ad-

[319] Rainer Gundlach, "§ 136a StPO", in Rudolf Wassermann (ed.), *Kommentar zur Strafprozessordung*, Reihe Alternativkommentare, vol. 2.1, Luchterhand, Neuwied, 1992, mn. 13; Matula, 2012, p. 100, see above note 314, with further references; Werner Leitner, "Unternehmensinterne Ermittlungen im Konzern", in Klaus Lüderssen *et al*. (eds), *Festschrift für Wolf Schiller: zum 65 Geburtstag am 12 Januar 2014*, Nomos, Baden-Baden, 2014, p. 432.

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

[321] German Federal Supreme Court, Decisions in Criminal Matters, (*Bundesgerichtshof, Entscheidungen in Strafsachen*, BGHSt), vol. 27, p. 357; vol. 34, p. 52; Matula, 2012, p. 97, see above note 314.

[322] Bundesgerichtshof ('BGH'), in *Neue Juristische Wochenschrift*, 1989, p. 843 (844); Matula, 2012, p. 97, see above note 314.

[323] BGH, 1989, p. 845, see above note 322.

[324] OLG Oldenburg, 1953, p. 1237, see above note 318; also OLG Celle, in *Neue Juristische Wochenschrift*, 1985, p. 641.

[325] Uwe Krüger, *Der Adressat des Gesetzgebers*, Duncker & Humblot, Berlin, 1969.

dressees)[326] to those who potentially 'use' the law, that is, the decision makers (Baden),[327] the arguments are manifold. Therefore, it seems more like a claim than a justified argument that an exclusionary rule – such as § 136a StPO – is directed at State organs. The larger issue that looms behind the question whom exclusionary rules are addressed to is the question of what procedural rules are (compared to rules of substantive criminal law). Space restrictions again pose limits to an in-depth-elaboration.

17.5.2.3.1.2.2.1. The Relationship Between Procedural and Substantive Law

Compared to substantive law, procedural law has famously been classified as "imperative law" *vis-à-vis* "punitory law",[328] "secondary rules" *vis-à-vis* "primary rules"[329] or as "decision rules" *vis-à-vis* "conduct rules".[330] Even today, some reduce the function of criminal procedure to merely execute substantive criminal law,[331] on the basis that substance was logically anterior to procedure.[332] However, a clear (hierarchical) division between substantive criminal law and procedure is neither possible nor desirable in a legal system.[333] It may even be viewed as a mere semantic distinction – not

[326] Peter Noll, *Gesetzgebungslehre*, Rowohlt, Reinbek bei Hamburg, 1973, pp. 172 ff.

[327] Eberhard Baden, *Gesetzgebung und Gesetzesanwendung im Kommunikationsprozeß*, Nomos, Baden-Baden, 1977, p. 69.

[328] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, Batoche Books, Kitchener, 2000 [1781], p. 241.

[329] Herbert L.A. Hart, *The Concept of Law*, second edition, Clarendon Press, Oxford, 1994, pp. 79–99.

[330] Meir Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law", in *Harvard Law Review*, 1984, vol. 97, no. 3, pp. 625–677.

[331] Karel De Meester, *The Investigation Phase in International Criminal Procedure* (Intersentia, Cambridge, Antwerp, Portland, 2015, p. 100; Gunther Arzt, "Der Internationale Strafgerichtshof und die formelle Wahrheit", in Jörg Arnold *et al*. (eds.), *Festschrift für Albin Eser*, C.H. Beck, München, 2005, pp. 691–692 with further references.

[332] Herbert L. Packer, "Two Models of the Criminal Process", in *University of Pennsylvania Law Review*, 1964, vol. 113, no. 1, pp. 1–69 (1, 3); Joshua Dressler, Alan C. Michaels, and Ric Simmons, *Understanding Criminal Procedure, Volume One: Investigation*, third edition, Carolina Academic Press, Durham, 2017, § 1.01.

[333] In a similar vein Heike Jung, "Anmerkungen zum Verhältnis des materiellen Strafrechts zum Strafverfahrensrecht", in *Goltdammer's Archiv für Strafrecht*, 2019, pp. 259 ff. In fact, most legal systems "are more concerned about procedural rights than about rights to a substantive law", George P. Fletcher, *Basic Concepts of Criminal Law*, Oxford University Press, 1998, p. 9.

more and not less.[334] This is especially true at the international level, where the concept of international criminal justice is still controversial, especially amongst the Realist school.[335] Moreover, there is not even a coherent definition of "international criminal law",[336] which "has not evolved in a linear, cohesive, consistent, or logical fashion"[337] and inevitably leads to an amalgamation of international criminal law and international criminal justice. The retributive or deterrent effect of punishment in international criminal law has always been dependent on the perception of international criminal trials.[338] Another telling example of the maceration of the substance-procedure divide at the international level is the application of the principle of non-retroactivity (*nullum crimen*, *nulla poena sine lege praevia*)[339] to procedural rules. While at the domestic level, this rule is usually only applied to matters of substance rather than procedure,[340] the ICC Statute ex-

[334] Klaus Volk, *Prozeßvoraussetzungen im Strafrecht*, Verlag Rolf Gremer, Ebelsbach, 1978, p. 4.

[335] Paul Roberts, "Comparative Law for International Criminal Justice", in David Nelken and Esin Örücü (eds.), *Comparative Law – A Handbook*, Hart Publishing, Oxford and Portland, Oregon, 2007, p. 341; Andreas Werkmeister, *Straftheorien im Völkerstrafrecht*, Nomos, Baden-Baden, 2015, p. 31; M. Cherif Bassiouni, "The Discipline of International Criminal Law", in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. 1, third edition, Martinus Nijhoff, Leiden, 2008, p. 26, all with further references.

[336] Roberts, 2007, p. 342, see above note 335; Jackson and Summers, 2012, p. 112, see above note 253.

[337] Bassiouni, 2008, pp. 17–18, see above note 335.

[338] Francis Biddle, *In Brief Authority*, Greenwood Press, Westport, 1962/1972, p. 372; Patricia M. Wald, "Running the Trial of the Century", *Cardozo Law Review*, 2005–6, vol. 27, pp. 1559, 1574; Geoffrey Lawrence, "Nuremberg Trial", in Guénaël Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford University Press, 2008, pp. 290, 292; Margaret M. de Guzman and Timothy Kelly, "The International Criminal Court is Legitimate Enough to Deserve Support", in *Temple International and Comparative Law Journal*, 2019, vol. 33, p. 402.

[339] Claus Roxin and Luis Greco, *Strafrecht Allgemeiner Teil*, vol. 1, fifth edition, C.H. Beck, München, 2020, § 5 mn. 10.

[340] Bruce Broomhall, "Article 51", in Kai Ambos (ed.), *Rome Statute of the ICC – A Commentary*, fourth edition, C.H. Beck, Hart, Nomos, München *et al*., 2021, pp. 1592–1613, mn. 33; Alexander Heinze, "Tor zu einer anderen Welt", in Bock *et al*. (eds), *Strafrecht als interdisziplinäre Wissenschaft* (Nomos, Baden-Baden, 2015, p. 199 with further references. A retroactive application of procedural rules is usually nevertheless prohibited through the rule of law, see *ibid*. pp. 199–200.

plicitly[341] prohibits the retroactive application of amendments to the Rules of Procedure and Evidence ('RPE').[342]

That being said, the traditional separation between substantive and procedural law (and the ensuing question of whom they are addressed to) is particularly fruitless in the face of exclusionary rules. Malcai and Levine-Schnur made this point very well: "The court's decision on a procedural question may be necessary as a logical requirement for the adjudication of the substantive issue. For example, it will never be the case that a court will announce the verdict first and then rule on the (in)admissibility of evidence on which the verdict relies".[343] This is an argument Schreiber already made in 1968: procedural rules, especially rules of evidence, have a considerable impact on the substantive issue of punishment.[344] And yet, inadmissibility due to a violation of a person's rights might still be ignored, since it is morally justified not to acquit the defendant.[345] It touches upon the balancing exercise many courts in the world carry out between the severity of the rights violation and the alleged crime the accused is charged with.[346] It also hints at the integrity and morality of a judgment as described above;[347] and

[341] ICC Statute, Article 51(4), see above note 182. In the same vein, but less explicit, see ICTY, Rules of Procedure and Evidence, 8 July 2015, IT/32/Rev.50, Rule 6(D) ('ICTY RPE') (https://www.legal-tools.org/doc/30df50/); ICTR, Rules of Procedure and Evidence, 13 May 2015, Rule 6(c) ('ICTR RPE') (https://www.legal-tools.org/doc/c6a7c6/) and Special Tribunal for Lebanon ('STL'), Rules of Procedure and Evidence, 20 March 2009, Rule 5(H) ('STL RPE') (https://www.legal-tools.org/doc/3773bf/). See, generally, Philipp Ambach, "The 'Lessons Learnt' process at the ICC – a suitable vehicle for procedural improvements?", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2016, vol. 11, p. 855.

[342] Albeit with the qualification "to the detriment of the person who is being investigated or prosecuted or who has been convicted" (ICC Statute, Article 51(4), see above note 182), which allows the retroactive application of amendments to the RPE in exceptional cases, as it has been passionately discussed in the context of the application of the amended Rule 68, ICC RPE ("Prior recorded testimony") in the case against *Ruto* and *Sang* before the ICC, see in more detail Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, Oxford University Press, 2016, pp. 497–499.

[343] Ofer Malcai and Ronit Levine-Schnur, "When Procedure Takes Priority: A Theoretical Evaluation of the Contemporary Trends in Criminal Procedure and Evidence Law", in *Canadian Journal of Law and Jurisprudence*, 2017, vol. 30, no. 1, p. 194.

[344] Hans-Ludwig Schreiber, "Die Zulässigkeit der rückwirkenden Verlängerung von Verjährungsfristen früher begangener Delikte", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1968, vol. 80, p. 366; see also Volk, 1978, p. 56, see above note 334.

[345] Malcai and Levine-Schnur, 2017, p. 201, see above note 343.

[346] Campbell, Ashworth, and Redmayne, 2019, pp. 42 ff., see above note 107.

[347] See above Section 17.5.2.2.3.1.

the remedy theory.[348] Malcai and Levine-Schnur call this the "*ex-post* and *ex-ante* perspectives" of "substance-procedure dilemmas", which is in the case of exclusionary rules: "creating significant incentives to avoid the violation of rights without making the substantive outcome of trial strictly conditional on the legality or constitutionality of the (probative) evidence".

German courts have addressed this dilemma by embracing it and drawing (or, at least, attempting to draw) a clear line between procedure and substance. In that line, the main reason for a rejection of any exclusionary rule in the case of private acts is a plain reference to the fact that private individuals who act illegally against other persons commit crimes.[349] Thus, there would be no need for other means of sanctions. This argument, however, cannot be transferred to the situation at hand, namely private individuals, non-official investigations, and the international context. First, because the international or transnational context makes the identification of the respective criminal offense considerably difficult. Second, and more importantly, what this view lays bare is the premise – probably influenced by German dogmatic – of a clear distinction between substantive and procedural law.[350] In reality, the argument goes like this: we have a sanction from substantive law, why apply a procedural one? This distinction, however, is not only domestically controversial, but even more at the international level, as I have shown.

17.5.2.3.1.2.2.2. Exclusionary Rules: Conduct Rules, Decision Rules or Both?

A conceptual visualisation of these dilemmas is provided by Meir Dan-Cohen's (albeit controversial)[351] distinction between "decision rules" *vis-à-vis* "conduct rules". Drawing on previous dichotomies (or, less strictly, distinctions), for Dan-Cohen there are laws addressed to the general public – the citizens – that are designed to shape people's behaviour (conduct control) and laws that are addressed to officials that provide guidelines for

348 See above Section 17.5.2.2.2.

349 Matula, 2012, p. 150, see above note 314, with further references.

350 In that vein, see Theodor Kleinknecht, "Die Beweisverbote im Strafprozeß", in *Neue Juristische Wochenschrift*, 1966, p. 1542.

351 See the critical comments of Kyron Huigens, Samuel W. Buell, Anne M. Coughlin, Luís Duarte d'Almeida, Adil Ahmad Hague, Eric J. Miller and Malcolm Thorburn, in Paul H. Robinson, Stephen P. Garvey and Kimberly Kessler Ferzan (eds.), *Criminal Law Conversations*, Oxford University Press, 2009, pp. 12 ff.

their decisions. The former, imply instructing the public about the required conduct and by issuing threats to secure compliance. The latter are made 'with respect' to members of the general public. They are designed to authorise, constrain, or otherwise guide officials in the wielding of the State's power ("power control"). Dan-Cohen emphasises that "communicating to legally trained officials suggests a different style than communicating to the legally untutored general public". Thus, the guidelines "may be enhanced by the use of a technical, esoteric terminology that is incomprehensible to the public at large".

Taking these characteristics of decision rules together, on its face, rules of procedure and evidence fall into the category of decision rules, "on the grounds that they concern the basis for the legal conduct of trials as interpreted by judges and lawyers".[352] If this were the case, procedural rules would not be addressed to private individuals. Yet, this general observation might be ill-suited for exclusionary rules, since those do regulate conduct. The question is whether exclusionary rules are addressed to public officials, regardless of their conduct regulation – in that case, they are decision rules, or whether they regulate a conduct, regardless of their nature as procedural rules that generally address public officials – in that case, they are conduct rules. To be fair, upon application of Dan-Cohen's theoretical model, the characteristics of exclusionary rules overwhelmingly seem to point in the direction of decision rules. Yet, Dan-Cohen himself admits that his dichotomy is theoretical, and unfolds in a more nuanced fashion in the 'real world'. Thus, the question of whether exclusionary rules are conduct rules or decision rules might not have a clear answer after all. As Dan-Cohen puts it: "Any given rule may be a conduct rule, a decision rule, or both. The mere linguistic form in which a legal rule is cast does not determine the category to which it belongs".[353]

A central element for the differing appearance of both conduct rules and decision rules is what Dan-Cohen calls "acoustic separation", which – at least theoretically – "ensures that conduct rules cannot, as such, affect decisions; similarly, decision rules cannot, as such, influence conduct".[354] This is different in the real world:

[352] A. Duff *et al*., 2007, p. 276, see above note 145.

[353] Meir Dan-Cohen, "Decision Rules and Conduct Rules – On Acoustic Separation in Criminal Law", in Paul H. Robinson, Stephen P. Garvey, Kimberly Kessler Ferzan (eds.), *Criminal Law Conversations*, Oxford University Press, 2009, p. 4.

[354] *Ibid*., p. 4.

> Here, officials are aware of the system's conduct rules and may take them into account in making decisions, and individuals may consider decision rules in shaping their conduct. Real-world decision rules are accordingly likely to have conduct side effects, and real-world conduct rules are likely to have decisional side effects.[355]

This is true with (real world) exclusionary rules: they are addressed to the courts as guidelines for decision making, and to the person conducting – for instance – the interview, to prescribe a certain behaviour. Whether this person must be a public official, still remains unanswered. Applying Dan-Cohen's model, Malcai and Levine-Schnur decide affirmatively.[356] Yet, to follow from the design of a rule (technical, power control, and so on) and the relationship among rules (acoustic separation) to an addressee seems to put the cart before the horse. It is presumably also not what Dan-Cohen envisaged. In fact, he himself acknowledged the difficulty to apply his model in reality (or "the real world", as he expressed it):

> Societies differ in their degree of acoustic separation. But just as we would be hard pressed to locate a society displaying complete acoustic separation, we would find it equally difficult to identify a society in which such separation was wholly absent. We are also likely to discover that, within any given society, the degree of acoustic separation varies with respect to different groups of the population and different issues.[357]

It is especially true at the international level. As I have illustrated elsewhere,[358] though applying the law, a procedural question before the ICC can be decided differently by different Chambers. The reason for this phenomenon is that the drafters of the ICC Statute relied on the "constructive ambiguity" of legal texts.[359] In the words of Safferling: "A procedural system, which is so complex that the rules could be interpreted in a purely positivistic way, does not exist at the international level".[360] Since the ICC Statute leaves room for interpretation, it apparently has become *en vogue* to

[355] *Ibid*.

[356] Malcai and Levine-Schnur, 2017, p. 201 with fn. 55, see above note 343.

[357] Dan-Cohen, 1984, pp. 634–635, see above note 330.

[358] Heinze, 2014, pp. 34 ff., see above note 110.

[359] Christoph Safferling, *International Criminal Procedure*, Oxford University Press, 2012, p. 112.

[360] *Ibid*.

decide procedural matters on a so-called case-by-case basis.[361] The ICC OTP, in particular, seems to accommodate such an approach.[362] In its policy paper on the interests of justice of September 2007, it declares that the paper's scope would only "offer limited clarification in the abstract" as "the particular approach then will necessarily have to depend on the facts and circumstances of the case or situation".[363] Thus, international criminal procedure at the ICC highly depends on the persons involved.[364] As I have illustrated, the composition of the chamber can play an important role in determining how the Statute and the Rules are interpreted.[365] Issues arising in different chambers may be resolved in slightly different ways.[366] That the creation of international procedural law very often lies in the hands of international judges might indicate that it is composed of decision rules, addressed to public officials, that is, the judges themselves. As a matter of fact, governments prefer to leave judges to determine for themselves how the court will operate.[367]

Thus, the classification of exclusionary rules as decision rules does not exclude the possibility that they are also conduct rules that are only addressed both to public officials and citizens. This is what Duff *et al.* realised, too, when they point out that the categorisation of procedural rules as decision rules

[361] In the same vein, see Swoboda, *Verfahrens- und Beweisstrategien*, Nomos, Baden-Baden, 2013, p. 203, seeing no alternative to a case-by-case approach.

[362] Safferling, 2012, p. 110, see above note 359.

[363] ICC OTP, *Policy Paper on the Interests of Justice*, 1 September 2007, p. 7, fn. 9 (https://www.legal-tools.org/doc/bb02e5/).

[364] Safferling, 2012, p. 111, see above note 359.

[365] Kristina D. Rutledge, "Spoiling Everything – But for Whom? Rules of Evidence and International Criminal Proceedings", in *Regent University Law Review*, 2003-2004, vol. 16, no. 1, pp. 151–189 (162–163).

[366] Robert Christensen, "Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court", in *UCLA Journal of International Law and Foreign Affairs*, 2001-2002, vol. 6, p. 414.

[367] Daniel Terris, Cesare P.R. Romano, Leigh Swigart, *The International Judge*, Oxford University Press, Oxford, 2007, pp. 104–105. See, for instance, the "Judge-Legislator" model known from the ad hoc Tribunals, see Fabricio Guariglia, "The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of Individual Criminal Responsibility", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court; A Commentary*, vol. II, Oxford University Press, 2002, p. 1116.

> does not imply, however, that such rules need not be comprehensible to citizens; indeed, the comprehensibility of the proceedings is still a precondition of a just public trial. If the trial is to address citizens in legal and moral terms which they can understand, the rules for courts must also be rules for citizens, in that they must be articulated in a way that connects appropriately with the ethical language of participants in the trial.[368]

Methodically, Duff *et al*. evade a by-effect of the application of Dan-Cohen's models: to miss the forest for the trees. It is so tempting to dive into the theoretical characteristics of decision rules and conduct rules that it is very easy to lose sight of what procedural law is really about: to regulate conduct during the proceedings and a trial respectively. The question of *whom* procedural rules are addressed to cannot therefore be answered without the question of *what* procedural rules are concerned with. It is unconvincing to rely on a principle according to which "the legal process should signify its insistence that those who enforce the law should also obey the law".[369] The *argumentum a contrario* that those who do *not* enforce the law are *not* obliged to obey the law demonstrates the fallacy of the principle, and calls for a holistic view on the addressee-issue.

17.5.2.3.1.2.2.3. The Holistic View: The Criminal Process as a System

This holistic view on the addressee-issue has roots in Luhmann's systems theory, which has a threefold effect. First, procedural law does not just delineate a bipolar relationship between the law and its addressees, but is a system. Especially the late Luhmann promoted the idea of sociological systems, where communication is a central feature.[370] Luhmann relied on theories of systems, as they had developed within biology and cybernetics. Law, within this theory, is one of society's sub-systems.[371] Teubner has taken this further, drawing on Luhmann's version of systems theory, to the

[368] A. Duff *et al*., 2007, p. 276, see above note 145.

[369] Per Lord Griffiths in UK HL, *R v. Horseferry Road Magistrates' Court, ex parte Bennett*, [1994] 1 AC 42; Ashworth, 2002, p. 318, see above note 184.

[370] Niklas Luhmann, *Einführung in die Systemtheorie*, Dirk Baecker (ed.), fourth edition, 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, Advance Article, p. 2.

[371] *Ibid*.; 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. 377 with fn. 13.

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.[372] Applying Luhmann's systems theory, laws are not so much addressed to individuals but to closed systems – systems that cannot be influenced but merely motivated by external factors.[373] According to Luhmann, "the social system consists of meaningful communications— only of communications, and of all communications",[374] and "the legal system, too, consists only of communicative actions which engender legal consequences".[375] Understood this way, the addressees of exclusionary rules are not so much either public officials or private citizens, or both, but are all those who factually conducts an investigation.

The procedural, investigatory context is the closed system. At the same time, the criminal process is part of the (broader) criminal justice system.[376] Luhmann also admitted that there are communications that transgress a closed system.[377] Hamel has taken this point further and demonstrated that the judgment, as a form of speech act, is the autopoietic operation of the system criminal justice that – through its effects, especially the *res iudicata* – communicates to society and thereby transgresses the closed system.[378] This is nothing less than the connection between a judgment of a criminal court and the expressive or communicative effects of punishment. Concretely, a judgment that is based on illegally obtained evidence, and has therefore a questionable moral authority, might also have an impact on the

[372] See, for example, 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, chap. 7.

[373] Niklas Luhmann, *Das Recht der Gesellschaft,* Suhrkamp, Frankfurt am Main, 1993-1997, p. 43; Theresa F. Schweiger, *Prozedurales Strafrecht: Zur Bedeutung von Verfahren und Form im Strafrecht*, Studien zum Strafrecht, vol. 91, Nomos, Baden-Baden, 2018, p. 113.

[374] Gunther Teubner, "Evolution of Autopoietic Law", in Gunther Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society*, Walter de Gruyter, Berlin and New York, 1988, p. 17.

[375] *Ibid*., p. 18; Mark van Hoecke, *Law as Communication*, Hart, Oxford and Portland, 2012, p. 117.

[376] Campbell, Ashworth, and Redmayne, 2019, pp. 2, 11-12, see above note 107; Heinze, 2014, pp. 114 ff., see above note 110; 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, no. 6, p. 937.

[377] Luhmann, 1993-1997, p. 34, see above note 373.

[378] Roman Hamel, *Strafen als Sprechakt*, Duncker & Humblot, Berlin, 2009, pp. 81–82.

expressive function of punishment. I will get back to this a little later, since this connection becomes vital in international criminal law.

When taking the procedural system and the investigatory process as a closed system,[379] where everyone is addressed by the relevant rules, the next step would be to determine the parameters of such a system. I have done this elsewhere, not only with regard to national systems of criminal procedure[380] but, especially, with a view to international criminal procedure. Thus, I will limit myself to some brief remarks. The relevant attempts to model a procedural system 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 or normative take.[381] The most prominent example of the descriptive model are Packer's Crime Control and Due Process Models. Packer's 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.[382] While under "crime control" speed, efficiency and finality are the overriding values, and any rule or measure compromising such values is deemed inappropriate,[383] "due process" aims at the protection of the "most disadvantaged" and thus demands equal treatment regardless of wealth or social status.[384] Under Packer's crime control model, the authority of the criminal justice system is derived from the laws passed by legislatures, whereas under his due process model authority is derived from the Supreme Court.

[379] About procedural law (more concretely, evidence law) as a system, see Roberts and Zuckerman, 2010, chap. 1 and p. 188, see above note 192.

[380] Heinze, 2014, pp. 92 ff., see above note 110.

[381] In more detail, see *ibid*., pp. 133 ff.

[382] Herbert L. Packer, *The Limits of the Criminal Sanction*, Stanford University Press/Oxford University Press, Stanford, California and Oxford, 1969, pp. 149–53; see also the accounts of Yvonne McDermott, *Fairness in International Criminal Trials*, Oxford University Press, Oxford, 2016, pp. 9–10; Katja Šugman Stubbs, "An Increasingly Blurred Division between Criminal and Administrative Law", in Bruce Ackerman, Kai Ambos, and Hrvoje Sikirić (eds.), *Visions of Justice – Liber Amicorum Mirjan Damaška*, Duncker & Humblot, Berlin, 2016, pp. 351–370, 353; Campbell, Ashworth, and Redmayne, 2019, pp. 39 ff., see above note 107.

[383] Cf. Heinze, 2014, p. 134, see above note 110.

[384] See Packer, 1969, p. 168, see above note 382.

17.5.2.3.1.2.2.3.1. Parameters of the Criminal Process System: Crime Control

It would be within the spirit of Packer's Crime Control Model to admit illegally obtained evidence by private individuals and not apply exclusionary rules. In fact, the model would even admit illegally obtained evidence by public officials. In Packer's words:

> In theory the Crime Control Model can tolerate rules that forbid illegal arrests, unreasonable searches, coercive interrogations, and the like. What it cannot tolerate is the vindication of those rules in the criminal process itself through the exclusion of evidence illegally obtained or through the reversal of convictions in cases where the criminal process has breached the rules laid down for its observance.[385]

Moreover, according to this model, illegally seized evidence should also be admissible at trial. Unlike coerced confessions, guns, drugs and stolen property reveal the truth regardless of how the police obtained them.[386]

Under Packer's Crime Control Model, the authority of the criminal justice system is derived from the laws passed by legislatures.[387] This legislature, as opposed to the courts, is the model's "validating authority". A criminal sanction is suggested to be "a positive guarantor of social freedom" and necessary for the maintenance of "public order".[388] In the Crime Control Model, the police have an important role. They are concerned with "factual guilt" in the sense that the accused probably committed the criminal act,[389] and carry out most of the fact-finding.[390] Because it treasures "speed and finality",[391] the Crime Control Model allows the police and prosecutors to screen out the innocent and secure "as expeditiously as pos-

[385] *Ibid*., pp. 167–168.

[386] *Ibid*., p. 199.

[387] *Ibid*., p. 173.

[388] *Ibid*., p. 158.

[389] As opposed to "legal guilt" that could be established beyond a reasonable doubt through admissible evidence and after considering all the rights and defences of the accused.

[390] But see Peter L. Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies", in *Georgetown Law Journal*, 1983, vol. 72, no. 2, pp. 185–248.

[391] Packer, 1969, p. 159, see above note 382.

sible, the conviction of the rest, with a minimum of occasions for challenge, let alone post-audit".[392]

It is important to clarify that Packer's Crime Control Model in no sense authorises broad police abuse, as some authors assert.[393] It is quite the opposite: Packer's Crime Control model even imposes ordinary law for State officials in line with Dicey's idea of the rule of law.[394] However, it is fair to say that what the model most fears is a criminal going free just because of (procedural) mistakes done by the police.[395]

17.5.2.3.1.2.2.3.2. Parameters of the System Criminal Process: Due Process

The Due Process Model, by contrast, is not concerned with "factual guilt" but with "legal guilt".[396] This seems to touch upon different understandings of fairness, on which I will elaborate in the next section. The Due Process Model aims at the protection of the "most disadvantaged" and thus demands equal treatment regardless of wealth or social status.[397] It places much less emphasis on efficiency and guilty pleas than the Crime Control Model and strives to avoid police abuses.[398] Procedural rights like the right to remain silent and the right to contact counsel are seen as most important.[399] Unlike the Crime Control Model, the Due Process Model does not allow separate civil, disciplinary, or criminal actions in cases of prosecutorial or police abuses.[400] Therefore, the model provides for "prophylactic and deterrent"[401] exclusionary rules because much police abuse will

[392] *Ibid*., p. 160.

[393] Kent Roach, "Four Models of the Criminal Process", in *Journal of Criminal Law & Criminology*, 1999, vol. 89, no. 2, pp. 671–716.

[394] Cf. Dicey, 1886 and 1979, pp. 188 ff., see above note 256.

[395] United States, New York Court of Appeals, *People v. Defore*, 12 January 1926, 150 N.E. 585, 587.

[396] Packer, 1969, p. 167, see above note 382.

[397] *Ibid*., p. 168.

[398] *Ibid*., p. 180.

[399] *Ibid*., p. 191: "The rationale of exclusion is not that the confession is untrustworthy, but that it is at odds with the postulates of an accusatory system of criminal justice in which it is up to the state to make its case against a defendant without forcing him to co-operate in the process, and without capitalizing on his ignorance of his legal rights".

[400] *Ibid*., p. 180. About disciplinary sanctions with respect to disclosure failures, see Heinze, 2014, pp. 421 ff., above note 110.

[401] *Ibid*., p. 168.

never reach the stage of a criminal trial.[402] Under the Crime Control Model, anything that exhausts resources must be avoided, that is, a criminal trial. This can be done through guilty pleas and plea-bargaining arrangements. The opposite is the case in the Due Process Model. A criminal trial "should be viewed not as an undesirable burden but rather as the logical and proper culmination of the process".[403] Thus, guilty pleas are not encouraged;[404] the criminal trial – conceivably based on Luhmann[405] – has an intrinsic value and is detached from substantive law.[406] The Luhmannesque notion of a trial (and of proceedings) renders it possible that within the confines of the Due Process Model, exclusionary rules also apply when evidence was illegally obtained by private individuals.

Packer's categorisation served as a basis for further elaborations, for example, taking into account rehabilitation and societal stability,[407] focusing on cases that never reach the courtroom,[408] emphasising more strongly the protection of innocents,[409] and the interests of victims.[410] Damaška, in

402 *Ibid*., p. 180.

403 *Ibid*., p. 224.

404 *Ibid*.

405 Niklas Luhmann, *Legitimation durch Verfahren*, Suhrkamp, Frankfurt a. M., 1983 [first edition published by Hermann Luchterhand Verlag in 1969], pp. 30–31 ("Verfahren finden eine Art generelle Anerkennung, die unabhängig ist vom Befriedigungswert der einzelnen Entscheidung, und diese Anerkennung zieht die Hinnahme und Beachtung verbindlicher Entscheidungen nach sich"); see also 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, no. 1, p. 78.

406 See Packer, 1969, p. 217, sees above note 382 ("Many of the limitations on substantive criminal enactments safeguard us against being punished for a mere propensity to commit crime").

407 John Griffiths, "Ideology in Criminal Procedure or A Third 'Model' of the Criminal Process", in *Yale Law Journal*, 1969-1970, vol. 79, no. 3, pp. 359–417.

408 Satnam Choongh, "Policing the Dross – A Social Disciplinary Model of Policing", in *British Journal of Criminology*, 1998, vol. 38, no. 4, p. 625.

409 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.

410 Kent Roach, 1999, p. 672, see above note 393; Hadar Aviram, "Packer in Context: Formalism and Fairness in the Due Process Model", in *Law and Social Inquiry*, 2011, vol. 36, no. 1, p. 241. See also Trüg, 2013, p. 79, see above note 405, who however neglects existing procedural models which take the role of the victim into consideration. See, generally, Ambos, 2016, p. 7, see above note 342.

his seminal *The Faces of Justice*,[411] developed a set of models based on attitudes towards State authority and on concepts of government.[412] It goes beyond the scope of this chapter to also apply those to the question of exclusionary rules.

17.5.2.3.1.3. Intermediate Conclusion

There are different investigatory contexts when private individuals collect evidence that eventually may be used before an ICT. The inter-investigatory context (international investigation – domestic investigation); the intra-investigatory context (internal investigation by a private individual); and the extra-investigatory context (collection of evidence by a private individual outside any investigation). I raised the question whether the procedural regime, especially exclusionary rules, maybe applicable in the inter-investigatory, intra-investigatory and extra-investigatory contexts. The inter-investigatory context turned out to be the least problematic. In the intra-investigatory context, there is an attribution of the private individual to an organ of the ICT (usually, the OTP) that may occur rather openly through a utilisation of the individual in the collection process, that is, *ab initio*; or through an *ex post* attribution, when the individual acted in the interest of the organ. In the latter, a person acts independently of an ICT-organ and outside an investigation. It is the extra-investigatory context that is the neuralgic point of exclusionary rules applied before ICTs. This section was merely concerned with the admittedly rather simple question of whether exclusionary rules apply in this setting. As I have demonstrated, the allegedly simple question unfolded into an analysis that entered the depth of procedural law theory. Through norm theory (Dan-Cohen) and systems theory (Luhmann and Teubner), combined with procedural theory (Packer), I have laid bare a wide-ranging controversy about the addressees of procedural rules. I conclude that a bipolar legislator-addressee relationship is fruitless. Instead, the addressee of procedural law is the process as a

[411] "[A] key work in the field of comparative procedure", Steven G. Calabresi, "The Comparative Constitutional Law Scholarship of Professor Mirjan Damaška: A Tribute", in Bruce Ackerman, Kai Ambos, and Hrvoje Sikirić (eds.), *Visions of Justice – Liber Amicorum Mirjan Damaška*, Duncker & Humblot, Berlin, 2016, p. 107.

[412] 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 Bruce Ackerman, Kai Ambos, and Hrvoje Sikirić (eds.), *Visions of Justice – Liber Amicorum Mirjan Damaška*, Duncker & Humblot, Berlin, 2016, pp. 199–211.

system. Rules apply to everyone within that system – and might even apply beyond that system through transgressive communication (just as the judgment communicates not only with the accused and victim but with society as a whole). Even when we divide the procedural law into a Crime Control and Due Process function, with the former addressing the police and prosecution, the latter applies to everyone that is involved in the investigatory process when this involvement eventually has an impact on due process. Understood this way, the exclusionary rules also apply to private conduct.

17.5.2.3.2. Rationales for the Exclusion of Illegally Obtained Evidence Before International Criminal Tribunals in the Face of Private Conduct

Due to the controversy around the application of exclusionary rules to the extra-investigatory context, the rationales for exclusionary rules again become the focus of attention – on its face because of the theoretical gap left by the controversy concerning the application of exclusionary rules. It is worth mentioning that this gap is larger in the civil law tradition than in the common law tradition. In the former, the application of legal principles is normally derived from or based on written law.[413] Thus, the exclusion of evidence must be based on written exclusionary rules. The generality of legal rules is high—codes in the civil law tradition are said to be rather a collection of abstract principles than specific rules for particular situations or even concrete cases.[414] Unsurprisingly, in Germany, most recent works about the exclusion of illegally obtained evidence by private individuals

[413] Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Intersentia, Cambridge *et al*., 2011, p. 70; Michael Bohlander, "Language, Culture, Legal Traditions, and International Criminal Justice", in *Journal of International Criminal Justice*, 2014, vol. 12, no. 3, pp. 494 ff.; on the importance of truth-seeking, see, for example, Michèle-Laure Rassat, *Traité de procedure pénale*, Presses Univ. 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; Peters, 1985, pp. 16, 82–83, see above note 113.

[414] 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; Heinze, 2014, p. 109, see above note 110. 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, no. 2, pp. 393–410, 402.

revolve around the question whether § 136a StPO, as written law, is applicable[415] – and not so much about what could be the rationale for excluding or admitting such evidence. While the civil law tradition emphasises codification, the chief source[416] of law in common law legal systems is the case law of the courts.[417] Procedural rules are especially set forth in the case law in a direct (or indirect) application of the constitution (if there is one).[418] As a result, the rationales for exclusionary rules have a much more prominent position in common law than in civil law. Yet, here too, the temptation is high to deny those rationales practical relevance, since they do not allow for a mechanical application of exclusionary rules. Roberts and Zuckerman made a similar observation and expressed it more eloquently:

> the impact of foundational principles on the day-to-day practice of the courts has been blunted by common lawyers' excessive preoccupation with technical legal definitions. The traditional textbook treatment of the Law of Evidence may allude to the rationale underpinning particular rules, but discussion then tends to proceed as though it can be assumed that the rules are either self-actuating, internally coherent, and ex-

[415] See, for example, Sebastian Eckhardt, *Private Ermittlungsbeiträge im Rahmen der staatlichen Strafverfolgung*, Peter Lang, Frankfurt a.M. *et al*., 2009, pp. 14 ff.; Anja Bienert, *Private Ermittlungen und ihre Bedeutung auf dem Gebiet der Beweisverwertungsverbote*, Shaker, Aachen, 1997, pp. 11 ff.

[416] Many observers from the civil law system still ignore that the common law in the respective 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 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, no. 5, pp. 965–1024.

[417] 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 i. Br., 2001, pp. 32, 43; Heinze, 2014, p. 111, see above note 110.

[418] David Alan Sklansky, "Quasi-Affirmative Rights in Constitutional Criminal Procedure", in *Virginia Law Review*, 2002, vol. 88, no. 6, pp. 1229–1300; Jerold H. Israel and Wayne R. LaFave, *Criminal Procedure*, seventh edition, Thomson West, St. Paul, Minnesota, 2006, pp. 3 ff.; Matthew Lippman, *Criminal Procedure*, second edition, Sage, London, 2014, p. 5.

> haustive, or else inexplicably self-contradictory. No further reference to deeper rationalization or justification is thought necessary.[419]

This argument, that builds on the flawed premise that individual decisions can only be derived from rules,[420] ignores that judges have discretion[421] and that "criminal evidence is developing into a branch of constitutional criminal jurisprudence".[422]

17.5.2.3.2.1. Integrity from the Subject Perspective: The Deterrence Theory Within the Extra-Investigatory Context

As described in detail, the deterrence theory assigns to exclusionary rules a deterrent effect on future behaviour of the person collecting evidence. Apart from the theoretical doubts that are voiced as to the justification of such a deterrence theory, it is even more questionable whether this theory may have any effect in the extra-investigatory context. Before going into the four arguments against the utility of the deterrence theory in the extra-investigatory context, however, one popular argument needs to be refuted *ab initio*: "If the exclusionary discretion is based on a disciplinary rationale, there is no reason for not admitting this evidence [that is, evidence a civilian obtained]. The authorities have done nothing wrong and the public interest in admitting the evidence may be very great".[423] The remark that 'authorities have done nothing wrong' in cases when private individuals illegally obtained evidence somehow insinuates that exclusionary rules are exclusively addressed to those authorities. Any argument that goes like this carries the requirement to elaborate on the addressee-question of procedural rules. I have demonstrated in detail why exclusionary rules do in fact apply in an extra-investigatory context.

More convincing arguments to question the utility of the deterrence rationale within an extra-investigatory context are the following:

First, even in the case of police conduct, it was remarked that there are other forms to 'police the police', such as disciplinary proceedings or criminal prosecution of law enforcement officials.[424] When private individ-

[419] Roberts and Zuckerman, 2010, p. 25, see above note 192.

[420] In the same vein, see Zuckerman, 1987, p. 59, see above note 194.

[421] Roberts and Zuckerman, 2010, pp. 27, 29 ff., see above note 192.

[422] *Ibid*., p. 31.

[423] P. Duff, 2004, p. 162, see above note 193.

[424] As is the case in Germany, Thaman and Brodowski, 2020, p. 458, see above note 196.

uals act, the criminal prosecution option becomes even more relevant, as is one of the prevailing objections against exclusionary rules in an extra-investigatory context in Germany. However, the criminal prosecution argument needs to be treated with caution at the international level – as argued earlier.[425]

Second, it is doubtful whether the exclusion of evidence is really the best vindication for police wrongdoing, especially when the individual officer is more concerned with making an arrest and/or has no personal interest in a conviction.[426] This counter-argument is even stronger at the international level, considering the individual motivations of private investigators, often acting in the interests of their donors. Third, in many criminal justice systems, officials who violate an exclusionary rule never learn whether or not the evidence they obtained is excluded.[427] This argument is especially true at the international level – for instance, when CIJA collects evidence and it is unclear before which national or international court this evidence might be used.[428] This leads to the fourth counter-argument: if it is doubtful whether public officials know in fact the exclusionary rule that might apply. This is all the more true in a context where it is unclear where the evidence might be admitted.

ICTs have reacted to the weakness of the deterrence theory, albeit in the inter-investigatory context. In *Brđanin*, the Trial Chamber admitted transcripts of illegally intercepted telephone conversations by the security forces of Bosnia and Herzegovina with the argument that the "function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence".[429]

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425 See above Section 17.5.2.3.1.2.2.1.

426 Thaman and Brodowski, 2020, p. 458, see above note 196; Gless and Macula, 2019, p. 355, see above note 8.

427 *Ibid*.

428 In more detail Heinze, 2019, pp. 171 ff., see above note 87; William H. Wiley, "International(ised) Criminal Justice at a Crossroads: The Role of Civil Society in the Investigation of Core International Crimes and the 'CIJA Model'", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Fact-Finding*, second edition, TOAEP, Brussels, 2020, pp. 547 ff.

429 See ICTY, *Prosecutor v. Radoslav Brđanin*, Decision on the Defence "Objection to Intercept Evidence", 3 October 2003, IT-99-36-T, para. 63 (https://legal-tools.org/doc/7efabf/); see also ICTY, *Prosecutor v. Kordić & Čerkez*, Transcript, 2 February 2000, IT-95-14/2-T, 13671 (https://www.legal-tools.org/doc/298d4d/): "It's not the duty of this Tribunal to discipline armies or anything of that sort". Pitcher, 2018, p. 291, see above note 192, with further references.

17.5.2.3.2.2. Integrity from Object Perspective: The Theory of Remedies in the Extra-Investigatory Context

The first rationale that does provide useful guidance for the collection of evidence by private individuals at the international level is the theory of remedies. This rationale is tailored – so to say – for the irrelevance of the interrogator's status. As George Christie remarks, "a right to one's bodily integrity, either against the state or against private persons, is only a right that neither state officials nor private persons may invade one's bodily integrity; and, if they do, that the law will give one a remedy against them".[430]

17.5.2.3.2.2.1. The Punishment Remedy

One possible remedy is a punishment of the interrogator according to substantive criminal law. To reiterate the Kantian footprint in the remedy theory: Kant remarks that "if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right".[431] In other words, "[c]oercion is in general unjust because it is a hindrance of freedom, but *state* coercion following on an unjust hindrance of freedom is just, for it is a hindrance of a hindrance of freedom, which is consistent with universal freedom".[432] Coercion is morally justified "when used to protect rational agency from standard threats to its existence and flourishing".[433] Thus,

> the use of coercion by the state to restrain the thief is right, even though it is a hindrance to the thief's freedom, because the thief is using *his* freedom to restrain the victim's freedom under a universal law (in this case, the victim's peaceful enjoyment of his possession).[434]

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[430] George C. Christie, *Philosopher Kings? The Adjudication of Conflicting Human Rights and Social Values*, Oxford University Press, Oxford, 2011, p. 15.

[431] Kant, 1991, p. 57 [231], see above note 163.

[432] Alan W. Norrie, *Law, Ideology and Punishment*, Kluwer, London, 1991, p. 51 (emphasis in the original).

[433] Brian Orend, "Kant on International Law and Armed Conflict", in *Canadian Journal of Law and Jurisprudence*, 1998, vol. 11, no. 2, p. 335.

[434] Fernando R. Teson, "Kantianism and Legislation", in *Annual Review of Law and Ethics*, 2008, vol. 16, p. 283.

Yet, I have previously shown that shifting the remedial possibilities of the suspect to substantive law presupposes a clear difference between substantive and procedural law, which is at least questionable at the international level.

17.5.2.3.2.2.2. Human Rights as Sword and Shield

Rogall refers to the State's obligation to protect individuals.[435] This is the shield function of human rights I have previously referred to.[436] This State obligation would be incomplete if it did not apply when private individuals obtain illegal evidence.[437] At the same time, the shield function of human rights collides with its sword function. The State is also obliged to ensure that justice is done and – indirectly – that the human rights of potential victims are protected.[438]

The argumentative force and even effectiveness of the remedy theory at the international level is underlined by the central role of human rights. Even though human rights have a dual character as constitutional norms and super-positive value,[439] they first took on concrete form as basic rights within constitutions or constitutional instruments.[440] As Habermas explains about human rights and basic rights:

> As constitutional norms, human rights have a certain primacy, shown by the fact that they are constitutive for legal order as such and by the extent to which they determine a framework within which normal legislative activity is possible. But even among constitutional norms as a whole, basic rights stand out. On the one hand, liberal and social basic rights have the form

[435] Klaus Rogall, "§ 136a StPO", in Hans-Joachim Rudolphi *et al*. (eds.), *Systematischer Kommentar zur Strafprozessordnung*, vol. II, §§ 94–136a StPO, fifth edition, Wolters Kluwer (Carl Heymanns), Köln, 2016, mn. 13.

[436] See above Section 17.5.2.2.2.

[437] Rogall, 2016, mn. 13, see above note 435.

[438] *Ibid*., mn. 14.

[439] Jürgen Habermas, "Kant's Idea of Perpetual Peace with the Benefit of 200 Years' Hindsight", in James Bohman and Matthias Lutz-Bachmann (eds.), *Perpetual Peace – Essays on Kant's Cosmopolitan Ideal*, MIT Press, Cambridge, 1997, p. 137 ("as constitutional norms they enjoy a positive validity (of instituted law), but as rights they are attributed to each person as a human being they acquire a above positive value").

[440] *Ibid*.

> of general norms addressed to citizens in their properties as "human beings" and not merely as member of a polity.[441]

Article 21(3) of the ICC Statute forms part of the provisions that identify the applicable law of the Court. It states that the

> application and interpretation of law […] must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender […],[442] age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.[443]

Therefore, ICC judges draw from a large body of human rights law with ample discretion to guarantee the most basic and important protections.[444] Article 21(3) thus reflects support for the view "that the nature of human rights is such that they may have a certain special status or, at a minimum, a permeating role within international law".[445]

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441 *Ibid*.

442 As defined in the ICC Statute, Article 7(3), see above note 182, the term 'gender' "refers to the two sexes, male and female, within the context of society" (fn. added).

443 *Ibid*., Article 21(3).

444 See also Adriaan Bos, "1948–1998: The Universal Declaration of Human Rights and the Statute of the International Criminal Court", in *Fordham International Law Journal*, 1998–99, vol. 22, no. 2, pp. 229, 234.

445 Rebecca Young, "'Internationally Recognized Human Rights' Before the International Criminal Court", in *International and Comparative Law Quarterly*, 2011, vol. 60, no. 1, pp. 189–90; Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law", in *American Journal International Law*, 1990, vol. 84, no. 4, pp. 866, 872: "The international human rights program is more than a piecemeal addition to the traditional corpus of international law, more than another chapter sandwiched into traditional textbooks of international law. By shifting the fulcrum of the system from the protection of sovereigns to the protection of people, it works qualitative changes in virtually every component."; James D. Fry, "International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity", in *Duke Journal of Comparative & International Law*, 2007–08, vol. 18, no. 1, p. 123: "The possibility exists that the field of human rights is an extra-special type of specialized regime that impacts all aspects of international law, and should not be seen as just another specialized body of law that other specialized bodies might use to reinterpret their own rules in its light, but is one that requires other specialized bodies to be reinterpreted in its light"; Dinah Shelton, "Normative Hierarchy in International Law", in *American Journal International Law*, 2006, vol. 100, no. 2, pp. 291, 294; Stefanie Schmahl, "Human Dignity in International Human Rights, Humanitarian and International Criminal Law: A Comparative Approach", in Eric Hilgendorf and Mordechai Kremnitzer (eds.), *Human Dignity and Criminal Law*, Duncker & Humblot, Berlin, 2018, p. 101; Yvonne McDermott, "The Influence of International Human Rights Law on International Criminal Procedure", in

Within the context of the ICC Statute, human rights reached the status of basic rights. In this context, human rights violations "are no longer condemned and fought from the moral point of view in an unmediated way, but are rather prosecuted as criminal actions within the framework of state-organised legal order according to the institutionalised legal procedures".[446] The Statute translates general human rights norms "into the language of criminal law", not only by defining the core international crimes, but also by providing procedural guarantees and a canonical formulation of the role of internationally recognised human rights.[447] The Appeals Chamber of the ICC has ruled, concerning the role of human rights in the interpretation of the Statute, that

> [h]uman rights underpin the Statute; every aspect of it […]. Its provisions must be interpreted, and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety.[448]

In other words, human rights can certainly be seen as the mainstay of the ICC Statute.[449] The mere existence and work of the Court help to promote human rights by: creating a historical record for past wrongs;[450] offering a forum for victims to voice their opinions and receive satisfaction and compensation for past violations;[451] creating judicial precedent; and deter-

Philipp Kastner (ed.), *International Criminal Law in Context*, Routledge, London, New York, 2018, p. 288.

446 Habermas, 1997, p. 140, see above note 439.

447 ICC Statute, Article 21(3), see above note 182: "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights".

448 *Lubanga*, 2006, para. 37, see above note 114. The ICC Pre-Trial Chamber I referred to that Judgment in *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Red, para. 45 (http://www.legal-tools.org/doc/4729b8/).

449 Benjamin Perrin, "Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in International Criminal Trials", in *Ottawa Law Review*, 2007–08, vol. 39, no. 2, p. 398.

450 United Nations Security Council, Statement of Judge Claude Jorda, UN Doc. S/PV.4161, 20 June 2000, p. 3 (http://www.legal-tools.org/doc/365c3f/); 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. 77, no. 1, pp. 86 ff. For more detail, see Heinze, 2014, pp. 218 ff., see above note 110.

451 Ben Swart, "Foreword", in *Journal of International Criminal Justice*, 2008, vol. 6, no. 1, pp. 87, 100; Minna Schrag, "Lessons Learned from ICTY Experience", in *Journal of Inter-*

ring potential violators of the gravest crimes[452] while punishing past offenders.[453] Thus, human rights norms in the Statute "provide a blueprint for the common good of a community" in the Aristotelian sense[454] – which is, at the same time, the link to Habermas's interpretation of Republicanism.[455] Kant laid the foundations for all current conceptions of human dignity and world peace. For Kant, a permanent peace is predicated on the recognition and respect for human rights, and gross human rights violations rights must be stigmatised as serious wrongs and punished.[456] Kant's language in this regard resonates in the following statement by the ICTY Appeals Chamber:

> A State-sovereignty-oriented approach has been gradually supplanted by a human-being oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory

national Criminal Justice, 2004, vol. 2, no. 2, pp. 427–28. For Ralph, this helps to constitute a world society: see Jason Ralph, "International Society, the International Criminal Court and American Foreign Policy", in *Review of International Studies*, 2005, vol. 31, no. 1, pp. 27 (39).

452 Kai Ambos, *Treatise on International Criminal Law*, vol. I, Oxford University Press, Oxford, 2013, p. 71.

453 ICTR, *The Prosecutor v. Omar Serushago*, Trial Chamber, Sentence, 5 February 1999, ICTR-98-39-S, para. 20 (http://www.legal-tools.org/doc/e2dddb/); ICTR, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Trial Chamber, Judgement and Sentence, 6 December 1999, ICTR-96-3-T, para. 455 (http://www.legal-tools.org/doc/f0dbbb/); ICTR, *The Prosecutor v. Emmanuel Ndindabahizi*, Trial Chamber, Judgement and Sentence, 15 July 2004, ICTR-2001-71-I, para. 498 (http://www.legal-tools.org/doc/272b55/); ICTR, *The Prosecutor v. François Karera*, Trial Chamber, Judgement and Sentence, 7 December 2007, ICTR-01-74-T, para. 571 (http://www.legal-tools.org/doc/7bc57f/).

454 John M. Czarnetzky and Ronald J. Rychlak, "An Empire of Law: Legalism and the International Criminal Court", in *Notre Dame Law Review*, 2003, vol. 79, no. 1, pp. 55, 110.

455 Fernando H. Llano, "European Constitutional Patriotism and Postnational Citizenship in Jürgen Habermas", in *Archiv für Rechts- und Sozialphilosophie*, 2017, vol. 103, no. 4, p. 506.

456 Ambos, 2013, pp. 293, 306, see above note 452.

> of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.[457]

The human rights language of Article 21(3) of the ICC Statute is translated into the admissibility provision of Article 69. Here, integrity from the perspective of the suspect is visibly enshrined in paragraph 7: "Evidence obtained by means of a violation of this Statute *or internationally recognized human rights* shall not be admissible if […] [t]he admission of the evidence would be antithetical to and would seriously damage the *integrity of the proceedings*".[458] At the same time, the integrity of the person as "internationally recognized human rights" is interlocked with integrity from the perspective of the process.

Taken the strong stance of human rights at the ICC, combined with a Kantian vision of human dignity protection, some scholars in my jurisdiction, Germany, make an exception of the general admissibility of illegally obtained evidence by private individuals when the constitutional right to human dignity has been infringed,[459] or when the collection of evidence "is flawed with an extreme violation of rights".[460]

17.5.2.3.2.3. Integrity from the Context Perspective: The Integrity of the Process in the Extra-Investigatory Context

At the heart of exclusionary rules within the extra-investigatory context lies the integrity of international criminal procedure itself. Illegally obtained evidence by private individuals questions the moral authority of the verdict and its legitimacy. The evidence may be unreliable. Admitting such evidence might violate the rule of law. So much about the raw claims. The ba-

[457] ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 97. For an analysis, see Luigi D.A. Corrias and Geoffrey M. Gordon, "Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 100–1.

[458] Emphasis supplied.

[459] Kleinknecht, 1966, p. 1543, see above note 350; Herbert Diemer, "§136a StPO", in Rolf Hannich (ed.), *Karlsruher Kommentar zur Strafprozessordnung*, eighth edition, C.H. Beck, München, 2019, mn. 3 *in fine*; Matula, 2012, p. 101, see above note 314.

[460] Kleinknecht, 1966, p. 1543, see above note 350; Karl-Heinz Nüse, Zu den Beweisverboten im Strafprozeß, in *Juristische Rundschau*, 1966, p. 281 (285); Diemer, 2019, mn. 3, see above note 459.

sis of the integrity of the process is fairness. I have elaborated on this elsewhere with Shannon Fyfe.[461]

The interrelationship between criminal justice and fairness is obvious. A judicial or administrative body is tasked with serving the public, and in serving the public, a government body's most important higher-order goal is to treat every member of the public fairly. Especially the juxtaposition of procedural and substantive fairness is vital for private investigations. Procedural fairness can be assessed based on a system's rules[462] and will be translated into integrity from the perspective of the process. Rights that are guaranteed by procedures "allow for a system of law to emerge out of a set of substantive rules and […] minimize arbitrariness".[463] If the same established rules and procedures are applied to all defendants and suspects (or potential suspects) without bias, then a system can be said to be procedurally fair, regardless of outcomes. To provide an extreme example: the accused is acquitted due to illegally obtained evidence, even though this evidence proofs his guilt beyond reasonable doubt – a popular counter-argument against the remedy rationale.[464] However, "equal treatment involves at one extreme the impartial application of existing rules and procedures, regardless of the outcome (procedural justice), and at the other, the idea that any policies or procedures that have the effect of punishing or controlling a higher proportion of one social group than another are unjust".[465] One might argue, then, "that law and social policy should be adjusted so as to achieve equal outcomes".[466] This is distributive fairness, which shall be neglected in this chapter. Substantive fairness involves the protection of substantive rights, such as the right to bodily autonomy, liber-

461 Heinze and Fyfe, 2020, pp. 345 ff., see above note 118; Heinze and Fyfe, 2018, pp. 3 ff., see above note 110.

462 See, for example, Fuller, 1969, see above note 282; McDermott, 2016, see above note 382.

463 Larry May, *Global Justice and Due Process*, Cambridge University Press, 2011, p. 52.

464 Zuckerman, 1987, p. 58, see above note 194 ("It is by no means self-evident that acquittal of the guilty is an appropriate response to earlier police transgressions. Nor is a blanket exclusion capable of achieving a balance between the seriousness of the infringement and the benefit to the accused").

465 Loraine Gelsthorpe and Nicola Padfield, "Introduction", in Loraine Gelsthorpe and Nicola Padfield (eds.), *Exercising Discretion: Decision-making in the criminal justice system and beyond*, Willian Publishing, New York, 2003, p. 12. See also Rebecca E. Hollander-Blumoff, "Fairness Beyond the Adversary System", in *Fordham Law Review*, 2017, vol. 85, no. 5, pp. 2081–2095.

466 Gelsthorpe and Padfield, 2003, p. 12, see above note 465.

ty from confinement, or a trial that does not result in a mistaken conviction.[467] A trial that results in an absurd outcome or one that is intuitively immoral would be considered substantively unfair.[468]

The public generally thinks about fairness in terms of substantive justice, meaning that a just result of a trial is one in which the guilty are convicted, and the innocent acquitted. Law enforcement officers, for instance, "have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime".[469] Yet, this result-based, substantive view of fairness can also be hard to achieve, depending on the availability and admissibility of evidence. Transferred to the debate around illegally obtained evidence and the rationale for its exclusion, this evidence might not only be procedurally unfair but – it might also have low reliability and could put a conviction based merely on this piece of evidence in question with regard to the fairness of its outcome. This is an argument similar to those brought forward by the reliability rationale.[470] A conviction that is based on unreliable evidence is not substantially fair. Strictly speaking, substantive fairness has a truth component, a fact that lays bare the common conceptual denominator of the juxtapositions 'substantive fairness vs. procedural fairness' and 'substantive truth vs. procedural truth'.[471] In an inquisitorial or policy-implementing[472] system like Germany, the criminal justice system seeks the truth, and all parties to the legal proceedings share this aim. Here, truth in the context of criminal procedure is only a "subgoal" of the goal "peace under the law".[473] A complete analysis of the role of truth-finding in

[467] See, for example, Larry Alexander, "Are Procedural Rights Derivative Substantive Rights?", in *Law and Philosophy*, 1998, vol. 17, no. 1, p. 19.

[468] See Fuller, 1969, see above note 282.

[469] US SC, *US v. Wade*, 1967, 388 US 218, pp. 256–58; Corrigan, 1986, p. 538, see above note 181.

[470] See above Section 17.5.2.2.3.2. and below Section 17.5.2.3.2.3.2.

[471] In a similar vein, see HO Hock Lai, *A Philosophy of Evidence Law*, Oxford University Press, Oxford, 2008, p. 49: "Various writers have cautioned against the tendency to explain and justify the law of evidence in strictly instrumental terms. They have argued persuasively that some evidential rules, principally those traditionally regarded as side-constraints on the main task of truth determination, are grounded in values that are intrinsic to the fairness, legitimacy, or integrity of the trial".

[472] For a categorisation of procedural models, see Heinze, 2014, pp. 104 ff., see above note 110.

[473] See Ralf Peter Anders, "Straftheoretische Anmerkungen zur Verletztenorientierung im Strafverfahren", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2012, vol. 124, no. 2,

the criminal process (and status afforded to the concept of 'truth' altogether) is outside the scope of this chapter. In Germany, a distinction is made between procedural truth and substantive truth, which largely corresponds with the distinction between procedural fairness and substantive fairness.[474] As Weigend notes, "[i]f truth-finding connotes the revelation (or discovery) of an objective reality, it is the result that legitimizes the process. The judicial process is only the means to discover the hidden, 'objective' reality and should be organized to optimize the chances of finding the 'piece of gold'".[475] He goes on to distinguish this substantive view of truth from procedural truth, which is "whatever emerges from a fair and rational discourse among the parties', and 'the content of the rules that determine the process [are] more important than the outcome itself, and adherence to these rules acquires paramount importance for truth-finding".[476] Interestingly, the BGH has explicitly underlined the role of procedural truth in criminal procedure:

> [a]cceptance and legitimacy of criminal judgments are not based on the trust in a 'correctness', understood as a material truth that is discovered in the course of a criminal trial. Instead, trust in the 'procedural truth' it is both necessary and sufficient. The 'procedural truth' is created through a trial that

p. 393. However, it should be stressed that the goals of criminal procedure in Germany and their relationship are highly disputed, see Dieter Dölling, "Über das Ziel des Strafverfahrens", in Christian Fahl *et al*. (eds.), *Festschrift für Werner Beulke zum 70 Geburtstag*, C.F. Müller, Heidelberg, 2015, pp. 679–87. About the divergent meanings of 'truth' in criminal procedure Edda Weslau, "Wahrheit und Legenden: die Debatte über den adversatorischen Strafprozess", in Roland Hefendehl, Tatjana Hörnle and Luis Greco (eds.), *Festschrift für Bernd Schünemann zum 70 Geburtstag*, De Gruyter, Berlin, 2014, pp. 1002–1005.

474 In that vein Edda Weßlau, *Das Konsensprinzip im Strafverfahren – Leitidee für eine Gesamtreform?*, Nomos, Baden-Baden, 2002, p. 20.

475 See Thomas Weigend, "Should We Search for the Truth, and Who Should Do it?", in *North Carolina Journal of International Law and Commercial Regulation*, 2011, vol. 36, no. 2, p. 389 (fn. omitted).

476 See *ibid*., p. 389 (fn. omitted). Weigend cites Jacqueline Hodgson, "Conceptions of the Trial in Inquisitorial and Adversarial Procedure", in Antony Duff *et al*. (eds), *The Trial on Trial – Volume 2: Judgment and calling to account*, Hart, Oxford, 2006, p. 225–226. For a general analysis, see A. Duff *et al*., 2007, pp. 61 ff., see above note 145. See also Safferling, 2012, p. 55, see above note 359. From the perspective of communication- and discourse-theory, see Klaus Rolinski, "Der Grundsatz der Unmittelbarkeit: Garant der Wahrheitsfindung?", in Robert Esser *et al*. (eds.), *Festschrift für Hans-Heiner Kühne*, C.F. Müller, Heidelberg, 2013, p. 311; Mariana Sacher, "Diskurstheorie als Legitimation für die Absprachen im Strafverfahren?", in Roland Hefendehl, Tatjana Hörnle, and Luis Greco, *Festschrift für Bernd Schünemann zum 70. Geburtstag*, De Gruyter, Berlin, 2014, pp. 959–960.

> complies with both the substantial and procedural law and is therefore fair.[477]

Thus, while both the Article 20(3) of the German Basic Law (Grundgesetz, 'GG') – in conjunction with Article 2(1) GG – and Article 6 of the European Convention on Human Rights,[478] ensure the right to a fair trial and other protections for the accused, a primary aim of the German criminal justice system is to seek the truth, or to seek the substantively fair result. The US criminal justice system, to take an example from the common law tradition, purports to be aimed at procedural fairness. The Fourteenth Amendment of the US Constitution states that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".[479] The Fourth, Fifth, Sixth, and Eighth Amendments also provide protections for accused individuals.[480] Yet it remains the case that in an adversarial system like the US, the judge is responsible for protecting the accused's due process rights, or procedural fairness, and the prosecutor is responsible for obtaining a substantively fair result within the parameters set by the judge (albeit through the adversarial process rather than a pure truth-seeking process). The same applies to the Crown Prosecution Service in England and Wales, which searches for an "*approximation* of 'the truth'", understanding "truth *as* proof",[481] which appears to fall within the concept

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[477] See BGH, Judgment from 10 June 2015 – 2 StR 97/14, in *Neue Zeitschrift für Strafrecht (NStZ)* 2016, 52, 58 (author's translation). The original quote reads:

> Akzeptanz und Legitimation strafrichterlicher Urteile werden nicht durch das Vertrauen auf 'Richtigkeit' im Sinne einer im Verfahren gefundenen materiellen Wahrheit begründet. Ausreichend aber auch erforderlich ist das Vertrauen in die 'prozessuale Wahrheit', die vermittelt wird durch ein rechtsrichtiges, prozessordnungsgemäßes und daher unter anderem faires Verfahren.

[478] Claus Roxin and Bernd Schünemann, *Strafverfahrensrecht*, twenty-ninth edition, C.H. Beck, München, 2017, § 11 mn. 4; Bertram Schmitt, "Introduction", in Lutz Meyer-Goßner and Bertram Schmitt (eds.), *Kommentar zur Strafprozessordnung*, sixty-third edition, C.H. Beck, München, 2020, mn. 19; Klaus Geppert, "Zum ‚fair-trial-Prinzip' nach Art. 6 Abs. 1 Satz 1 der Europäischen Menschenrechtskonvention", in *Juristische Ausbildung*, 1992, pp. 597–604 (597); Robert Esser, *Auf dem Weg zu einem europäischen Strafverfahrensrecht*, de Gruyter, Berlin, 2002, p. 401.

[479] United States, Constitution of the United States of America, 1787, amendment XIV (https://www.legal-tools.org/doc/bc3d56/).

[480] *Ibid*., amends. IX, X, XI, XIII.

[481] Gary Slapper and David Kelly, *The English Legal System*, eighth edition, Routledge, London, New York, 2017, p. 394 (emphasis in the original). Cicchini argues that the truth as proof-model is now also applied by prosecutors in the US, see Michael D. Cicchini, "Spin

of 'procedural truth' rather than 'substantive truth'.[482] In the international arena, too, substantive fairness has received particular emphasis.[483] At the same time, however, especially at the *ad hoc* Tribunals, procedural fairness could outweigh substantive fairness: "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial".[484]

17.5.2.3.2.3.1. Integrity as Moral Authority of the Verdict, and Integrity as Legitimacy

As remarked earlier, the public would hold a critical attitude towards the fairness of the trial and argue that the courts fail to uphold procedural justice if wrongfully obtained evidence would be admitted in every case and without scrutiny.[485] What this sentence incorporates is a combination of substantive fairness and the communicative effect of a judgment. In the words of Duff *et al.*:

> The communicative process is essential in order that verdicts reflect not only the epistemic standards appropriate to the criminal law, but also the court's moral standing to condemn the defendant for committing a public wrong. Such moral standing, we suggest, is only secure if the defendant is treated as a full citizen who is entitled to participate in a criminal process which he could accept as legitimate.[486]

This combination has turned out to be one of the theoretical bases of international criminal law.[487]

Doctors: Prosecutor Sophistry and the Burden of Proof", in *University of Cincinnati Law Review*, 2018, vol. 87, no. 2, p. 491.

482 See in more detail Heinze and Fyfe, 2020, p. 348, see above note 118.

483 Pitcher, 2018, p. 281, see above note 192 ("is concerned with the need to ensure a fair trial; specifically, it appears to be linked to a chamber's truth-finding task, i.e. the ability of a chamber to determine the guilt or innocence of accused accurately, or otherwise to 'trial fairness'") with further references.

484 ICTY RPE, Rule 89(D), see above note 341.

485 See above Section 17.5.2.2.3.1.

486 A. Duff *et al*., 2007, p. 236, see above note 145.

487 The following part is, albeit in modified form, taken from Alexander Heinze, "The Statute of the International Criminal Court as a Kantian Constitution", in Morten Bergsmo and Emiliano J. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, TOAEP, Brussels, 2018, pp. 351–428.

At the international level, retribution is clothed in an expressivist[488] and communicative[489] appearance,[490] that is, as the expression of condemnation and outrage of the international community, where the international community in its entirety is considered one of the victims.[491] The stigmatisation and punishment for gross human rights violations in service of the confirmation and reinforcement of fundamental human rights norms can justify a right to punish of an international criminal tribunal that lacks the authority of a State. Given this justification of punishment, what the world community is trying to achieve through international criminal trials is a communicative effect: to show the world that there is justice at an international level, and that no perpetrator of grave international crimes can es-

[488] See for a definition and in more detail Heinze, 2018, pp. 417 ff., see above note 487. On the different forms of expressivism in ICL Sander, LJIL, 32 (2019), 851 ff.; Carsten Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, Cambridge, 2019, pp. 181–182; on the limits of expressivism Barrie Sander, "The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law", in International Criminal Law Review, 2019, vol. 19, pp. 1014 ff.; Daniela Demko, "An Expressive Theory of International Punishment for International Crimes", in Florian Jeßberger and Julia Geneuss (eds.), *Why punish perpetrators of mass atrocities? Purposes of punishment in international criminal law*, Cambridge University Press, 2020, pp. 176 ff.

[489] Heinze, 2018, pp. 417 ff., see above note 487; Klaus Günther, "Positive General Prevention and the Idea of Civic Courage in International Criminal Law", in Florian Jeßberger and Julia Geneuss (eds.), *Why punish perpetrators of mass atrocities? Purposes of punishment in international criminal law*, Cambridge University Press, 2020, pp. 213 ff.

[490] Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007, pp. 173 ff.; Mark A. Drumbl, "International Punishment from 'Other' Perspectives", in Róisín Mulgrew and Denis Abels (eds.), *Research Handbook on the International Penal System*, Edward Elgar Publishing, Northampton, 2016, p. 386; Jonathan H. Choi, "Early Release in International Criminal Law", in *Yale Law Journal*¸ 2014, vol. 123, no. 6, p. 1810; Robert D. Sloane, "The Expressive Capacity of International Punishment", in *Stanford Journal of International Law*, 2007, vol. 43, no. 1, p. 44; Kirsten J. Fisher, *Moral Accountability and International Criminal Law*, Routledge, London, 2012, pp. 51, 56–63, 65; Carsten Stahn, "Between 'Faith' and 'Facts'", in *Leiden Journal of International Law*, 2012, vol. 25, no. 2, pp. 251, 279–80; Larry May, *Aggression and Crimes Against Peace*, Cambridge University Press, Cambridge, 2008, pp. 329 ff. From a German perspective, see also Klaus Günther, "Criminal Law, Crime and Punishment as Communication", in Andrew P. Simester *et al.* (eds.), *Liberal Criminal Theory*, Hart, Oxford, 2014, pp. 123 ff. About the communicative function within the (new) retributivist theories, see Michael Pawlik, "Kritik der präventionstheoretischen Strafbegründungen", in Klaus Rogall *et al.* (eds.), *Festschrift für Rudolphi*, Luchterhand, Neuwied, 2004, p. 229.

[491] Kai Ambos, "Review Essay: Liberal Criminal Theory", in *Criminal Law Forum*, 2017, vol. 28, no. 3, pp. 589, 601.

cape it.[492] That is why international criminal law seeks to achieve retributive and deterrent effects of punishment through creating a certain perception of international criminal trials. It is also why the protection of due process rights is perceived as crucial in order to restore international peace, and strengthen the trust of the international society in legal norms (procedure "as an end in itself"[493]), and is the reason why Nazi perpetrators were not executed without trial. Instead, the former President of the US, Harry S. Truman, remarked at the start of the trials before the International Military Tribunal at Nuremberg in 1945: "The world should be impressed by the fairness of the trial. These German murderers must be punished, but only upon proof of individual guilt at a trial".[494]

It would be detrimental to the expressivist and communicative function of a public trial, if a conviction rendered by an ICT was based on illegally obtained evidence – irrespective of the status of the person who obtained the evidence. Rogall makes a similar general-preventive, or expressivist argument: trials and judgments respectively have a general-preventive effect. This effect would be circumvented, if evidence that is illegally obtained by private individuals could generally be admitted.[495] Rogall combines this argument with an empirical premise: private investi-

[492] International criminal law is also "educating society about its past" through the truth-telling function of international criminal trials, see Mina Rauschenbach, "Individuals Accused of International Crimes as Delegitimized Agents of Truth", in *International Criminal Justice Review*, 2018, Advance Article, p. 3 with further references.

[493] Jonathan Hafetz, *Punishing Atrocities Through a Fair Trial*, Cambridge University Press, 2018, p. 109.

[494] Cited in Francis Biddle, *In Brief Authority*, Greenwood Press, Westport, 1962/1972, p. 372; Patricia M. Wald, "Running the Trial of the Century", in *Cardozo Law Review*, 2005–6, vol. 27, no. 4, pp. 1559, 1574. US Chief prosecutor Jackson famously argued: "Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during war. We must establish incredible events by credible evidence.", see Telford Taylor, *The Anatomy of the Nuremberg Trials*, Back Bay Books, Boston, 1992, p. 54; Henry T. King, "The Spirit of Nuremberg—Idealism", in Beth A. Griech-Polelle (ed.), *The Nuremberg War Crimes Trial and its Policy Consequences Today*, 2nd edn., Nomos, Baden-Baden 2020, p. 5. Or, in the words of British International Military Tribunal Judge Geoffrey Lawrence, one wanted to punish "those who were guilty", to establish "the supremacy of international law over national law" and to prove "actual facts, in order to bring home to the German people and to the peoples of the world, the depths of infamy to which the pursuit of total warfare had brought Germany", see Geoffrey Lawrence, "Nuremberg Trial", in Guénaël Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford University Press, 2008, pp. 290, 292.

[495] Rogall, 2016, mn. 13, see above note 435.

gations are aimed at the production of evidence. Thus, private individuals in such a context show a reduced willingness to abide by procedural law or due process, due to a case of what Rogall calls "evidentiary emergency".[496] Excluding the evidence has the purpose of demonstrating the illegality of an individual taking justice in his or her own hands – a purpose that is generally assigned to an expressivist theory of punishment. This is especially underlined upon viewing the criminal process as a system: if evidence, based on an infringement of rights and a violation of rules, is used in a trial, the public loses confidence in the *system* of rules and their effectiveness – and not so much in a particular rule. It is of secondary importance who in fact broke the rules and violated the rights, whether a public official or a private individual. The public's trust in the system of rules is different from its expectation to be protected by the State against rights violations. The latter is what I have previously described as the sword function of human rights,[497] or *Strafanspruch*.[498] The former touches upon the expressivist and communicative function of a trial and the judgment.[499] More concretely: norms are recognised by society *as a whole* and determine the contents of social communication[500] – an argument put forward by Jakobs. He draws attention to the "validity" (*Geltung*) of a norm and its affirmation

[496] *Ibid*.

[497] See above Section 17.5.2.2.2.

[498] Henning Radtke, "Beweisverwertungsverbote in Verfahrensstadien vor der Hauptverhandlung und die sog. Widerspruchslösung", in Stephan Barton *et al*. (eds.), *Festschrift für Reinhold Schlothauer zum 70. Geburtstag*, C.H. Beck, München, 2018, pp. 461 ff.; Hilde Kaufmann, *Strafanspruch Strafklagerecht*, Otto Schwartz, Göttingen, 1968), pp. 9 ff.; Klaus Günther, "Falscher Friede durch repressives Völkerstrafrecht?", in Werner Beulke *et al*. (eds.), *Das Dilemma des rechtsstaatlichen Strafrechts*. Berliner Wissenschafts-Verlag, Berlin, 2009, p. 89 ("Parallel zum öffentlichen Strafanspruch beim nationalstaatlichen Strafrecht wird auch der völkerrechtliche Strafanspruch nicht im Namen der Verletzten erhoben, sondern im Namen der Völkergemeinschaft oder im Namen eines Staates, der auf der Grundlage des Universalitätsprinzips ein Völkerrechtsverbrechen verfolgt"). In detail Kai Ambos, "Strafrecht und Verfassung: Gibt es einen *Anspruch* auf Strafgesetze, Strafverfolgung, Strafverhängung?", in Jan Christoph Bublitz *et al*. (eds.), *Recht – Philosophie – Literatur. Festschrift für Reinhard Merkel zum 70. Geburtstag*, Berlin, Duncker & Humblot, 2020, pp. 565 ff. About a critique of the term 'Strafanspruch' Jung, 2019, pp. 265–266, see above note 333.

[499] See above notes 488 and 489 with main text.

[500] Günther Jakobs, "Strafrechtliche Zurechnung und die Bedingungen der Normgeltung", in Ulfried Neumann and Lorenz Schulz (eds.), *Verantwortung in Recht und Moral. ARSP-Beiheft*, vol. 74, Franz Steiner Verlag, Stuttgart, 2000, pp. 58–59; Günther Jakobs, "Das Strafrecht zwischen Funktionalismus und „alteuropäischem" Prinzipiendenken", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1995, vol. 107, no. 4, pp. 843 ff. In detail Ambos, 2013, p. 300, see above note 163.

(*Bestätigung*).[501] Dennis combines these elements under the umbrella of legitimacy.[502] Understood this way, legitimacy has both a descriptive and normative element: descriptive, because it "refers to social facts concerning actors' beliefs about the legitimate authority" of an ICT; normative due to the "motivating force" behind an ICT's judgment (as implementation of international criminal justice goals).[503] What becomes visible upon reading these arguments is a close interrelationship between the goals and purposes of substantive criminal law[504] and procedural law – and underlines, again, the synchronisation between the two.[505] I have made this argument elsewhere: punishing perpetrators of international crimes will not work without the admission of relevant evidence. Thus, the goal of the admission of relevant evidence for guilt or not is at the same time the goal of punishing perpetrators of international crimes, which becomes a purpose of international criminal procedure.[506] Moreover, the admission of relevant evidence as a goal of international criminal procedure is also connected to the purpose of punishment "in such a way that it will increase the likelihood that the guilty will be punished and the innocent will go free".[507]

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501 Günther Jakobs, *Strafrecht, Allgemeiner Teil*, second edition, Walter de Gruyter, Berlin, New York, 1991, pp. 34 ff. See also Andrew P. Simester, Antje Du Bois-Pedain, and Ulfried Neumann, *Liberal Criminal Theory: Essays for Andreas von Hirsch*, Hart Publishing, Oxford, 2014, p. 25.

502 Dennis, 2020, mn. 2-022, see above note 192.

503 The definitions are taken from Andreas Føllesdal, "The Legitimacy of International Courts", in *Journal of Political Philosophy*, 2020, Advance Article, p. 5. See generally with an instructive overview Cesare P.R. Romano, "Legitimacy, Authority, and Performance: Contemporary Anxieties of International Courts and Tribunals", in *American Journal of International Law*, 2020, vol. 114, pp. 149–163. About the legitimacy of International Criminal Justice, combined with expressivism, Tom Dannenbaum, "Legitimacy in War and Punishment", in Kevin Jon Heller, et al. (eds.), *The Oxford Handbook of International Criminal Law,* Oxford University Press, Oxford, 2020), pp. 136 ff.

504 In detail, see Heinze, 2018, pp. 929–957, see above note 376.

505 In a similar vein, see Volk, 1978, p. 173, see above note 334.

506 As clarified throughout the chapter, its research object is illegally obtained evidence. It goes without saying that the sentence to this footnote in the main text applies *mutatis mutandis* also to the rationale of disclosing exculpatory evidence and other procedural safeguards. After all, the goal of punishing perpetrators of international crimes also strives to punish only those perpetrators who are perceived to be guilty beyond reasonable doubt.

507 Jens David Ohlin, "Goals of International Criminal Justice and International Criminal Procedure", in Göran Sluiter *et al*. (eds.), *International Criminal Procedure*, Oxford University Press, 2013, p. 61.

Yet, it would have a similar detrimental effect, if the decision of excluding crucial evidence was only due to a relatively minor violation of legal procedure. The ICTY Appeals Chamber in *Karadžić* highlighted this imbalance by recalling

> that the Appellant is charged with genocide, crimes against humanity and war crimes. The public interest in the prosecution of an individual accused of such offences, universally condemned, is unquestionably strong. Against the legitimate interest of the international community in the prosecution of the Appellant for Universally Condemned Offences stands the alleged violation of the Appellant's expectation that he would not be prosecuted by the Tribunal, pursuant to the alleged Agreement.[508]

Here again, the two dimensions of fairness – procedural fairness (the accused go free, since procedural rules have been violated) vs. substantive fairness (the accused are convicted despite the violation of procedural rules, since they have been found guilty beyond reasonable doubt) – affect a judgment like two parents their child. Within this rationale, integrity becomes a "proxy, synonym or placeholder" for procedural values such as fairness, due process, natural justice or judicial legitimacy.[509]

17.5.2.3.2.3.2. Integrity as Reliability

Substantive fairness in international criminal law is also the objective behind integrity as reliability, since the use of unreliable evidence "increases the risk of error in fact-finding".[510] The interrelationship – almost interchangeability – of substantive fairness and substantive truth becomes most visible here, since excluding wrongfully obtained evidence would even *advance* the search for truth. As pointed out earlier, integrity as reliability is informed by the expressivist notion of integrity as moral authority of the verdict. Rogall expressly refers to a forward-looking evaluation of the illegally obtained evidence and requires the courts to take into account the "normative" (read as general-preventive, expressive) effect that the admission of the evidence might have.[511] Thus, the question of whether or not to

[508] ICTY, *Prosecutor v. Karadžić*, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2009, IT-95-5/18-AR73.4, para. 49 (https://www.legal-tools.org/doc/a1da0d/). See also Pitcher, 2018, p. 277, see above note 192.

[509] Roberts *et al*., 2016, p. 5, see above note 146.

[510] HO, 2019, p. 828, see above note 189.

[511] Rogall, 2016, mn. 14, see above note 435.

exclude illegally obtained evidence by private individuals is a balancing exercise,[512] where the search for truth, and "indirectly, society's interest in criminal enforcement", is pit against "the respect for the rights of criminal defendants and, indirectly, of the entire civilian population, which have been declared to be so important to the legal order that they have been enshrined in human rights conventions and national constitutions".[513] Considering this balancing exercise, Haffke sees a prevalence of the search for truth.[514]

For ICTs, a reason not to admit – otherwise admissible – evidence is that the use of illicit methods would negatively affect the reliability of the evidence.[515] Article 69(7) of the ICC Statute – *lex specialis* to the general admissibility rule of paragraph (4) of the same article – repeats the (new) Rule 95 of the ICTY and ICTR Statutes stating: "Evidence obtained by means of a violation of this statute or internationally recognized human rights shall not be admissible if: […] The violation casts substantial doubt on the reliability of the evidence". The integrity as reliability rationale becomes even more visible in the ICTY's framework (now MICT's respectively): a Chamber "may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial"[516] or "if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings".[517]

[512] *Ibid*., mn. 15.

[513] Thaman and Brodowski, 2020, p. 437, see above note 196.

[514] Bernhard Haffke, "Schweigepflicht, Verfahrensrevision und Beweisverbot", in *Goltdammer's Archiv für Strafrecht*, 1973, p. 83.

[515] ICC Statute, Article 69(7)(a), see above note 182; also ICTY RPE, Rule 95(1), see above note 341; ICTR RPE, Rule 95(1), see above note 341 and Mechanism for International Criminal Tribunals ('MICT'), Rules of Procedure and Evidence, 8 June 2012, MICT/1, Rule 117(1) ('MICT RPE') (https://www.legal-tools.org/doc/cef176/).

[516] ICTY RPE, Rule 89(D), see above note 341 and MICT RPE, Rule 105(D), see above note 515 (emphasis added).

[517] ICTY RPE, Rule 95, see above note 341; ICTR RPE, Rule 95, see above note 341 and MICT RPE, Rule 117, see above note 515; also Special Court for Sierra Leone ('SCSL'), Rules of Procedure and Evidence, 31 May 2012, Rule 95 ('SCSL RPE') (https://www.legal-tools.org/doc/4c2a6b/) (exclusion if "admission would bring the administration of justice into serious disrepute").

17.5.2.3.2.3.3. Integrity as Rule of Law

As I have demonstrated above in detail, one of the main rationales for excluding or not admitting evidence is the rule of law principle. Ideally, the 'law' in rule of law incorporates the integrity rationale, that is, the moral authority of the verdict, legitimacy, fair trial and reliability.[518] The question that remains to be answered is whether the rule of law principle applicable to both the extra-investigatory context and the international level?

17.5.2.3.2.3.3.1. Applicability of the Rule of Law to the Extra-Investigatory Context

I have previously opined that the question of *whom* a procedural rule is addressed to cannot be answered without the question of *what* procedural rules are concerned with. Applying Luhmann's systems theory, laws are not so much addressed to individuals but to closed systems – systems that cannot be influenced but merely motivated by external factors. I concluded that the addressee of procedural law is the process as a system. Rules apply to everyone within that system – and might even apply beyond that system through transgressive communication (just as the judgment communicates not only with the accused and victim but with society as a whole). Even when we divide the procedural law into Crime Control and Due Process functions, with the former being addressed to the police and prosecution, the latter applies to everyone that is involved in the investigatory process when this involvement eventually has an effect on Due Process. Understood this way, the exclusionary rules also apply to private conduct.

In this extra-investigatory context, where exclusionary rules still apply, the rule of law principle – and with it, integrity – is vital. In fact, it is the benchmark for every conduct within a procedural system. In the words of Turvey and Cooley, "The credibility of the criminal justice system relies heavily on the integrity of those who work *in* the system".[519] Due to the above-mentioned understanding of 'law', which incorporates integrity, the rule of law becomes a "proxy" (a term borrowed from Paul Roberts) for integrity and procedural values such as fairness, due process, natural justice

[518] Dennis, 2020, mn. 2-022, see above note 192. In a similar vein Allen Buchanan, "The Complex Epistemology of Institutional Legitimacy Assessments, As Illustrated by the Case of the International Criminal Court", in *Temple International and Comparative Law Journal*, 2019, vol. 33, p. 332-333.

[519] Turvey and Cooley, 2014, p. 164, see above note 180 (emphasis added).

or judicial legitimacy.[520] In a similar, albeit more restrictive fashion, some scholars in Germany make an exception of the general admissibility of illegally obtained evidence by private individuals when the State intends to make use of such evidence.[521] They argue that this might violate the rule of law, the legal order, or the constitution.[522]

Rogall refers to the rule of law that is also applicable in the case of evidence obtained by private individuals.[523] This goes to what Postema famously underlined through his "reflexive dimension" of the rule of law, while referring to Bentham: "Those in power as well as those subject to that power must be subject to the law".[524]

17.5.2.3.2.3.3.2. Criminal Procedure's Sub-systems

Every endeavour of applying the systems-theory by Luhmann and Teubner eventually passes over to the bifurcated decision of how narrow the systems and sub-systems should be. The criminal process with its various stages[525] is especially prone to such an endeavour. Strictly speaking, the investigatory context (sub-system 1) could easily be (and often is) separated from the trial process (sub-system 2).

17.5.2.3.2.3.3.2.1. Separating Investigatory System and Trial System: *Beweiserhebung* vs. *Beweisverwertung*

Separating the investigatory and trial contexts has the advantage of separating the effects violations may have within these systems. Let us assume, for a moment, that both systems are closed systems. They could thus be hermetically sealed to avoid that a violation of the integrity of one system affects the other system. This way, the advantages of sanctioning illegally obtained evidence could be enjoyed without risking the rupture of the en-

[520] Roberts *et al*., 2016, p. 5, see above note 146.

[521] Matula, 2012, p. 101, see above note 314.

[522] Rogall, 2016, mn. 11 with further references in fn. 63, see above note 435.

[523] *Ibid*., mn. 13: "Nach unserer verfassungsmäßigen Ordnung hat der Staat die Rechtsordnung so zu gestalten (vgl. Art. 1 Abs. 1 Satz 2, Abs. 3, 20 Abs. 3 GG), dass eine Verletzung der Grundrechte, namentlich der Menschenwürde, verhindert wird. Diese staatliche Schutzverpflichtung besteht dabei auch gegenüber Angriffen Privater".

[524] Gerald J. Postema, "Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law", in ZHAI Xiaobo and Michael Quinn (eds.), *Bentham's Theory of Law and Public Opinion*, Cambridge University Press, 2014, p. 56.

[525] Heinze, 2014, pp. 264 ff., see above note 110.

tire trial and eventually putting into question the substantive fairness of an acquittal (when it is almost certain, for instance, that the accused is guilty).

What sounds like a viable but almost artificial compromise is a reality in German criminal procedure. German courts differentiate between rules prohibiting the *obtaining or taking* of evidence (*Beweiserhebungsverbote*), and rules prohibiting the *use* of evidence by the court in its assessment of the defendant's guilt (*Beweisverwertungsverbote*).[526] How radically separated the two stages, or put differently: how closed the two subsystems are, is a matter of controversy, with the strictest separation-theory probably brought forward by Jäger ("Separation- and Abstraction Principle").[527] Distinguishing between the obtaining of evidence and its actual use at trial is *Janus*-faced. This works in both ways: not every illegally obtained piece of evidence necessarily leads to its exclusion.[528] And not all evidence obtained legally may later be used as evidence.[529] The separation of the two stages and the focus on the short- and long-term effects of a procedural violation creates a chain reaction of exclusionary rules: those rules may address a) the "re-use"[530] of the (same) evidence *as evidence* in further proceedings against the same or other defendants; b) a possible effect of illegally obtained evidence on a fresh investigation; and c) whether further evidence taken on the basis of excluded evidence needs to be excluded as well ("fruit of the poisonous tree"; "*Fernwirkung*").[531]

Separating the two stages in the scenario that this chapter is about (illegally obtained evidence in the extra-investigatory context at the international level), ICTs could declare that illegally obtained evidence must be

[526] In detail, see Thaman and Brodowski, 2020, pp. 434–435, see above note 196.

[527] Christian Jäger, *Beweisverwertung und Beweisverwertungsverbote im Straprozess*, C.H. Beck, München, 2003, pp. 137–138 (author's translation, original terminology: "Trennungs- und Abstraktionsprinzip").

[528] See German Federal Constitutional Court, Decision of 20 09 2018 – 2 BvR 708/18 –, para. 40; *idem*, Decision of 16.02.2006 – 2 BvR 2085/05 = BVerfG NStZ 2006, 46, 47; *idem*, Decision of 02.07.2009 – 2 BvR 2225/08 = NJW 2009, 3225; German Federal Court of Justice, Judgment of 13.01.2011 – 3 StR 332/10 = BGHSt 56, 127, para. 13; Kai Ambos, *Beweisverwertungsverbote*, Duncker & Humblot, Berlin, 2010, p. 22; Jäger, 2003, p. 135, see above note 527; Matthias Jahn, *Beweiserhebung und Beweisverwertungsverbote im Spannungsfeld zwischen den Garantien des Rechtsstaates und der effektiven Bekämpfung von Kriminalität und Terrorismus, Gutachten C, 67. Deutscher Juristentag*, C.H. Beck, München, 2008, p. 36.

[529] Thaman and Brodowski, 2020, p. 436, see above note 196.

[530] Translation by *ibid*., p. 458.

[531] Generally, see *ibid*., p. 436.

excluded from trial (non-use, or *Verwertungsverbot*), but it could still be eventually *used in the pre-trial stage as lead evidence*. In other words, evidence could be illegally obtained, but only lead to other evidence, and not be used in court.[532] An exclusionary rule would thus only address the non-use of evidence in court, and requires balancing that allows for the obtainment of the evidence (even though it was illegally obtained). To provide an example: in the case against Ieng Thirith before the ECCC, a statement was made under torture. The Defence requested the co-investigating judges not only to hold this statement inadmissible, but also to decide against its use as 'lead evidence'. With regard to the latter request, that is of interest at this point, the judges decided:

> there is nothing objectionable in using the information contained in confessions as investigative leads to other sources of information, even if the information within the confession is ultimately deemed unreliable. A great deal of 'lead evidence' used in investigations is inherently unreliable and as such, would not be relied on in the Closing Order. However, during the course of the investigation, the Co-Investigating Judges need not rule out any hypothesis and it is not necessary for them to believe the assertions in the confessions to be true in order to use them to develop new avenues for searching out the truth, without this affecting the integrity of the proceedings.[533]

Another emanation of the separation hypothesis is the amended Rule 95 of the ICTY RPE. The former rule provided that evidence shall not be admissible "*if obtained by methods* which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings".[534] As Calvo-Goller analysed, this rule "had the merit to discourage human rights violations in the gathering of evidence *ab initio"*.[535] The rule is reminiscent of the German '*Beweismethoden-*

[532] About lead evidence, see Heinze, 2014, p. 455, see above note 110.

[533] Extraordinary Chambers in the Courts of Cambodia ('ECCC'), Office of the Co-Investigating Judges, *Prosecutor v. Ieng Thirith*, Order on use of statements which were or may have been obtained by torture, 28 July 2009, C002/19-09-2007-ECCC-OCIJ, para. 26 (https://www.legal-tools.org/doc/6uqmcu/). See also Fergal Gaynor *et al*., "Law of Evidence", in Göran Sluiter *et al*. (eds.), *International Criminal Procedure*, Oxford University Press, 2013, p. 1029.

[534] Emphasis added.

[535] Karin N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court*, Martinus Nijhoff, Leiden, Boston, 2006, p. 97 (emphasis in the original).

verbote', prohibiting certain *methods* of obtaining evidence. In 1995, on the basis of proposals from the governments of the United Kingdom and the US,[536] the rule was amended to add "which constitute a serious violation of internationally protected human rights" after methods. The significance of this amendment cannot be overstated: from now on, evidence obtained by an illegal method could still be admitted at trial, unless it "seriously" damaged the integrity of the proceedings.[537] Since Article 69(7) of the ICC Statute is based on the amended Rule 95 of the ICTY RPE, the same applies regarding the former provision, as the *Lubanga* Trial Chamber confirmed:

> Some scholars have suggested that any violation of internationally recognized human rights will necessarily damage the integrity of proceedings before the ICC. This argument does not take into account the fact that the Statute provides for a "dual test", which is to be applied following a finding that there has been a violation. Therefore, should the Chamber conclude that the evidence had been obtained in violation of the Statute or internationally recognized human rights, under Article 69(7) it is always necessary for it to consider the criteria in a) and b), *because the evidence is not automatically inadmissible*. It is important that artificial restrictions are not placed on the Chamber's ability to determine whether or not evidence should be admitted in accordance with this statutory provision.[538]

However, the dual test of Article 69(7) of the ICC Statute has not always been envisaged for the Court's exclusionary rules. In fact, in what arguably became "the most important basis for the Rome negotiations",[539] the *Zutphen Report*, the exclusionary rule was proposed without the second

[536] Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, reprinted in ICTY Yearbook, p. 287, U.N. Doc. S/1995/728, 23 August 1995 (https://www.legal-tools.org/doc/9a66a1/). For the amendment see ICTY, Rules of Procedure and Evidence, 6 October 1995, IT/32/REV.6 (https://www.legal-tools.org/doc/rkps3b/).

[537] Calvo-Goller, 2006, p. 97, see above note 535; Ambos, 2009, p. 370, see above note 191.

[538] ICC, *Prosecutor v. Lubanga*, Decision on the admission of material from the "bar table", 24 June 2009, ICC-01/04-01/06-1981, para. 41 (fn. omitted, emphasis added) (https://www.legal-tools.org/doc/c692ec/).

[539] Ambos, 2013, p. 24, see above note 452.

prong, allowing for the exclusion *ab initio* (the dual test was provided in brackets, though):

> Evidence obtained by means of violation of this Statute or of other rules of international law [or by means which cast substantial doubt on its reliability] [or whose admission is antithetical to, and would seriously damage, the integrity of the proceedings] [or by means which constitute a serious violation of internationally protected human rights] [or which have been collected in violation of the rights of the defence] shall not be admissible.[540]

In other instances, an ICT might find a violation grave enough to find that the illegally obtained evidence can neither be admitted in court nor lead to other evidence. Thus, the separation hypothesis provides a tool to disentangle the Gordian knot of procedural vs. substantive fairness.

17.5.2.3.2.3.3.2.2. Disclosure System

The separation hypothesis is a familiar basis for another evidentiary problem that provides useful guidance for the matter at hand: disclosure violations. An appellate court in England, for instance, referred to the "integrity of the discovery process", albeit in a civil case.[541] I have pointed this out elsewhere: the position of a human rights non-governmental organisation with respect to the confidentiality of witnesses and the information collected from them is troubling.[542] This created a problem that became visible at the ICC: in the *Lubanga* case, the Prosecution obtained evidence from the UN and certain NGOs pursuant to confidentiality agreements made under Article 54(3)(e) of the ICC Statute.[543] Basically, there was nothing wrong

[540] Article 62(5) Zutphen Draft, in M. Cherif Bassiouni and William A. Schabas (eds.), *The Legislative History of the International Criminal Court*, vol. 2, second edition, Brill Nijhoff, Leiden, Boston, 2016, pp. 620–621.

[541] UK HL, *Taylor & Anor. v. Director of the Serious Fraud Office & Ors*., 29 October 1998, [1998] 3 W.L.R. 1040, [1999] 2 A.C. 177, p. 191.

[542] Bergsmo and Wiley, 2008, p. 18, see above note 1.

[543] Article 18(3) of the ICC–UN Relationship Agreement provides that "the United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents shall not be disclosed to other organs of the Court or third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations", cited in *Prosecutor v Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements, 15 June 2008, ICC-01/04–01/06-1401, para. 93 ('Lubanga, 2008') (https://www.legal-tools.org/doc/e6a054/). The same rule applies to the UN peacekeeping mission, MONUC, in the Democratic Republic of

with that. As long as the amount of evidence obtained this way is relatively minor, and the documents or information were received on a confidential basis "solely for the purpose of generating new evidence" (lead evidence), the Prosecution was allowed to do this.[544] It had no effect on the trial phases, and thus paid tribute to the separation hypothesis. In other words, a few documents and pieces of information can be obtained, coupled with an agreement for non-disclosure, as long as the only purpose of receiving this material is that it leads to other evidence. However, this was far from what the Prosecution did. First, the Prosecution obtained more than fifty per cent of its evidence on the basis of confidentiality agreements with NGOs.[545] The Prosecution itself admitted that its use of Article 54(3)(e) of the ICC Statute to obtain evidence "may be viewed as excessive" and that "an excessive use of Art. 54(3)(e) would be problematic".[546] Second, a great amount of these documents were exculpatory material relevant to defence preparation.[547] These documents usually have to be turned over to the defence.[548] Third, and most importantly, the Prosecution did not use the Article 54(3)(e)-agreements only for the purpose to obtain other evidence, for example, as "springboard or lead potential".[549] In fact, the Prosecution did quite the opposite, as the Trial Chamber described:

Congo by way of Article 10(6) of the MONUC Memorandum of Understanding with the ICC, which reads: "Unless otherwise specified in writing […], documents held by MONUC that are provided by the United Nations to the Prosecutor shall be understood to be provided in accordance with and subject to arrangements envisaged in Article 18, paragraph 3, of the Relationship Agreement", cited in Kai Ambos, "Confidential Investigations (Article 54(3)(e) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law", in *New Criminal Law Review*, 2009, vol. 12, no. 4, p. 550. Generally, see Heinze, 2014, p. 454, see above note 110.

544 Lubanga, 2008, para. 93, see above note 543.

545 ICC, *Prosecutor v. Lubanga*, Hearing Transcript, 13 March 2008, ICC-01/04-01/06-T-79, pp. 5–6 (https://www.legal-tools.org/doc/bdf4aa/).

546 Cf. Lubanga, 2008, para. 32, see above note 543.

547 *Ibid*., para. 63 ("In this case over 200 documents, which the prosecution accepts have potential exculpatory effect or which are material to defence preparation, are the subject of agreements of this kind. On 10 June 2008, the Chamber was told that there are 'approximately' 95 items of potentially exculpatory material and 112 items which are 'material to defence preparation', pursuant to Rule 77, making a total of 207 items of evidence. Of these 207 items, 156 were provided by the UN", fn. omitted). See also Heinze, 2014, p. 455, see above note 110.

548 See *ibid*., pp. 344 ff.

549 Cf. Lubanga, 2008, para. 72, see above note 543.

> the prosecution's general approach has been to use Article 54(3)(e) to obtain a wide range of materials under the cloak of confidentiality, in order to identify from those materials evidence to be used at trial (having obtained the information provider's consent). This is the exact opposite of the proper use of the provision, which is, exceptionally, to allow the prosecution to receive information or documents which are not for use at trial but which are instead intended to 'lead' to new evidence.[550]

As a result of this, the Chamber opted for a stay of proceedings because of an abuse of process.[551] I will go into this in detail in a moment. For now, it suffices to say that the exclusion of evidence as a result of non-disclosure, as it is the law in England,[552] was never even an option at the ICC and the "drastic" and "exceptional" stay of the proceedings turned into the hot potato of (*Lubanga*) case law.[553] More importantly, the Lubanga-disclosure-scenario casts doubts on the practicability of the condition to only use illegally obtained evidence as lead evidence: this condition is very much dependant on the *bona fide* conduct of both prosecutors and investigators. It might not be taken seriously when a court – as the ICC did – is reluctant to follow through with an effective remedy, namely a stay of proceedings.

17.5.2.3.2.3.3.2.3. The Conceptual Flaw of the Separation Hypothesis

If the separation hypothesis provides a tool to disentangle the Gordian knot of procedural vs. substantive fairness, this tool is indeed a sword (as in the original legend involving Alexander the Great) rather than a sophisticated strategy. As I see it, the separation hypothesis is a radical conceptual measure that comes at a price. This price is: a) the artificial separation of proce-

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[550] *Ibid*., para. 73.

[551] Jenia Iontcheva Turner, "Policing International Prosecutors", in *New York University Journal of International Law & Policy*, 2012, vol. 45, pp. 194 ff.: "The balancing approach recognizes that remedies such as dismissal, stay, retrial, and exclusion may impose significant burdens on third parties and on the justice system, and it takes these burdens into consideration when determining the optimal remedy".

[552] UK, Police and Criminal Evidence Act 1984, s. 78, see above note 250.

[553] ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582, para. 55 (https://www.legal-tools.org/doc/8f3b61/); in more detail Heinze, 2014, pp. 443 ff., see above note 110.

dural stages that can easily be viewed as a unified system; and b) the false premise that these stages are in fact closed.

Employing Damaška's models of criminal procedure, the criminal process needs to be viewed first and foremost holistically, independent of its stages. Just because a procedural stage might appear in a certain setting does not change the characterisation of the process as a whole, but 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".[554] At first sight, this argument appears to resemble the familiar argument that different procedural stages may have different "objectives and procedural influences".[555] However, a procedural stage does not present some sort of autonomous, closed, Luhmannesque[556] system.[557] 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[558] (and are therefore – as already mentioned – assigned to "methodological *sub*tasks");[559] and b) the existence of procedural stages *per se* and the extent of their integration into the proceedings are already characteristics of a certain procedural model.[560] 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

554 Damaška, 1986, pp. 47–48, see above note 412.

555 See, for example, Mark Klamberg, *Evidence in International Criminal Trials*, Martinus Nijhoff, Leiden, Boston, 2013, p. 499.

556 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 am Main, 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; Luhmann, 2008, pp. 50 ff. (sixth edition, 2011, p. 111), see above note 370; Brian H. Bix, *Legal Theory*, Oxford University Press, 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.

557 In a similar vein, see Campbell, Ashworth, and Redmayne, 2019, p. 10, see above note 107.

558 Damaška, 1986, pp. 47–48, see above note 412.

559 Emphasis added.

560 See Damaška, 1986, p. 57, see above note 412.

somehow beg the question. Think of the perception of the criminal process in civil law *vis-á-vis* common law systems: it is certainly fair to say that all domestic legal systems within the common law or civil law tradition contain concentrated and 'continuous' proceedings, but they reach this concentration differently. In proceedings of the civil law tradition, the trial is the cumulation of a continuing criminal process, whereas many common law legal systems conceive the trial as "a discrete and continuous event" and differentiate more sharply between the trial and pre-trial phases of criminal proceedings.[561] A good illustration for this difference is the fact, that Franz Kafka's "Der Prozess" is still translated as "The Trial" in English, instead of "The Proceedings", which would certainly be more accurate.[562]

Furthermore, the ICC provides a reality check to the separation hypothesis, since the investigation phase (read as formal investigations)[563] and the trial phase can hardly be separated. As I have commented on elsewhere,[564] the ICC Appeals Chamber held that "the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth".[565] The Appeals Chamber based this decision on Article 54(1)(a) of the ICC Statute, which lays down that the Prosecutor shall, "[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally".[566] The Appeals Chamber further recognised that "ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing" but this

[561] Roberts and Zuckerman, 2010, p. 55, see above note 192.

[562] Mirjan Damaška, "Models of Criminal Procedure", in *Zbornik Pravnog Fakulteta u Zagrebu*, 2001, vol. 51, p. 490.

[563] Ambos, 2016, pp. 342 ff., see above note 342.

[564] Heinze, 2014, pp. 524 ff., see above note 110.

[565] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgement on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, 13 October 2006, ICC-01/04-01/06-568, para. 52 ('Lubanga, 2006') (https://www.legal-tools.org/doc/7813d4/). This view has been adopted by Trial Chamber IV in the case against Nourain and Jerbo Jamus, see ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Trial Chamber, Prosecution's Response to the Defence's Oral Application of 19 April 2011, 4 May 2011, ICC-02/05-03/09-140, para. 7 (https://www.legal-tools.org/doc/e5a6ea/).

[566] Lubanga, 2006, para. 52, see above note 565.

was "not a requirement of the Statute".[567] It, therefore, accepted the argument of the Prosecutor

> that in certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence – particularly in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing.

As a consequence, the Prosecution may investigate as long as the trial has not been concluded. I have expanded on this argument elsewhere.[568] The rights of the defence to have adequate time and facilities for the preparation of the trial could be safeguarded even if the investigation continues beyond the confirmation of the charges.[569]

This does not mean that viewing procedural stages separately to decide about the admission or exclusion of evidence could not be a practical compromise. Yet, this compromise comes at the price of dissolving the criminal process as a system. As I have demonstrated, it is also questionable whether the separation hypothesis may work at the international level in the face of the growing popularity of private investigations. Even the OTP in the *Lubanga* case deliberately violated procedural rules to ensure the success of its investigation. It can only be speculated that the Office was probably rather certain that the ICC could not afford excluding the evidence and eventually acquit Lubanga – for reasons of substantive fairness. *Argumentum a majore ad minus*, a similar motivation might drive private investigators. Duff *et al*. take this argument conceptually even further. They distinguish two types of integrity (both types have been elaborated on earlier in a different context):[570]

> First, a defendant might claim that it would be inconsistent to continue the prosecution given the State's conduct at the pretrial stage. Secondly, a defendant might claim that the moral standing of the trial would be undermined by the prosecution

[567] *Ibid*., para. 54.

[568] In more detail Heinze, 2014, pp. 524 ff., see above note 110.

[569] Cf. Lubanga, 2006, para. 55, see above note 565.

[570] See above Section 17.5.2.2.

> through the association between the trial and the wrongful conduct pre-trial.[571]

While the former "focuses in particular on conduct of state officials",[572] the latter addresses

> wrongful behaviour without emphasising the need for that conduct to be perpetrated by state officials. We have already seen some examples of the latter claim where the former is not at issue: there might be cases of private torture where the rights of D are not violated by the state itself. Despite this, there seem good grounds to exclude the evidence obtained, even if those grounds are not as strong as cases in which torture is perpetrated by state officials.[573]

Duff *et al*. call this "integrity as integration": "the defendant must be treated as a citizen not only at trial, but throughout the criminal process, and that the normative validity of the trial rests on the validity of the state's conduct pre-trial".[574] They too argue against the separation hypothesis, meaning "that each part of the criminal justice process can be considered independently. According to this thesis, faults at one stage of the process need not infect decisions taken at later stages as long as there are independent remedies for those earlier faults".[575]

The rejection of the separation-hypothesis and the ensuing holistic view on the process (for Duff *et al*., integrity as integration) is the continuation of the holistic view on the addressee-issue.[576] Integrity as integration, combined with the presumption that procedural rules are not merely addressed to actors but to systems and sub-systems respectively, allow for the application of exclusionary rules to private conduct. The status of the person collecting the evidence is not relevant for exclusionary rules, but the investigatory context is (within which both public officials and private individuals act). More concretely: whether exclusionary rules apply does not

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[571] A. Duff *et al*., 2007, p. 234, see above note 145.

[572] *Ibid*. ("It rests on the identification between the state and the actions of its officials such that actions by officials in the course of investigation are to be treated as actions by the state, which then have implications for the justification of future state actions").

[573] *Ibid*.

[574] *Ibid*., p. 236.

[575] *Ibid*.

[576] See above Section 17.5.2.3.1.2.2.3.

depend on the *investigator* but on the existence of an *investigation*.[577] In the words of Duff *et al*.: "Integrity as moral coherence involves the moral coherence of treating certain actions, be they of officials or private citizens, as part of the investigation of D".[578] To separate trial and judgment as one sub-system from the investigation as another sub-system is thus not only artificial, it also betrays the communicative, moral and normative standards of a trial that I described above.[579] The umbrella that protects a trial from failing on legitimacy grounds is integrity, and eventually the rule of law with its coherence and consistency elements. It applies to both private actions and actions of public officials.[580] The integrity principle "suggests that there is normative continuity between the investigatory stage and the criminal trial".[581]

Admittedly, the holistic view misses the practicability[582] advantage of the separation-hypothesis. Yet, it is no less practical in the face of private investigators and possible rights violations at the international level. By simply asking whether there is an official investigation or not, it circumvents the somewhat Sisyphean task of categorising investigators into private, public and so forth, which is especially useful in the face of an increasing number of private investigators, security companies and so on.[583] This investigatory context can be as broad as the IIIM.[584]

[577] In a similar vein, see A. Duff *et al*., 2007, p. 239, see above note 145: "What distinguishes the cases of private torture, private entrapment, private phone-tapping and the like from this case is that those cases are investigatory".

[578] *Ibid*.

[579] See above Sections 17.5.2.2.3.1. and 17.5.2.3.2.3.1. In the same vein, see *ibid*.

[580] *Ibid*. ("[E]ven as far as private citizens are concerned, use of evidence wrongfully obtained involves treating the actions of those private citizens as part of the investigation. The argument on this view is that the integrity principle, the principle that the trial cannot be detached from the investigation in normative terms, applies to private actions as well as actions of public officials").

[581] *Ibid*., p. 243.

[582] About practicability as an important value in evidence law, see Volk, 1978, p. 3, above note 334.

[583] See above Section 17.5.1.

[584] See above Section 17.2.2.

17.5.2.3.2.3.3.3. Applicability of the Rule of Law to the International Level

To justify the applicability of the rule of law at the international level, a recourse to Kant is anew fruitful.

Kant's conception of human dignity is complemented by his vision of a 'perpetual peace'. I have disentangled the structure of Kant's work *Toward Perpetual Peace* elsewhere.[585] In this vein, Kant's Definitive Articles:

> 1. The Civil Constitution of Every State shall be Republican (principle of civil right);
> 2. The Right of Nations shall be based on a Federation of Free States (principle of international right);
> 3. Cosmopolitan Right shall be limited to Conditions of Universal Hospitality (principle of cosmopolitan right).
>
> *Perpetual Peace*, p. 98.

The conceptual novelty of Kant's doctrine of cosmopolitanism is that he recognised "three interrelated but distinct levels of 'right', in the juridical senses of the term".[586] Of interest for the rule of law[587] is the third level, a world citizen law (*Weltbürgerrecht*) which entails the "right of hospitality" (*Recht der Hospitalität*), that is, that each citizen must not be treated in a hostile way by another State.[588] With regard to the term hospitality, Kant himself notes the oddity of the term in this context, and therefore remarks that "it is not a question of philanthropy but of right".[589] In other writings, Kant clarified that the notion of hospitality and cosmopolitan right included a wider range of rights, including "the right of citizens of the world *to try to* establish community with all",[590] "engage in commerce with any other,

[585] Heinze, 2018, pp. 356 ff., see above note 487.

[586] Seyla Benhabib, *Another Cosmopolitanism*, Oxford University Press, 2006, p. 21.

[587] In more detail Denninger, 1978, p. 69, see above note 255.

[588] Ambos, 2013, pp. 293, 305–6, see above note 163.

[589] Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Yale University Press, New Haven, 2006, p. 105; Benhabib, 2006, pp. 21–22, see above note 586. For a detailed analysis see Jasmine K. Gani, "The Erasure of Race: Cosmopolitanism and the Illusion of Kantian Hospitality", in *Millennium*, 2017, vol. 45, no. 3, pp. 425 ff.; Pauline Kleingeld, "Kant's Cosmopolitan Law: World Citizenship for a Global Order", in *Kantian Review*, 1998, vol. 2, p. 75.

[590] Kant, 1991, p. 158, see above note 163 (emphasis in the original); Wade L. Huntley, "Kant's Third Image", in *International Studies Quarterly*, 1996, vol. 40, no. 1, p. 51.

and each has a right to make this attempt without the other",[591] and a free "public use of man's reason".[592] For Benhabib, therefore, human rights covenants can be qualified as cosmopolitan norms.[593] Günther follows from Kant's Third Definitive Article, that the application of public human rights is a necessary precondition for a permanent peace.[594] In sum, with this conception, Kant laid the foundations for all current conceptions of human dignity and world peace, an "international rule of law".[595] Even though according to the Second Definitive Article, international law is created through treaty obligations between States, cosmopolitan norms move the individual as a moral and legal person in a worldwide civil society into the centre of attention.[596]

17.5.2.3.2.4. Intermediate Conclusion

In this section, the rationales for exclusionary rules were applied to the extra-investigatory context. After questioning the usefulness of the deterrence theory, both remedy theory and the integrity of the process provide an im-

[591] Kant, 1991, p. 158, see above note 163 (fn. omitted).

[592] Immanuel Kant, "An Answer to the Question: What is 'Enlightenment?'", in Hans Reiss (ed.), *Immanuel Kant, Political Writings*, H.B. Nisbet (trans.), Cambridge University Press, 1991, p. 55; Garrett Wallace Brown, "Kantian Cosmopolitan Law and the Idea of a Cosmopolitan Constitution", in *History of Political Thought*, 2006, vol. 27, no. 4, pp. 661, 664; Gani, 2017, p. 431, see above note 589; Jürgen Habermas, *Politische Theorie*, Philosophische Texte, vol. 4, Suhrkamp, Frankfurt am Main, 2009, p. 321: "Die Gefahr des Despotismus, die in allen von der Obrigkeit bloß auferlegten Gesetzen brütet, kann einzig durch das republikanische Verfahren einer fairen Meinungs- und Willensbildung aller potentiellen Betroffenen vorgebeugt werden".

[593] Seyla Benhabib, "Claiming Rights across Borders", in *American Political Science Review*, 2009, vol. 103, no. 4, pp. 691, 696. Against this view with a narrow reading of hospitality, Vischer, 2017, p. 325, see above note 164: "Kant's cosmopolitan law is far from proclaiming a firm catalogue of human rights or even a world constitution. It only asserts in a rather moral than legal tone a minimal guarantee of peaceful intercourse, and explicitly presumes the ongoing asymmetry of host and visitor".

[594] See also Günther, 2009, p. 84, see above note 498. About Kant's two-step-justification see Heinze, 2018, p. 371, see above note 487.

[595] Huntley, 1996, pp. 45, 49, see above note 590; Alec Stone Sweet, "A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe", in *Global Constitutionalism*, 2012, vol. 1, no. 1, pp. 53 (58); Jorrik Fulda, "Eine legitime Globalverfassung? Die US-Hegemonie und die weltgesellschaftlich gerechte Vollendung des Kantischen Projektes", in *Archiv des Völkerrechts*, 2016, vol. 54, no. 3, pp. 334, 345. About the role of human dignity in international human rights law and international criminal law, see Schmahl, 2018, pp. 79 ff., above note 445.

[596] Benhabib, 2009, pp. 691, 695, see above note 593.

portant theoretical basis for the exclusion of illegally obtained evidence in the extra-investigatory context. The argumentative force and even effectiveness of the remedy theory at the international level are underlined by the central role of human rights. The human rights language of Article 21(3) of the ICC Statute is translated into the admissibility provision of Article 69. Here, integrity from the perspective of the suspect is visibly enshrined in paragraph 7: "Evidence obtained by means of a violation of this Statute *or internationally recognized human rights* shall not be admissible if […] [t]he admission of the evidence would be antithetical to and would seriously damage the *integrity of the proceedings*".[597] At the same time, the integrity of the person ('internationally recognized human rights') is interlocked with integrity from the perspective of the process.

Yet, at the heart of exclusionary rules within the extra-investigatory context lies the integrity of international criminal procedure itself. Illegally obtained evidence by private individuals questions the moral authority of the verdict and its legitimacy. The evidence may be unreliable. Admitting such evidence might violate the rule of law. The basis of the integrity of the process is fairness. Especially the juxtaposition of procedural and substantive fairness is vital for private investigations. A conviction that is based on unreliable evidence is not substantially fair. The two dimensions of fairness – procedural fairness vs. substantive fairness – affect a judgment like two parents their child. Within this rationale, integrity becomes a "proxy, synonym or placeholder"[598] for procedural values such as fairness, due process, natural justice or judicial legitimacy. Moreover, it would be detrimental to the expressivist and communicative function of a public trial, if a conviction rendered by an international tribunal was based on illegally obtained evidence – irrespective of the status of the person who obtained the evidence.

Every endeavour of applying the systems theory by Luhmann and Teubner eventually passes over to the bifurcated decision of how narrow the systems and sub-systems should be. The criminal process with its various stages is especially prone to such an endeavour. Strictly speaking, the investigatory context (sub-system 1) could easily be, and is often, separated from the trial process (sub-system 2). This separation hypothesis has practical advantages on the international level: ICTs could, if they found that

[597] Emphasis supplied.

[598] Roberts *et al*., 2016, p. 5, see above note 146.

evidence had been illegally obtained, declare that, even if this evidence must be excluded from trial, it could still be obtained and eventually be *used in the pre-trial stage as lead evidence*. An exclusionary rule would thus only address the non-use of evidence in court and requires balancing that allows for obtainment of the evidence (even though it was illegally obtained).

Yet, the separation hypothesis must be rejected on the international level. It artificially separates procedural stages that can easily be viewed as a unified and is based on the false premise that procedural stages are in fact closed. The rejection of the separation-hypothesis and the ensuing holistic view on the process (Duff *et al.*'s integrity as integration) is the continuation of the holistic view on the addressee-issue. Integrity as integration, combined with the presumption that procedural rules are not merely addressed to actors but to systems and sub-systems respectively, allow for the application of exclusionary rules to private conduct. Whether exclusionary rules apply does not depend on the *investigator* but on the existence of an *investigation*.[599]

Last but not least, the *Lubanga* disclosure scenario casts doubt on the practicability of the condition to only use illegally obtained evidence as lead evidence: this condition is very much dependant on the *bona fide* conduct of both prosecutors and investigators. It might not be taken seriously when a court is reluctant to follow through with an effective remedy, that is, a stay of proceedings, as the ICC declared. These remedies and consequences and their effectiveness to ensure the integrity of the process shall be briefly analysed in the following section.

17.5.2.4. Consequences and Remedies: Exclusion vs. Other Remedies

As mentioned at the outset, integrity as an element and value in the decision about illegally obtained evidence by private individuals may lead to several consequences. For the sake of better following the arguments, I have decided to single out – by way of example – the exclusion of evidence as the consequence for a violation of the integrity element (in whatever form). It goes without saying that there are other consequences. Their mere existence has a considerable influence on the decision about whether to

[599] In a similar vein, see A. Duff *et al*., 2007, p. 239, above note 145: "What distinguishes the cases of private torture, private entrapment, private phone-tapping and the like from this case is that those cases are investigatory".

exclude evidence from a trial or not. Rogall[600] and others[601] have made this point concerning the balancing exercise within the exclusion decision: the exclusion or non-use of evidence is *one*, but not necessarily the most apt reaction to an illegal gathering of evidence. According to them, whether this response is the appropriate remedy depends more on systemic aspects than on the individual situation of the accused. Thus, integrity can also be used to rationalise a stay of proceedings. It is the broader question of how to address procedural violations committed in the pre-trial phase of the proceedings. I will provide a brief sketch of those judicial responses, since there are others who have provided profound studies of the matter, especially recently Pitcher.[602] Other remedies involve financial compensation,[603] sentence reductions,[604] integrity testing and integrity units. Financial compensation and sentence reductions provide enough material for another chapter and will thus be neglected altogether. Integrity testing and integrity units need to be illuminated briefly since their existence is indeed an important check for both prosecutors and persons working in law enforcement.

Some prosecutors have set prosecution integrity units within their offices, to provide an internal review when they believe it is warranted.[605] The units usually work closely together with innocence projects. Some states in the US have created so-called 'integrity testing', where a police officer "is placed in a position where he or she might be tempted to break a rule or a law and monitored to see what he or she will do".[606] As Pollock explains: "Integrity testing is like undercover work in that unsuspecting

[600] Klaus Rogall, "Gegenwärtiger Stand und Entwicklungstendenzen der Lehre von den strafprozessualen Beweisverboten", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1979, pp. 31–35; see also Klaus Rogall, "Über die Folgen der rechtswidrigen Beschaffung des Zeugenbeweises im Strafprozeß", in *Juristenzeitung*, 1996, 947–948; for a further summary see Thaman and Brodowski, 2020, p. 451, see above note 196.

[601] See Jürgen Wolter, "Beweisverbote und Umgehungsverbote zwischen Wahrheitserforschung und Ausforschung", in Claus Wilhelm Canaris *et al*. (eds.), *50 Jahre Bundesgerichtshof, Festgabe aus der Wissenschaft, Band IV*, C.H. Beck, München, 2000, pp. 963, 985–986; Greco, 2018, pp. 512 ff., see above note 203; see, generally, Thaman and Brodowski, 2020, p. 451, see above note 196.

[602] Pitcher, 2018, see above note 192.

[603] *Ibid*., pp. 298 ff.

[604] *Ibid*., pp. 302 ff.

[605] Turvey and Cooley, 2014, p. 368, see above note 180.

[606] Pollock, 2019, p. 204, see above note 179.

officers are tempted with an opportunity to commit an illegal or corrupt act, such as keeping a found wallet or being offered a bribe".[607]

17.5.2.4.1. Exclusion: Balancing

A decision about the exclusion of evidence is never a black and white decision. The entire criminal process is about balancing rights and interests[608] and so is the decision about excluding evidence. In fact, the exclusion of evidence is perceived "as playing an integral role in ensuring constitutional and judicial integrity in the criminal justice system as a whole, as well as promoting constitutional compliance by the police and prosecutorial services".[609] It is especially this decision that requires a specific justification for the exclusion of evidence. As I have illustrated, this is easier said than done – especially because it seems all too easy to let the goals of International Criminal Justice outweigh an alleged minor rights violation committed by a private individual.[610] Thus, even the law at ICTs is fragmented in that regard: the law of the *ad hoc* Tribunals provides explicitly for exclusionary rules in case of serious fair trial violations, while the ICC regime only takes such considerations into account with regard to admissibility and relevance of the respective evidence or generally as an admissibility criterion.[611] Last but not least, there are instances where the Chamber is obliged to 'exclude' ("not consider") the evidence ("shall")[612] and where this is within its discretion ("may").[613] Especially in the latter case, recourse to rationales of exclusionary rules is useful. Yet, the rationales themselves must not be taken as a dogma.[614] After all, they are theories.[615] For instance, the remedy rationale, taken in its pure form, can be

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607 *Ibid*.

608 Dennis, 2020, mn. 2-009, see above note 192.

609 Roberts and Hunter, 2012, p. 49, see above note 192.

610 Lüderssen made this argument, albeit on a more conceptual level, see Klaus Lüderssen, "Was ist das – ein 'Rechtsstaat'?", in Erhard Denninger and Klaus Lüderssen (eds.), *Polizei und Strafprozeß im demokratischen Rechtsstaat*, Suhrkamp, Frankfurt a. M., 1978, p. 95.

611 Cf. ICC Statute, Article 69(7), see above note 182: "shall not be admissible".

612 Cf., for example, ICTY RPE, Rule 95, see above note 341; MICT RPE, Rule 117, see above note 515 and ICC Statute, Article 69(7), see above note 182.

613 Cf., for example, ICTY RPE, Rule 89(D), see above note 341 and MICT RPE, Rule 105(D), see above note 515 and ICC Statute, Article 69(4), see above note 182.

614 The value of a dogma is that it applies to a wide range of cases and instance. Those cases and instance thus do not have to be rationalized de novo, every time they occur, see Volk, 1978, p. 54, see above note 334.

> a very crude tool, effectively allowing the court no discretion to vary the remedy according to the harm done to the accused. The remedy is either granted – and the evidence thus excluded – or the remedy is refused – and the evidence is admitted. There is no scope for adjusting the remedy according to the circumstances of the case, as in the case of a civil wrong, for instance, where there is scope for infinite variation of the damages awarded.[616]

As a result, national courts have developed sophisticated balancing exercises to be used upon an exclusionary decision. Thaman and Brodowski, in a recent and illuminating study, have summarised these factors with a special view to the US and Germany:[617]

> the gravity of *objective* and *subjective misconduct*, such as the clear lack of a (sufficient) legal basis for the specific act of gathering evidence; a wilful, widespread and/or arbitrary misuse of state powers, or a wilful, widespread and arbitrary circumvention of a requirement of ex-ante judicial authorization […] the *ratio legis* of the protected norm, including whether the "legally protected sphere" of the defendant has been affected; the *quality of the evidence* in light of the misconduct, the existence of *supporting evidence*; and a *hypothetical clean path* doctrine (i.e., whether the evidence could have been gathered legally); the *gravity* of the crime being prosecuted, in particular based on the guilt of the defendant and the expected punishment; and *systemic effects* on society's trust in criminal justice *and* in the lawfulness of state actions.

It needs to be emphasised that Thaman and Brodowski's criteria are descriptive and not prescriptive. It is also not surprising that Article 69(7)(b) of the ICC Statute does not require any degree of "damage" to the integrity of the proceedings; instead, this integrity must be "seriously" damaged, which thus involves a judgment of degree by the respective judge(s).[618]

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615 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, p. 379: "[Theorie] ermöglicht die begriffliche und/oder dogmatische Einordnung der einschlägigen Problemlösung(en)").

616 P. Duff, 2004, p. 165, see above note 193.

617 Thaman and Brodowski, 2020, pp. 451–452, see above note 196 (fn. omitted, emphasis in the original). See also Jahn, 2008, pp. 46–47, see above note 528.

618 Pitcher, 2018, p. 327, see above note 192.

Drawing on my argument about integrity as integration (following Duff *et al*.), the same test applies to the extra-investigatory context. Surely, it is fair to say that there is a stronger reason to exclude evidence once a State authority committed the rights violation.[619] Yet, this is more of a yardstick than a rule set in stone. Generally, what applies to State authorities also applies to private individuals in the context of obtaining evidence: "the trial provides the normative standards that ought to govern the investigation of public wrongs. In using evidence wrongfully obtained by private citizens in their investigations of public wrongdoing, the trial cannot distance itself from those wrongs".[620]

17.5.2.4.2. Stay of Proceedings

The most drastic consequence of illegally obtained evidence is a stay of proceedings.[621] As Roberts eloquently puts it: "Even more closely than its natural affinity with evidentiary exclusion, judicial integrity-talk is bound up with permanent stays of proceedings on the grounds of abuse of process".[622] In a seminal decision that became a yardstick for cases that followed, the ICTR Appeals Chamber in *Barayagwiza* recognised that a stay of proceedings may be imposed, among other things, "where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct".[623] The "sense of justice" can be understood as the notions of fairness as previously defined. It could even easily be categorised as 'substantive fairness', if the Chamber had merely formulated "sense of justice". Yet, it clarified "the court's sense of justice". Thus, the criterion seems just to be a reformulation of the integrity concept. This reading is supported by a stay of proceedings decision at the ICTY in the case of *Stanišić and Župljanin*, where the Appeals Chamber remarked:

> The doctrine of "abuse of process" allows a court to decline to exercise jurisdiction either because it will be impossible to give the accused a fair trial or because it offends the court's sense of justice and propriety to try the accused in the circum-

619 A. Duff *et al*., 2007, p. 239, see above note 145.

620 *Ibid*.

621 About the difference between a permanent and a conditional stay of proceedings Pitcher, 2018, pp. 305 ff., see above note 192.

622 Roberts *et al*., 2016, p. 6, see above note 146.

623 Barayagwiza decision, 1999, Introduction, para. 77, see above note 304.

> stances of a particular case. The question in cases of abuse of process is not whether it is "necessary" for a court to issue an interlocutory decision terminating proceedings […], but whether a court should continue to exercise jurisdiction over a case in light of serious and egregious violations of the accused's rights that would prove detrimental to the court's integrity. The discretionary power of a court to stay or terminate proceedings by reason of abuse of process applies during the trial phase of a case, and is mostly concerned with prosecutorial misconduct, since its main purposes are to prevent wrongful convictions and preserve the integrity of the judicial system.[624]

The ICC Chambers have had several opportunities to comment on the abuse of process doctrine.[625] On the one hand, they have recognised that the principle of abuse of process leading to the court's authority to stay proceedings is not provided for in the Statute, nor is it "generally recognised as an indispensable power of a court of law".[626] On the other hand, however, they have stated that the ICC Statute safeguards the rights of the suspect and the accused, especially under Articles 55 and 67 of the ICC Statute. Drawing on Article 21(3) of the ICC Statute,[627] the Appeals Chamber in *Lubanga* pointed out that "if no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped".[628] However, not every breach of the rights of the suspect and/or the accused is tantamount to an abuse of process entailing the need to stay the proceed-

[624] ICTY, *Prosecutor v. Stanišić and Župljanin*, Decision on Mićo Stanišić's Motion Requesting a Declaration of Mistrial and Stojan Župljanin's Motion to Vacate Trial Judgement, 2 April 2014, IT-08-91-A, para. 35 (fn. omitted) (https://www.legal-tools.org/doc/494e31/).

[625] ICC, *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber, Decision on the "Defence request for a permanent stay of proceedings", 1 July 2011, ICC-01/04-01/10-264, p. 4, with further references ('Mbarushimana, 2011') (https://www.legal-tools.org/doc/27c6ab/); ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Trial Chamber, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410 (https://www.legal-tools.org/doc/414cc4/). Recently ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Decision on Defence Request for a Stay of Proceedings, 16 October 2020, ICC-02/05-01/20-186, paras. 7 ff. (https://www.legal-tools.org/doc/1nq46m/).

[626] Lubanga, 2006, para. 35, see above note 114; Mbarushimana, 2011, p. 4, see above note 625.

[627] Lubanga, 2006, paras. 36–37, see above note 114; Mbarushimana, 2011, p. 4, see above note 625.

[628] Lubanga, 2006, para. 37, see above note 114.

ings.[629] Only gross violations, which make it impossible for the accused "to make his/her defence within the framework of his rights" justify the proceedings being stayed.[630] Thus, as has been stated in the case law of the Court,[631] behaviours which may trigger a stay of proceedings are those that entail unfairness of such a nature that it cannot be resolved, rectified or corrected in the subsequent course of the proceedings.[632]

One form of this 'behaviour' has included disclosure violations by the Prosecution. The Trial Chamber imposed a stay of proceedings because of an abuse of process relating to disclosure violations in connection with Article 54(3)(e) of the ICC Statute.[633] The Chamber imposed the stay of proceedings because of an abuse of process, also labelled as the "balancing approach".[634] It stated that "[t]he prosecution's approach constitutes a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances".[635] Thus, the Trial Chamber issued a stay of the proceedings, because "the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial"[636] and this "right to a fair trial – which is without doubt a fundamental right – includes an entitlement to disclosure of exculpatory material".[637] The Appeals Chamber later confirmed the stay,[638] but

[629] Mbarushimana, 2011, p. 4, see above note 625.

[630] Lubanga, 2006, para. 39, see above note 114; Mbarushimana, 2011, pp. 4–5, see above note 625.

[631] See, for example, Lubanga, 2008, para. 89, see above note 543.

[632] Mbarushimana, 2011, p. 5, see above note 625.

[633] See above Section 17.5.2.3.2.3.3.2.2. See, generally, Heinze, 2014, pp. 458 ff., see above note 110.

[634] Turner, 2012, see above note 551.

[635] Lubanga, 2008, para. 73, see above note 543; see, generally, Turner, 2012, pp. 179 ff., above note 551.

[636] Lubanga, 2008, para. 93, see above note 543.

[637] *Ibid*., para. 77. With ponderous words, the Chamber continued (para. 91):

> This is an international criminal court, with the sole purpose of trying those charged with the 'most serious crimes of concern to the international community as a whole' and the judges are enjoined, in discharging this important role, to ensure that the accused receives a fair trial. If, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary – indeed, inevitable – that the proceedings should be stayed.

[638] ICC, *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-

made clear that the Trial Chamber "intended to impose a stay that was conditional and therefore potentially only temporary".[639]

17.5.2.4.2.1. The Intra-Investigatory Context: Lubanga and Intermediaries

Even more relevant for the purpose of this chapter is an instance where another stay was imposed: when during the proceedings against *Lubanga* the suspicion arose that certain so-called intermediaries had bribed various persons to prepare false evidence for alleged former child soldiers.[640] Intermediaries are "local organisations and/or private persons supporting the OTP by assisting in the collection of evidence and communication with potential witnesses, given their familiarity with the cultural, geographic and other characteristics of the region where alleged crimes took place".[641] In the case against *Lubanga* about twenty-three intermediaries assisted the OTP, seven of whom were used to contact approximately half of the witnesses the OTP called to give evidence against *Lubanga*.[642] Usually, both the cooperation with intermediaries and their use to create incriminating evidence are common and perfectly legal. Moreover, the Chamber deemed it appropriate that the identities of the intermediaries would not have to be dis-

disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486 (https://www.legal-tools.org/doc/485c2d/).

639 *Ibid*., para. 75, continuing: "The Trial Chamber acknowledged, however, that circumstances might change, in particular should the information providers alter their position and give their consent to the disclosure of the documents in question."

640 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Transcript of hearing, 13 March 2009, ICC-01/04-01/06-T-146-Red-ENG, p. 3, lines 11-18 (https://www.legal-tools.org/doc/b0e64b/) ("[…] the Defence explained that they wished to explore the possibility that certain people have participated in preparing false evidence for alleged former child soldiers, and in this case that [143] helped the witness to invent a false story or a false identity, or both."), cited in *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, 31 May 2010, ICC-01/04-01/06-2434-Red2, para. 16 ('Lubanga, 2010') (https://www.legal-tools.org/doc/8b5694/).

641 See ICC Monitor, no. 41, November 2010 – April 2011, p. 9; Ambos, 2016, p. 122, see above note 342; Ambos, 2013, p. 31, see above note 452. The ASP broadly defines an intermediary "as an individual or entity that facilitates contact between the Court and a witness, victim or other source of information.", see ASP, Resolution ICC-ASP/9/Res.5, Adopted at the 5th plenary meeting, 10 December 2010, Annex, para. 2 with fn. 3 (https://www.legal-tools.org/doc/a399fa/).

642 Lubanga, 2010, para. 3, see above note 640.

closed to the Defence, if particular material required protection and if the statement or document, in its redacted form, is sufficiently comprehensible for the purposes of dealing with trial issues.[643] Yet, once intermediaries commit illegal acts, there is an issue of illegally obtained evidence in an intra-investigatory context.

On 15 March 2010, the Chamber indicated that the Defence was entitled to know the names of certain intermediaries.[644] Balancing the need for intermediary-protection on the one hand and the rights of the accused on the other, the Trial Chamber adopted an approach under which, among other things, the intermediary's identity is disclosable under Rule 77 of the ICC RPE[645] (if "prima facie grounds have been identified for suspecting that the intermediary in question had been in contact with one or more witnesses whose incriminating evidence has been materially called into question, for instance by internal contradictions or by other evidence").[646] Be-

[643] Cf. *ibid*., para. 6.

[644] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of hearing, 15 March 2010, ICC-01/04-01/06-T-261-Red3-ENG, p. 6, line 18 to p. 7, line 8 (https://www.legal-tools.org/doc/d5ee58/) cited in *ibid*., para. 41.

[645] About ICC, Rules of Procedure and Evidence, 9 September 2002, Rule 77 ('ICC RPE') (https://www.legal-tools.org/doc/8bcf6f/); see Heinze, 2014, pp. 355 ff., above note 110.

[646] Lubanga, 2010, para. 139, see above note 640. The entire approach is:

a. Given the markedly different considerations that apply to each intermediary (or others who assisted in a similar or linked manner), disclosure of their identities to the defence is to be decided on an individual-by-individual basis, rather than by way of a more general, undifferentiated approach.
b. The threshold for disclosure is whether prima facie grounds have been identified for suspecting that the intermediary in question had been in contact with one or more witnesses whose incriminating evidence has been materially called into question, for instance by internal contradictions or by other evidence. In these circumstances, the intermediary's identity is disclosable under Rule 77 of the Rules. [...]
c. The identities of intermediaries (or others who assisted in a similar or linked manner) who do not meet the test in b. are not to be disclosed.
d. Disclosure of the identity of an intermediary (or others who assisted in a similar or linked manner) is not to be effected until there has been an assessment by the VWU, and any protective measures that are necessary have been put in place.
e. The identities of intermediaries who did not deal with trial witnesses who gave incriminating evidence are not to be revealed, unless there are specific reasons for suspecting that the individual in question attempted to persuade one or more individuals to give false evidence or otherwise misused his or her position. Applications in this regard will be dealt with by the Chamber on an individual basis.
f. The threshold for calling intermediaries prior to the defence abuse submissions is that there is evidence, as opposed to prima facie grounds to suspect, that the individual in question attempted to persuade one or more individuals to give false evidence.

cause "some intermediaries may have attempted to persuade individuals to give false evidence", those *prima facie* grounds have been identified. As a consequence, the Trial Chamber ordered the Prosecution to disclose confidentially to the Defence the identity ("names and other identifying information" plus the "professional background") of certain intermediaries.[647]

That the proceedings had to be stayed did not – at least not directly – result from the mere fact that the Chamber discovered that certain intermediaries, whose identity did justifiably not have to be revealed, had bribed witnesses to give false testimony. Instead, it resulted from the non-compliance of the Prosecution with the disclosure order just mentioned.[648] The Prosecution quite frankly remarked, after having missed the deadline by the Trial Chamber to comply with the order: "The Prosecution consider [sic] that it cannot disclose the information in the current circumstances, but will consult with the VWU as to whether the security situation allows for disclosure now". They continued: "The Prosecution is bound by autonomous statutory duties of protection that it must honour at all times".[649]

From the perspective of remedies, the refusal of the Prosecution to implement the Court's order is the fact that distinguishes this stay of proceedings from the earlier stay caused by an incorrect reading of Article 54(3)(e) of the ICC Statute. This refusal had – in the view of the Court – a twofold impact: first, it had an impact on the assessment of evidence by the Court, and second, it had an impact on the administration of justice. Both impacts were described and provided with an explicit warning by the – noticeably enraged – Chamber in sharp language. With regard to the former, the Chamber warned: "However, if the identifying information for 143, despite the orders of the Chamber, is not disclosed to the defence, then the Chamber will need to scrutinize the impact of this eventuality in the context of its *overall assessment of the evidence in the case*, and the fairness of

647 Lubanga, 2010, para. 150, see above note 640.

648 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, 8 July 2010, ICC-01/04-01/06-2517-RED, paras. 12, 13 ('Decision on the Prosecution's Urgent Request') (https://www.legal-tools.org/doc/cd4f10/).

649 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with VWU, 7 July 2010, ICC-01/04-01/06-2515, paras. 1, 3 (https://www.legal-tools.org/doc/5e2ba5/), cited in *ibid*., para. 13.

the proceedings against the accused".[650] This is an astonishing statement. The warning that the Chamber "will need to scrutinize the impact of this eventuality in the context of its *overall assessment of the evidence in the case*" mirrors the language of exclusionary rules. As I have shown elsewhere,[651] in England and Wales s. 87 PACE provides for the exclusion of evidence as a remedy for non-disclosure "if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".[652] The use of intermediaries by the Prosecution qualifies this context as an intra-investigatory one.

17.5.2.4.2.2. The Extra-Investigatory Context: Nikolić and Tolimir

A situation of illegal actions of private individuals in the extra-investigatory context[653] occurred before the ICTY in the case against Nikolić. The accused, living in what was then the Federal Republic of Yugoslavia, "was taken forcibly and against his will and transported into the territory of Bosnia and Herzegovina […] by unknown individuals having no connection with SFOR and/or the Tribunal".[654] In Bosnia and Herzegovina, Nikolić was then arrested and detained by the Stabilisation Force ('SFOR'), and delivered to the ICTY.[655] In its evaluation of the situation, the Appeals Chamber invoked the test in *Barayagwiza* previously mentioned.[656] It also stressed that, just because the unknown individuals could not be attributed to SFOR or the Prosecution, it "does not mean that such acts do not raise concerns with the Chamber".[657] And indeed, it remarked with rather clear words:

> [T]he Chamber holds that, in a situation where an accused [person] is very seriously mistreated, maybe even subjected to

[650] Decision on the Prosecution's Urgent Request, para. 20, see above note 648 (emphasis added).

[651] Heinze, 2014, pp. 437 ff., see above note 110.

[652] See *ibid*., pp. 443 ff.

[653] For more examples see Aksenova, Bergsmo and Stahn, 2020, pp. 9 ff., see above note 1.

[654] ICTY, *Prosecutor v. Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, IT-94-2-PT, para. 21 (https://www.legal-tools.org/doc/352e8c/).

[655] *Ibid*., para. 21.

[656] *Ibid*., para. 111.

[657] *Ibid*., para. 113.

> inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused [person]. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment. *But even without such involvement this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated*.[658]

Citing *Barayagwiza*, the Chamber decided that it was thus "irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights".[659] In a twofold way, this decision confirms what has been elaborated earlier. First, that the rule of law with its integrity prong applies to the acts of individuals in an extra-investigatory context; and second, that this, however, does not relieve the Chamber from a balancing exercise between substantive and procedural fairness. The Chamber required not just any rights violation but an "egregious" violation,[660] which seems a too strict requirement that contradicts the equal treatment of investigatory context. A similar situation occurred in the *Tolimir* case, where the Chamber referred to *Nikolić*.[661]

17.5.3. Consequences for Private Investigators at the International Level

The aim of a private investigator is to answer the questions who, what, when, where, how, and why.[662] Investigators – whether private or public – use observation, inquiry, examination and experimentation to obtain evidence and factual information that can be used – if necessary – in court.[663] More concretely, a criminal investigation "is the systematic process of identifying, collecting, preserving, and evaluating information for the pur-

[658] *Ibid*., para. 114 (emphasis added).

[659] *Ibid*. (emphasis added).

[660] *Ibid*. (emphasis added). See, in detail, the analysis in Pitcher, 2018, p. 273, see above note 192.

[661] ICTY, *Prosecutor v. Tolimir*, Trial Chamber, Decision on Preliminary Motions on the Indictment pursuant to Rule 72 of the Rules, 14 December 2007, IT-05-88/2-PT, para. 8 (https://www.legal-tools.org/doc/014693/).

[662] McMahon, 2001, p. 16, see above note 102.

[663] *Ibid*.

pose of bringing a criminal offender to justice".[664] McMahon mentions the "three I's": information, interrogation, and instrumentation.[665] By applying the three I's, "the investigator gathers the facts that are necessary to establish the guilt or innocence of the accused in a criminal trial".[666] The private investigator is often the "last hope for many people"[667] and it is certainly fair to say the same applies to CIJA's investigations in Syria.

This is the reason why the information that organizations like CIJA collect must be admissible in court as evidence[668] – and exactly that is unclear.[669] For CIJA's material to be admissible, its work must satisfy international standards of an evidentiary nature.[670] Here, these 'standards' might actually work in favour of CIJA in two ways. First, the evidence law of international criminal tribunals is governed by the principle of the free assessment of all evidence.[671] This means that Trial Chambers have "maxi-

664 *Ibid*., p. 138.

665 *Ibid*., p. 144.

666 *Ibid*.

667 *Ibid*., p. 16.

668 About term "evidence" *vis-à-vis* "material" and "information", see Ambos, 2016, pp. 446–447, see above note 342.

669 In a similar vein, see Rankin, 2017, p. 402, see above note 56.

670 *Ibid*., p. 403.

671 Ambos, 2016, p. 447, see above note 342. Cf. ICC RPE, Rule 63(2), see above note 645 ("assess freely all evidence"); for the case law, for example, see ICC, *Prosecutor v. Bemba et al*., Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red, paras. 93, 554 (https://www.legal-tools.org/doc/56cfc0/) ("'[d]eferring these assessments is also more consonant with' the right and duty to assess freely, according to Rule 63(2) of the Rules, all evidence submitted"), 585, 591; previously ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, paras. 24, 32 ('Lubanga Decision on admissibility') (https://www.legal-tools.org/doc/2855e0/); ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), Public redacted version of Decision on the Prosecution's Application for Addition of Documents to Its List of Evidence, 3 September 2014, ICC-01/09-01/11-1485-Red2, para. 28 (https://www.legal-tools.org/doc/342ede/) ("The Prosecution notes that there is a principle that the Chamber should have the ability to freely assess the evidence before it rather than seek to limit the use of evidence at the outset"); ICC, *Prosecutor v. Ongwen*, Pre-Trial Chamber II, Decision on Prosecution Request in Relation to its Mental Health Experts Examining the Accused, 28 June 2017, ICC-02/04-01/15-902, para. 6 (https://www.legal-tools.org/doc/80f3dc/).

mum flexibility"[672] and "broad discretion" when deciding on the admissibility.[673] The admissibility decision of the ICC, for instance, depends on the "relevance"[674] and "probative value"[675] of the evidence[676] and the absence of any serious rights violation.[677] Thus, as long as CIJA investigators do not commit a (serious) rights violation, it could be speculated that their information will at least not be ruled inadmissible prior to a judgment.[678] Es-

672 Gideon Boas *et al*., *International Criminal Procedure*, International Criminal Law Practitioner Library Series, vol. III, Cambridge University Press, 2011, p. 336; Ambos, 2016, p. 447, see above note 342.

673 Cf. Lubanga Decision on admissibility, para. 23, see above note 671; *Prosecutor v. Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, para. 222 (https://www.legal-tools.org/doc/edb0cf/) ("In deciding on the admission of the various items, […] the Chamber is afforded a measure of discretion".); for the same position at the *ad hoc* Tribunals and other ICTs, see ICTY, *Prosecutor v. Aleksovski*, Appeals Chamber, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, IT-95-14/1-AR73, para. 15 (https://www.legal-tools.org/doc/168b25/); ICTY, *Prosecutor v. Kordić and Čerkez*, Appeals Chamber, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, IT-95-14/2-AR73.5, para. 20 (https://www.legal-tools.org/doc/da3903/); ICTY, *Prosecutor v. Aleksovski*, Appeals Chamber, Judgment, 24 March 2000, IT-95-14/1-A, para. 63 (https://www.legal-tools.org/doc/176f05/); ICTR, *Prosecutor v. Musema*, Appeals Chamber, Judgment, 16 November 2001, ICTR-96-13-A, paras. 37–8 (https://www.legal-tools.org/doc/fba4cc/); SCSL, *Prosecutor v. Norman et al.*, Trial Chamber I, Appeal against Decision Refusing Bail, 11 March 2005, SCSL-04-14-AR65, para. 26 (https://www.legal-tools.org/doc/5f388e/) (purpose of Rule 89(C) "to avoid sterile legal debate over admissibility"). For the literature see, for example, Ambos, 2016, pp. 447 ff., see above note 342 with further references.

674 ICC Statute, Articles 64(9)(a) and 69(4), see above note 182 (authorising the Trial Chamber to "rule" on the "relevance" of evidence), ICC RPE, Rule 63(2), see above note 645; see also ICTY RPE, Rule 89(C), see above note 341; ICTR RPE, Rule 89(C), see above note 341; SCSL RPE, Rule 89(C), see above note 517 and MICT RPE, Rule 105(C), see above note 515 (referring to "relevant" evidence); Ambos, 2016, p. 448, see above note 342.

675 ICC Statute, Article 69(4), see above note 182, ICC RPE, Rule 72(2), see above note 645; see also ICTY RPE, Rule 89(C), see above note 341; ICTR RPE, Rule 89(C), see above note 341 and MICT RPE, Rule 105(C), see above note 515. Cf. SCSL, *Prosecutor v. Taylor*, Appeals Chamber, Decision on "Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents", 6 February 2009, SCSL-03-01-T-721, para. 37 (https://www.legal-tools.org/doc/453718/); also Boas *et al*., 2011, p. 340, see above note 672, with further references in fn. 18.

676 In more detail Ambos, 2016, pp. 449–450, see above note 342.

677 ICC Statute, Article 69(4), see above note 182, ICC RPE, Rule 72(2), see above note 645; see also ICTY RPE, Rule 89(D), see above note 341 and MICT RPE, Rule 105(D), see above note 515. Cf. Katanga and Ngudjolo, 2010, paras. 13 *et seq*., see above note 311.

678 In a similar vein Donald K. Piragoff and Paula Clarke, "Article 69", in Kai Ambos (ed.), *Rome Statute of the International Criminal Court – A Commentary*, fourth edition, C.H. Beck, Hart, Nomos, München *et al*., 2021, p. 2093, mn. 95.

pecially considering the ICC's practice, and, more concretely, the *Ongwen* Trial Chamber[679] – which rejected the Chambers' previous practice[680] of deciding on admissibility issues at the moment of submission (the 'admission approach') and promoted an alternative approach (authorised by the *Bemba* Appeals Chamber)[681] to defer the admissibility decision "until the end of the proceedings" (the 'submission approach').[682] The submission approach was recently adopted by Trial Chamber X in the Al Hassan case,[683] and by Trial Chamber V in the *Yekatom and Ngaissona* case.[684] However, if private investigators commit a rights violation while collecting evidence, exclusionary rules apply – irrespective of whether the investigators worked on behalf of an ICT-organ or *proprio motu*.

Second, on the international level, the importance of documentary evidence cannot be overstated.[685] Especially photography and visual media

[679] ICC, *Prosecutor v. Ongwen*, Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, paras. 24 *et seq*. (https://www.legal-tools.org/doc/60d63f/); Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, 11 August 2016, ICC-02/04-01/15-520, para. 7 (https://www.legal-tools.org/doc/c47593/). In the same vein, see Fabricio Guariglia, "'Admission' v. 'Submission' of Evidence at the International Criminal Court", in *Journal of International Criminal Justice*, 2018, vol. 16, no. 2, p. 321 (who, however, cites the wrong decision in fn. 20).

[680] See, for example, Katanga and Ngudjolo, 2010, para. 15, see above note 311. For a similar approach at the ICTY, see Christine Schuon, *International Criminal Procedure, A Clash of Legal Cultures*, T.M.C. Asser Press, The Hague, 2010, pp. 137–8 (shift from admissibility to weight/reliability). See, generally, Ambos, 2016, p. 449, see above note 342.

[681] ICC, *Prosecutor v. Bemba*, Appeals Chamber, Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of TC 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, paras. 37, 41-2, 52-7 (http://www.legal-tools.org/doc/7b62af/).

[682] *Ibid*., para. 37; in the same vein, see *Prosecutor v. Bemba et al.*, Decision on Prosecution Requests for Admission of Documentary Evidence, 24 September 2015, ICC-01/05-01/13-1285, para. 9 (https://www.legal-tools.org/doc/5a06b3/). See, generally, Guariglia, 2018, p. 315, see above note 679.

[683] ICC, *Prosecutor v. Al Hassan*, Annex A to the Decision on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, paras. 29 *et seq.* (https://www.legal-tools.org/doc/jk54h9/).

[684] ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631, paras. 52–59 (https://www.legal-tools.org/doc/ubfjw1/).

[685] Ambos, 2016, p. 487, see above note 342. Cf. Gaynor *et al*., 2013, pp. 1045–1046, see above note 533. But see also Nancy Amoury Combs, *Fact-Finding Without Facts*, Cambridge University Press, 2010, pp. 6, 12–14, finding that the ICTR, the SCSL, and the SPSC basically relied on witness testimony with only the latter also receiving significant forensic evidence.

is gaining increasing importance and relevance before both ICTs and national courts trying international crimes.[686] Unsurprisingly, Wiley, CIJA's Director, maintained: "The queen and king of evidence in any criminal investigation is a document. It isn't cross-examined because it is factual".[687] As to the admissibility of documentary evidence the same general principles apply, that is, it depends on its relevance and probative value (reliability).[688] A document can only be reliable if it is authentic since "the fact that the document is what it purports to be enhances the likely truth of the contents thereof".[689] Thus, authenticity speaks to the probative value of a document, be it in the form of reliability or its evidentiary weight.[690] Furthermore, the 'chain of custody', that is, the document's production process from its creation to the submission to a Chamber, is to be considered.[691] The demonstration of that chain of custody is certainly one of the main challenges for the work of CIJA-investigators.[692]

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686 See Section 17.3 for the impact the Group Caesar had on German proceedings. See also Aoife Duffy, "Bearing Witness to Atrocity Crimes: Photography and International Law", in *Human Rights Quarterly*, 2018, vol. 40, no. 4, pp. 798 ff.

687 Rankin, 2017, p. 409, see above note 56.

688 See also ICTY, *Prosecutor v. Brđanin and Talić*, Standards Order, 15 February 2002, IT-99-36-T, para. 18 (https://www.legal-tools.org/doc/005043/); ICTR, *Prosecutor v. Musema*, Appeals Chamber, Judgement, 16 November 2001, ICTR-96-13-A, para. 56 (https://www.legal-tools.org/doc/6a3fce/); *Katanga and Ngudjolo*, 2010, paras. 13 *et seq*., see above note 311; ICC, *Prosecutor v. Ruto and Sang*, Decision on the Prosecution's Request for Admission of Documentary Evidence, 10 June 2014, ICC-01/09-01/11-1353, paras. 13 *et seq*., 37 (https://www.legal-tools.org/doc/e1a55f/). See, generally, Ambos, 2016, p. 487, see above note 342.

689 ICC, *Prosecutor v. Bemba*, Public Redacted Version of Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64 (9) of the Rome Statute of 6 September 2012, 8 October 2012, ICC-01/05-01/08-2299-Red, para. 9 (https://www.legal-tools.org/doc/13ca4b/); see also Ambos, 2016, p. 501, see above note 342.

690 ICTY, *Prosecutor v. Blaškić*, Trial Chamber, Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence, 30 January 1998, IT-95-14-T (https://www.legal-tools.org/doc/vdkn6i/) ("the weight to be ascribed to it will depend on the additional elements which will have, if necessary, been provided and which permit attesting to its authenticity"). See also Boas *et al*., 2011, p. 341, see above note 672.

691 ICC, *Prosecutor v. Lubanga*, Judgment pursuant to Article 74 of the Statute, 5 April 2012, ICC-01/04-01/06-2842, para. 109 (https://www.legal-tools.org/doc/677866/); *Prosecutor v. Katanga*, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 91 (https://www.legal-tools.org/doc/f74b4f/).

692 Rankin, 2017, p. 401, see above note 56.

17.6. Conclusion

Considering the current political landscape of anti-multilateralism and the politically impotent UN Security Council, it was long overdue that the international community became more creative in its fight against impunity. The IIIMs in both Syria and Myanmar are the first step, CIJA is another. In an instructive short article about private investigations in Austria and Germany, Maier listed three reasons for the initiation of private investigations.[693] First, when public authorities are unwilling or unable to investigate; second, when the investigations of public authorities are ineffective and badly done; and third, when the victim does not want public authorities to investigate. The first and second requirements are met in the situation of Syria: the ICC (or any other ICT) cannot investigate, and investigations on the ground are fruitless. Private investigations are without an alternative, so to say, and there is nothing wrong with that. Despite the rich history and impressive success of private investigations in domestic contexts, private investigators still feel that "their role within society, the value of their services and the problems they faced, have been overlooked and undervalued for too long".[694] In fact, the perception of private investigators does not mirror the admiration readers identify with Sherlock Holmes and Miss Marple. Many private investigators are still viewed as "cowboys" and "dodgy characters".[695] This does not do justice to their work – at the international level, it is likely that they will be the future, and the next ICC Prosecutor is certainly aware of that. After all, human rights organisations and entities such as CIJA on the one hand, and the investigative arms of ICTs on the other, share one goal: the desire to end impunity.[696] This goal, however, is a double-edged sword: it makes the use of evidence collected by private individuals both necessary and dangerous; without it, perpetrators of international crimes can hardly be convicted – when illegally obtained, a conviction becomes less likely. It is thus past time for a framework for private conduct in investigatory contexts at the international level. One way to establish such a framework is regulation. Countries such as the US, Canada, Australia, New Zealand, Belgium, the Netherlands, Germany, Finland or Spain, have a statutory framework for regulating private investi-

693 Bernhard Maier, "Verbrechensaufklärung durch Privatdetektive", *Kriminalistik*, 2001, pp. 670–672 (670).

694 Gill and Hart, 1999, p. 246, see above note 137.

695 *Ibid*.

696 Bergsmo and Wiley, 2008, p. 2, see above note 1.

gators.[697] However, regulation cannot go at the detriment of the nature of those investigations. In other words, overregulation will eventually deprive private investigators of the advantages they have *vis-à-vis* public investigators. Thus, until today Britain has not regulated private investigations.[698] At the international level, regulation is unlikely. This is where 'integrity' can be employed. As an element of the rule of law, it is the umbrella that protects a trial from failing on legitimacy grounds. It applies to both private actions and actions of public officials. Understood this way, integrity becomes a proxy, synonym or placeholder for procedural values such as fairness, due process, natural justice or judicial legitimacy. All those values are the DNA of the ICC Statute. The integrity of the Statute is thus a crucial part in the fight against impunity. To close this chapter with the Declaration of the Statute's Review Conference in Kampala 2010:

> We, high-level representatives of States Parties to the Rome Statute of the International Criminal Court […] [r]eaffirm our commitment to the Rome Statute of the International Criminal Court and its full implementation, as well as to its universality and *integrity*.[699]

[697] Johnston, 2007, p. 288, see above note 93.

[698] Gill and Hart, 1999, p. 248, see above note 137; Johnston, 2007, p. 288, see above note 93.

[699] ICC ASP, Review Conference of the Rome Statute of the International Criminal Court, Declaration RC/Decl.1, 1 June 2010 (https://www.legal-tools.org/doc/146df9-1/), emphasis added.

Nuremberg Academy Series No. 4 (2020):

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ISBNs: 978-82-8348-190-7 (print) and 978-82-8348-191-4 (e-book).

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