

THE USAGE AND LIMITATIONS OF COMPARATIVE LAW AND THE METHODOLOGY OF INTERNATIONAL CRIMINAL PROCEDURE

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INTRODUCTION

The evolution of international criminal procedure can rightfully be considered as one of the most fascinating developments in international adjudication in the past two decades. The speed with which this process took place, resulting in the accretion of an elaborate body of international law and practice almost from zero, is unparalleled. Barely in existence in early 1990s but firmly established at present, international criminal procedure is a corpus of international legal standards that govern the conduct of proceedings before international and hybrid criminal tribunals.² Furthermore, it is now also an independent field of study. The sheer number of recent academic treatises and edited works devoted solely to international criminal procedure is evidence to its status as a flourishing legal discipline.³

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² On the definition and scope of international criminal procedure, see Editors, 'Introduction' in G. Sluiter, S. Linton, H. Friman, S. Vasiliev, and S. Zappalà (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013) 13-18.

³ See, among others, Sluiter *et al.*, *International Criminal Procedure* (n 2); C. Schuon, *International Criminal Procedure: A Clash of Legal Cultures* (The Hague: T.M.C. Asser Press, 2010); C. Safferling, *International Criminal Procedure* (Oxford: Oxford University Press, 2012); G. Boas, J.L. Bischoff, and N. Reid, and B.D. Taylor III, *International Criminal Practitioner Library. Vol. 3: International Criminal Procedure* (Cambridge: Cambridge University Press, 2011); F. Pocar and L. Carter (eds), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (Cheltenham: Edward Elgar, 2013); G. Sluiter and S.

This body of law is firmly associated with the existence and operation of international and internationalized (hybrid) criminal courts – judicial institutions established by, or with the assistance of, the international community. Their mandates tend to be limited to investigating, prosecuting, and trying ‘core’ international crimes—genocide, war crimes, crimes against humanity, the crime of aggression—and other grave offences under international law (and in some instances, depending on the terms of their material jurisdiction, serious crimes under domestic law). In principle, the applicability of international criminal procedure is not inseparable from the enforcement of individual criminal responsibility for specific offences. Although it is the law that is ‘adjectival’ to substantive international criminal law, it is still a legal device on its own.⁴

In essence, the constitutive standards of international criminal procedure are extrapolations onto the international level of procedural norms and practices originating from the influential legal traditions of ‘common law’ and ‘civil law’. In the tribunals, those elements were combined in an innovative fashion and underwent the complex and piecemeal process of adjustment and readjustment aimed at making the resulting combination a better fit in light of the special objectives, needs, and operational realities of international criminal justice. The experimentation has proceeded from what the tribunals’ procedural legislators and international criminal practitioners knew about the approaches employed in national criminal justice systems and what they thought or believed the most appropriate solutions would be for international criminal courts.

Accordingly, comparative law has played a crucial and multifaceted role in the formation and continuous reform of international criminal procedure. Scholarship was recruited to respond to the urgent demand for knowledge in comparative criminal procedure at the international criminal courts and tribunals. Of course, the interest was mutual. Even more than the perceived approximation of domestic traditions of procedure brought about as the result of the adjudication by regional human rights courts,⁵ international criminal procedure came to be viewed as the prime meeting point for the civil law and common law procedural cultures. Both by design and by need, the tribunals find themselves in the vanguard of the global movement for the harmonization of the procedural and evidentiary rules of different

Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May, 2009).

⁴ Editors, ‘Introduction’ (n 2) 13.

⁵ In particular, the European Court on Human Rights is believed to have had such an impact on procedural law in the Council of Europe member states. See e.g. J.D. Jackson, ‘The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?’ (2005) 68(5) *Modern Law Review* 737.

domestic traditions.⁶ It is unsurprising then that the phenomenon of international criminal procedure has instantly received attention of comparative law scholars interested in the interaction between different legal traditions and that this interest has been on the rise ever since.⁷

Despite its theoretical sophistication, the new discipline of international criminal procedure is still experiencing growing pains and suffers from methodological disorientation (not much unlike international criminal law generally). At the present ‘methodological’ stage, it is struggling to develop and refine a conceptual basis and terminological apparatus.⁸ The perennial questions which it has preoccupied itself with from early days concerned the character of international criminal procedure in light of comparative law. Much ink has been spilt in an effort to situate international criminal procedure and its shifting positions among familiar (domestic) reference points in criminal procedure,⁹ as well as to define whether the tribunals’ procedure draws more from the ‘adversarial’ or ‘inquisitorial’ models of process or amounts to a new—mixed or *sui generis*—model.¹⁰ On the whole range of procedural questions and for different purposes, it has been common for scholars (and practitioners) to rely on comparative law methods, notions, and information. This has included advocacy for procedural reforms at the tribunals in order to address numerous evidentiary and procedural challenges faced by the tribunals.

However, despite extensive engagement with comparative law, its value and functions as part of the epistemology of international criminal procedure have received a

⁶ P.R. Dubinsky, ‘Human Rights Law Meets private Law Harmonization: The Coming Conflict’ (2005) 30 *Yale Journal of International Law* 211, at 311 (establishment of an international criminal tribunal ‘fostered a useful hybridization of procedural law that is more difficult to create in national legal systems.’).

⁷ See e.g. J.D. Jackson and S.J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge: Cambridge University Press, 2012), chapter 5; M. Langer, ‘The Rise of Managerial Judging in International Criminal Law’ (2005) 53 *American Journal of Comparative Law* 835; M. Delmas-Marty, ‘The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law’ (2003) 1(1) *Journal of International Criminal Justice* 13.

⁸ Discussing the current ‘methodological’ wave of international criminal law scholarship, see Vasiliev, *International Criminal Trials: A Normative Theory* (n *), chapter 1.

⁹ A. Orie, ‘Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC’ in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary, Vol. 2* (Oxford: Oxford University Press, 2002); G. Boas, ‘Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility’ (2001) 12 *Criminal Law Forum* 41; D.A. Mundis, ‘From “Common Law” Towards “Civil Law”: The Evolution of the ICTY Rules of Procedure and Evidence’, (2001) 14 *Leiden Journal of International Law* 367.

¹⁰ K. Ambos, ‘The Structure of International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed?’, in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2007); F. Pocar, ‘Common and Civil Law Traditions in the ICTY Criminal Procedure: Does Oil Blend with Water?’, in J. Walker and O. Chase (eds), *Common Law, Civil Law and the Future of Categories* (Markham, Ontario: Lexis Nexis, 2010); P.L. Robinson, ‘Ensuring Fair and Expeditious Trials at the

limited attention so far.¹¹ As a result, it has gone largely unnoticed that the frequently asked questions about the nature and prospects of international criminal procedure cannot be answered to full satisfaction, let alone to everyone's consensus, unless it is known *how* the comparative legal method data are to be employed in this domain. In other words, what are the terms of engagement and interaction between the discipline of international criminal procedure and its elder cousin, comparative criminal procedure? What amounts to a proper use of comparative law and what usages are undesirable and methodologically flawed?

Instead of trying to unravel the 'true nature' of international criminal procedure or any of its specific rules and practices, this article turns to this default question of the role and functions of comparative law in international criminal procedure. For background, it first gives an overview of the genesis and special features of international criminal procedure as body (or system) of law (section 2). In doing so, it employs a perspective of 'pluralism'. This law is remarkably pluralistic not only as a natural consequence of decentralized law-making in this field and the existence of plural frameworks for applying it, but also because of its historical origins and nature as an indeterminate amalgamation of plural procedural cultures. Section 3 elaborates why the reliance on comparative law as the source of normative considerations is inappropriate in international criminal procedure, whether for the purpose of providing a critique, defending the current approach, or advocating reforms. The damage done by crossing this line in the past is, however, no good reason to lose faith in the potential of comparative law in this context. Therefore, section 4 draws that line by pointing out several admissible and constructive usages of the comparative law method and terminology in the procedural discourse relating to international criminal tribunals.

1. GENESIS AND PLURALISM OF INTERNATIONAL CRIMINAL PROCEDURE, IN A NUTSHELL

Although international criminal justice institutions belonged to the realm of fantasies of legal utopians and human rights idealists just a few decades ago, they form an integral part of the international legal landscape nowadays. The historical precedents of the Nuremberg and Tokyo International Military Tribunals laid the basis for modern international criminal

International Criminal Tribunal for the Former Yugoslavia', (2000) 11(3) *European Journal of International Law* 569.

¹¹ But see P. Roberts, 'Comparative Law for International Criminal Justice', in A. Esin Özücü and D. Nelken (eds), *Comparative Law: A Handbook* (Oxford: Hart Publishing, 2007); R. Vogler, 'Making International Criminal Procedure Work: From Theory to Practice', in R. Henham and M. Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (Aldershot: Ashgate, 2011).

law and procedure.¹² But they were followed by a period of dormancy of the international criminal justice project in the context of the Cold War. There were few omens then portending the frantic institution-building and unparalleled legal vibrancy that sprung in this sphere in the last years of the twentieth century.

Starting with the establishment by the UN Security Council (UNSC), acting under Chapter VII of the UN Charter, of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, followed in 1994 by its twin tribunal for Rwanda (ICTR),¹³ a plethora of tribunals were established to exercise international jurisdiction over core crimes. This includes, among others, the permanent International Criminal Court (ICC) that was established in 1998 and came into being in 2002;¹⁴ the Special Court for Sierra Leone (SCSL) set up by a bilateral agreement between the UN and Sierra Leone in 2002;¹⁵ the Extraordinary Chambers in the Courts of Cambodia (ECCC) launched by the Cambodian government with the UN's assistance in 2006;¹⁶ and, finally, the Special Tribunal for Lebanon (STL) set up pursuant to a bilateral agreement between the UN and Lebanon in 2007 that was brought in force by the UNSC pursuant to Chapter VII of the Charter.¹⁷ Some of these institutions have completed, or are about to complete, their mandates and have been replaced or, until their full closure, supplemented by the limited successor mechanisms reserved for ongoing and residual functions, competences, and jurisdiction.¹⁸

¹² Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945, 82 UNTS 279 ('IMT Charter'); Charter, International Military Tribunal for the Far East, annexed to Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, adopted on 19 January 1946 ('IMTFE Charter').

¹³ UNSC Resolution 827 (1993), UN Doc. S/RES/827 (1993) 25 May 1993; UNSC Resolution 955 (1994), UN Doc. S/RES/955 (1994), 8 November 1994.

¹⁴ Rome Statute of the International Criminal Court, signed 17 July 1998, in force 1 July 2002, UN Doc. A/CONF.183/9, 2187 UNTS 3 ('ICC Statute').

¹⁵ Statute of the Special Court for Sierra Leone, Agreement Between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, 2178 UNTS 138 ('ICTY Statute').

¹⁶ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006); Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, signed 6 June 2003, entered into force 29 April 2005, 2329 UNTS 117.

¹⁷ Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, signed 7 February 2007, entered in force 10 June 2007, and Statute of the Special Tribunal for Lebanon, annexed to UNSC Resolution 1757 (2007), UN Doc. S/RES/1757 (2007), 30 May 2007.

¹⁸ The SCSL has completed its mandate and was replaced by the Residual Special Court: Agreement between the United Nations and the Government of Sierra Leone on the Establishment of Residual Special Court for Sierra Leone, signed on 11 August 2010 and ratified by Sierra Leone on 1 February 2012 (Residual Special Court for Sierra Leone Agreement (Ratification) Act, 2011, Supplement to the Sierra Leone Gazette Vol. CXLIII, No. 6, 9 February 2012). The ICTY and ICTR are in the process of completing last trial and appeal proceedings and the Residual Mechanism for the tribunals was established and commenced functioning on 1 July 2012 (branch for the ICTR) and 1 July 2013 (branch for the ICTY). See UNSC Resolution 1966 (2010), UN Doc. S/RES/1966, 22 December 2010, para. 1.

International criminal procedure, as a body of procedural law developed for those institutions, is a system with unique features and a curious legal phenomenon. In a number of respects, this has to do with its multifaceted ‘pluralism’.¹⁹ This section examines in more detail the facets of procedural pluralism that shed light on the functions and value of the comparative law apparatus and methodology in international criminal procedure.

1.1 EXTRINSIC PLURALISM AND ‘COMPARATIVE INTERNATIONAL CRIMINAL PROCEDURE’

The first such aspect of pluralism in international criminal procedure can be referred to as ‘extrinsic’, or ‘cross-jurisdictional’ pluralism. The multiplicity of courts charged with the task of enforcing international criminal law, in combination with relative autonomy of each individual regime, accounts for the diversity of procedural forms among the institutions. A fully uniform procedural model is lacking in the tribunals. There is no singular and mandatory format of investigation, indictment and charging, trial, and appellate procedures inexorably linked with international criminal law enforcement and are (or should be) adopted by all international criminal justice institutions.²⁰ Effectively, there are as many ‘international criminal procedures’ as there are courts because each of them is endowed with a distinct framework for the conduct of proceedings, codified in their respective Statutes and Rules of Procedure and Evidence (RPE). None of the procedural models in use in the past or at present is binding or even more authoritative and reputable than any other, not least because the criteria that would could serve as the basis for ranking are far from clear.²¹ In the scenario that another *ad hoc* international or hybrid tribunal is set up in the future to adjudicate international crimes, nothing would preclude its architects from using any of the familiar molds of procedure, from adopting a new model if deemed appropriate in the circumstances, or from blending familiar and novel elements in one regime.

This does not mean, of course, that there are or may be no commonalities in the overall design and detail of procedure of different courts. When adopting and amending the

¹⁹ S. Vasiliev, ‘The Plural Pluralisms of International Criminal Procedure: The Law in Search for an Identity’ in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014).

²⁰ Lamenting this fact, see Vogler, ‘Making International Criminal Procedure Work’ (n 11) 105 (‘After two decades of debate and experimentation it is still not clear whether a definitive model of “international” criminal procedure has emerged’).

²¹ Editors, ‘Introduction’ (n 2) 6 (observing that ‘no explicit uniform theory and design for the organization of international criminal proceedings could have emerged to serve as a universal model to guide

RPE, the procedural approaches in other jurisdictions have routinely served as sources of inspiration and borrowing. In some cases, such was the legislative will of mandate-sponsors.²² In many cases, this was also the consequence of the recognition that cross-fertilization was necessary in this underdeveloped area of international law. The mutual awareness as a community of international criminal courts and keen attention towards each other's experiences led to a degree of initial uniformity or (partial) convergence over time, but it has not precluded significant divergences between the tribunals either. What is more, the similarities resulted neither from the aspiration to achieve cross-jurisdictional uniformity, nor from attempts to adhere to a single mandatory blueprint, which would in any event have been impossible in the absence thereof. Instead, the partial overlap and convergence between standards were occasioned by the pragmatism and expediency of drawing upon experience of courts with similar mandates and procedural and forensic challenges and learning from the precedents of other courts. The option of falling back on the procedural solutions that were readily available and believed to be fair and workable presented itself as a far more efficient modality of legislating than 'reinventing the wheel' anew, particularly that the procedural rules had to be put in place within a very limited time (as was the case, for example, at the IMT and ICTY).

The procedural diversity as a corollary of plural enforcement regimes in international criminal justice has also been informed by the distinctive characteristics and dynamics of procedural law-making in international criminal law. In most instances and with the important exception of the ICC, whose RPE were adopted and may only be amended by the Assembly of States Parties,²³ the power to adopt the RPE was entrusted to the judges, who also took on the task of continuously revising them.²⁴ The judges have been very active and creative in the

judge-legislators and negotiators' and speaking of the various international procedural models as 'independent units of equal worth').

²² See e.g. Art. 14 ICTR Statute ('The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the Rules of Procedure and Evidence ... of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.');

Art. 14(1) SCSL Statute ('The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.').

²³ Rules of Procedure and Evidence, adopted by the Assembly of State Parties, First Session, New York, 3-10 September 2002, Official Records ICC-ASP/1/3 (ICC-ASP/1/3 and Corr.1), part II.A. But see also Art. 51(3) ICC Statute (authorizing judges to adopt, by a two-thirds majority, provisional Rules 'in urgent cases where the Rules do not provide for a specific situation before the Court' that can be applied 'until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties').

²⁴ Art. 13 IMT Charter; Art. 7 IMTFE Charter; Art. 15 ICTY Statute and Rule 6 ICTY RPE; Art. 14 ICTR Statute and Rule 6 ICTR RPE; Art. 14(2) SCSL Statute ('The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.') and Rule 6 SCSL RPE.

exercise of their legislative authority.²⁵ This factor endowed the law of international criminal procedure with remarkable dynamism, flexibility, and considerable room for ‘learning by doing’ as the *modus vivendi*.²⁶ The procedural law evolved independently within each institution, being informed by unique institutional circumstances and own pace and focus of rule-amendments. The plurality of institutional frameworks, decentralized nature of procedural law-making, and conferral of legislative competences to the judges had the effect of catalysing, rather than inhibiting, the divergence between different courts and, hence, contributed to the diversity of international criminal procedure. In this light, even if splendid cross-jurisdictional uniformity had been a valid goal at all (which it was arguably not), it is difficult to see how it would have been achieved, even in theory.²⁷

This brings us back to the earlier point about the peculiarity of international criminal procedure as a ‘system’, which is to be viewed in light of its cross-jurisdictional or extrinsic pluralism. As a branch of law, it has a natural claim to being regarded as a coherent system.²⁸ Yet, given the way in which it got consolidated, it may rather appear as a ‘normative jungle’ – a haphazard and incongruent conglomerate of disparate standards, the occasional sameness of which is as coincidental and arbitrary as their divergence. But this impression is deceptive: if one is to look beyond the surface, the conglomerate is not bereft of the orderliness of a normative system. ‘Ordered pluralism’ is not tantamount to regulatory anarchy or lawlessness.²⁹

First of all, international procedural and evidentiary rules, despite all diversity, have a uniform basis in international human rights law, including the fundamental right to a fair trial as enshrined in human rights treaties and interpreted by the respective human rights courts and monitoring bodies.³⁰ At the very least, those standards and interpretations have

²⁵ As of January 2014, the ICTY RPE have been amended 49 times and the ICTR RPE 22 times. Throughout its existence, the SCSL judges amended the SCSL Rules 14 times.

²⁶ Some commentators have negatively assessed this dynamism: e.g. Vogler, ‘Making International Criminal Procedure Work’ (n 11) 105 (tribunals ‘have demonstrated a procedural instability characterized by sudden and sometimes damaging changes in direction over a very limited period of time.’).

²⁷ Editors, ‘Introduction’ (n 2) 7 (noting the ‘little prospect of achieving uniformity as long as international criminal law is enforced through multiple jurisdictional fora, each reinforced by its own procedural rule-making authority’ and critical of the idea that ‘uniformity is or should be a proper goal or value in itself, without identifying any concrete and practical benefits for the system of international criminal justice or its specific elements.’); Nerlich, ‘Daring Diversity’ (n 32) 781 (‘however, there is no need to have a unified “international criminal procedure”, nor is such unification even desirable.’).

²⁸ S. Vasiliev, ‘General Rules and Principles of International Criminal Procedure: Definition, Legal Nature and Identification’ in Sluiter and Vasiliev (eds), *International Criminal Procedure* (n 3) 20-25.

²⁹ For an exploration, see M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (translated by N. Norberg) (Portland, OR: Hart Publishing, 2009).

³⁰ Art. 6 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Rome, 4 November 1950, CETS No. 5; Art. 14 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), adopted on 16 December 1966, 21 U.N. GAOR Supp. (No. 16) at 52, UN Doc.

served procedural legislators and courts as highly authoritative points of reference.³¹ The normative effect of internationally human rights standards vis-à-vis international criminal jurisdictions is a powerful harmonizing factor that imbues the procedural law and practice with a degree of cohesion across the courts. But, admittedly, international human rights law standards can only be the normative ‘backbone’, not regulatory ‘flesh’, of international criminal procedure. The original addressees of those standards (states) enjoy a ‘margin of appreciation’ in ensuring compliance with the relevant human rights conventions. They are bound as to the outcome and left to determine the specific arrangements to be adopted to guarantee the adequate protection of human rights. International standards of fair trial only provide general and inconclusive regulation, as opposed to the regulatory density and comprehensiveness found in any domestic regime of criminal procedure.³²

Nevertheless, and secondly, international criminal procedure still amounts to a system of law, even though it is composed of several sub-systems that are independent to a considerable degree. The normative coherency across multiple procedural frameworks is safeguarded by the centripetal force of a number of mandatory principles and shared general rules. Those principles and rules are not limited to international human rights standards, although they may amount to translations thereof into the specific procedural language, and cover in greater detail the areas of practice with respect to which human rights law taken on its own remains inconclusive.³³ The same standards are the carcass of regulation and demarcate the normative boundaries of international criminal procedure whilst leaving room for individual tribunals to develop a ‘thicker’ regulatory regime within that frame. This combination of normative structure, on the one hand, and diversity and entropy, on the other hand, fits seamlessly into the paradigm of ‘ordered pluralism’.

A/6316 (1966), 999 UNTS 171; Art. 8 American Convention on Human Rights, Organization of American States, signed at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969; Art. 7 African (Banjul) Charter of Human and Peoples’ Rights, Organization of African Unity, adopted on 27 June 1981, entered into force 21 October 1986, Doc. OAU/CAB/LEG/67/3/Rev.5; Arts 10-11 Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st Plen. Mtg., U.N. Doc. A/810, 10 December 1948.

³¹ In detail, see Vasiliev, *International Criminal Trials* (n *), chapter 2.

³² F. Mégret, ‘Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure’ (2009) 14 *UCLA Journal of International Law & Foreign Affairs* 36, at 51 (‘despite all the rhetoric, international human rights will in most cases be under-determinative of the issues at stake’) and 53 (‘international human rights law is interested in broad outcomes, not ... ways of implementing them. It lacks the “thickness” of domestic traditions in that it is only interested in a few key principles and typically neglects most of the technical, ritual, and institutional features that are so characteristic of ordinary criminal procedure. Fundamental intuitions about the need or fight to a fair trial await concretization in actual forms.’); V. Nerlich, ‘Daring Diversity – Why There is Nothing Wrong with the “Fragmentation” in International Criminal Procedure’ (2013) 26(4) *Leiden Journal of International Law* 777, at 779-80.

³³ For the findings of a major research initiative aimed at the identification of such standards, see Sluiter *et al.* (eds), *International Criminal Procedure* (n 2).

Irrespective of the view one takes on the degree of coherence of international criminal procedure as a corpus of law, any attempt to study it meaningfully—rather than singularly on the basis of the law and practice of any individual court—entails the need to make use of comparative method. Given that comparison is the elementary way of knowing, the task of gaining even a general understanding of the nature and distinctive characteristics of procedural law in any given jurisdiction, let alone international criminal procedure, is impossible in a vacuum and without any points of reference. An inquiry into the regulation of issues of procedure and evidence and any related practice in other international jurisdictions enables one to identify essential similarities and dissimilarities between them. Whilst comparison is rarely made for its own sake, it is a step *sine qua non* in any further use of the comparative data, whether the objective is to reflect on the reasons for divergence, to track the evolution of law and practice over time, or to reflect on flaws and advantages of any a specific solution.

In the same way as comparative method has contributed to learning about (foreign) criminal justice systems and developing influential taxonomies and classifications, it is the basic epistemic algorithm in the study of international criminal process which has received the label of ‘comparative international criminal procedure’.³⁴ The comparative method tends to sharpen the contrast and magnify differences between objects of comparison. The emphasis on differences might result in an insufficient attention to essential similarities between the procedures in various courts and thus obscure the relative uniformity of international criminal procedure as a ‘system of law’. Provided that comparatists look through the mere form and appearances into the substance of procedural arrangements, the choice of comparative mode as a principal angle of inquiry into ‘extrinsic pluralism’ of procedure poses no special problems.

1.2 INTRINSIC PLURALISM AND THE PROJECT OF HYBRIDIZATION

Another dimension of procedural pluralism in international criminal tribunals which leaves ample room for contributions of comparative law, and where comparative law has indeed played a visible role, is the ‘intrinsic pluralism’—and more specifically, the ‘pluralism

³⁴ M. Langer, ‘Trends and Tensions in International Criminal Procedure: A Symposium’ (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 1, at 15; Sluiter *et al.* (eds), *International Criminal Procedure* (n 2) 29; Nerlich, ‘Daring Diversity’ (n 32) 781 (‘rather than fearing “fragmentation”, the focus should shift to ‘comparative international criminal procedure.’).

of origins’—of international criminal procedure. Distinct from numerical plurality of procedural forms, ‘intrinsic pluralism’ refers to those forms’ legal-cultural heterogeneity. This is the corollary of international criminal procedure stemming from domestic criminal process of major legal traditions of the world, and of its nature being as a (more or less) consummated amalgamation of elements drawn from national systems.

The comparative law data regarding the different procedural nuances have been relied upon heavily by international judges when creating procedural rules and interpreting them in practice. This usage has also been frequent in the international criminal law scholarship. It essentially consists in the contrasting of the ‘adversarial’ and ‘inquisitorial’ models of criminal procedure found, in different variations, in countries representing ‘common law’ and ‘civil law’ traditions.³⁵ The resulting insights were then applied to international criminal tribunals as a means of describing, analyzing, determining ways to refine their procedure in order to enhance its fairness and efficiency. Hence the function of comparative law has not only been heuristic and analytical but also a normative and reformative one. It seems as if the primordial—and long abandoned or at least considerably reduced—ambition of comparative law to create ‘a common law of mankind’ through the cognition and harmonization of national laws,³⁶ loomed large again in the nascent body of international criminal procedure.

The character and evolution of the tribunals’ procedural regimes have tended to be examined and debated in light of their semblance with, and deviation from, the ‘civil law’ and ‘common law’ traditions and related theoretical models, most notably the ‘adversarial’ and ‘inquisitorial’ ideal types. From its beginnings at Nuremberg and Tokyo and in every following round of institution-building in international criminal justice, international criminal procedure was constructed by way of putting together the elements deemed most suitable in the circumstances and drawn from the influential domestic traditions.³⁷ Hence, it has been

³⁵ On the historical origins and shifting (and at times erroneous) interpretations of ‘adversarial’ and ‘inquisitorial’ terminology in comparative literature, see K. Ambos, ‘International Criminal Procedure: “Adversarial”, “Inquisitorial” or “Mixed”?’ (2003) 3 *International Criminal Law Review* 1, at 2-5; M. Damaška, ‘Models of Criminal Procedure’ (2001) 51 (3-4) *Zbornik PFZ* 477, at 478-82; Vasiliev, *International Criminal Trials* (n *), chapter 4.

³⁶ See K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn, translated by T. Weir (Oxford: Oxford University Press, 1998) 2-3.

³⁷ The typologies, relevant criteria, and terms denoting classes of similar approaches to procedure are varied and contested in the literature. The terms such as ‘family’, ‘culture’, ‘style’, and ‘tradition’ have been used interchangeably, but all of them are questioned. Using the term ‘legal families’, see Zweigert and Kötz, *An Introduction to Comparative Law* (n 36) 63 *et seq.* Preferring ‘legal cultures’ and ‘traditions’ to ‘legal families’, see H. Patrick Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’ in M. Reimann and R. Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006); R. Vogler, *A World View of Criminal Justice* (Aldershot: Ashgate, 2005) 4 (characterizing the comparative analysis in terms

usual to see it as a ‘melting pot’ of legal cultures – and a system torn apart by ‘clashes’ and ‘tensions’ arising between them. These would have to be alleviated before a fair and effective international criminal procedure could possibly emerge.³⁸ The creative effort by the tribunals of merging the different procedural elements into one coherent whole has been characterized as ‘amalgamation’, ‘hybridization’, or ‘combination-fusion’. Delmas-Marty defined ‘hybridization’ undertaken within international criminal law as ‘going beyond mere juxtaposition, requiring genuine, creative re-composition through the search for a synthesis of, or equilibrium between, diverse elements or diverse systems.’³⁹

One of the more fundamental critiques of international criminal procedure, expressed by a number of commentators, relates to the limited scope of its ‘intrinsic pluralism’, namely insufficient accommodation of legal cultures other than those representing the Global North.⁴⁰ The inability or reluctance of procedural legislators to provide for an inclusive—i.e. truly pluralistic rather than strictly dualistic—concept of international criminal procedure is rooted in the objective predominance of certain legal-cultural influences at the major milestones of its evolution. In turn, this reflects the proponent states’ varying degrees of interest in, and engagement with, international criminal justice – and, indirectly, with political, economical, and other inequalities between them. Further institutional, sociological, and economic constraints should not be underestimated. From the perspective of the tribunals, stretching pluralism beyond cultures already represented and competing among themselves for decisive influence, in order to make the procedure more culturally inclusive than necessary to ensure that it can ‘work’, would also have been impracticable. The resources invested in carrying out

of ‘legal families’ a ‘Darwinian endeavour’). See also M. Findlay, ‘Synthesis in Trial Procedures? The Experience of International Criminal Tribunals’ (2001) 50 *International and Comparative Law Quarterly* 26, at 30-31 (proposing to discuss ‘styles’ rather than (origin-based) traditions).

³⁸ P.L. Robinson, ‘Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY’ (2005) 3 *Journal of International Criminal Justice* 1037, at 1040; Schuon, *International Criminal Procedure* (n 3) 5-7.

³⁹ Delmas-Marty, ‘The Contribution of Comparative Law’ (n 7) 18 and 21.

⁴⁰ *Ibid.*, 20 (‘hybridization is essentially limited to “Western” law, as if the concept of “civilized nations” had resurfaced, with the danger that other legal traditions will be reduced to progressive domination by Western law.’); Vogler, ‘Making International Criminal Procedure Work’ (n 11) 115 (‘This is hardly internationalism. ... [T]he international tribunals are intended to be truly global and it is extraordinary that the debates over procedure have remained so Atlanticist and introspective. As a result, the practice of the international tribunals increasingly gives the impression that defendants from the developing world, and in particular from Africa, are being dragged unwillingly before alien, western courts.’); M. Bohlander, ‘Radbruch Redux: The Need for Revisiting the Conversation between Common and Civil Law at Root Level at the Example of International Criminal Justice’ (2011) 24 *Leiden Journal of International Law* 393, at 395-96 (critical of the neglect of Islamic law in comparative law research); F. Mégret, ‘The Sources of International Criminal Procedure’ (in L. Gradoni, D. Lewis, F. Mégret, S.M.H. Nouwen, A. Reisinger Coracini, and S. Zappalà, ‘General Framework’) in Sluiter *et al.* (eds), *International Criminal Procedure* (n 2) 72 (‘Whilst this may be understandable in view of international criminal justice’s overarching mandate to conform to international human rights standards, it also in practice greatly reduces the claim that general principles are truly derived from all of the world’s legal systems. This

the legislative task were at all times modest in international conferences, let alone the courts. Only the comparative data that were easily available and comprehensible to the negotiators, judges, and their staff could be taken into account. Besides, the judges' approach to executing their quasi-legislative tasks in the domain of international criminal procedure has been to a large extent problem-oriented.⁴¹ It was not motivated primarily by academic curiosity or an abstract ideal of pluralistic procedure. Rather, it was fixed on, and limited to, the goal of enacting procedure that would make fair and expeditious proceedings possible in the factually complex and evidence-rich international criminal trials.

What is to be made of the lop-sidedness of 'intrinsic pluralism' of procedure? One may be rightly be critical of the reality in which the sources of comparative information, influences, and solutions to be transposed onto international criminal procedure are myopically limited to the two 'main' legal traditions. But it needs to be recognized that this melancholy fact has a mixed bag of causes. Among others, it reflects the actual degree of participation and prevalence by specific traditions in the decisive exchanges that preceded and attended the formation of international criminal procedure at key stages. Making that dialogue more inclusive was neither a matter of principle for any of the parties involved nor their primary objective, so insistence on bringing non-Western cultures into the 'equation' may have seemed misplaced to them. Although participation cannot be imposed, non-inclusiveness should of course not stem from a deliberate exclusion from conversation on any ground. In order to enjoy the necessary legitimacy, the construction of international criminal procedure must be consensual and open to non-Western perspectives. As will be discussed in the next section, the current non-inclusive character of international criminal procedure sets (or should set) fetters on the *normative* use of comparative law in this domain.

Leaving to one side the problem of insufficient inclusiveness of cultural 'hybridization', it needs to be seen what the idea of an amalgamated or hybrid procedure bodes for 'intrinsic pluralism'. Will it transmogrify into the monism of a fully homogenous regime when the amalgamation process is consummated? The assessments of the prospect of international criminal procedure achieving internal legal-cultural coherency as a completely unified *sui generis* system in its own right, as well as the need for such cultural syncretism, have ranged from reasonably optimistic (and laudatory) to sceptical (and scathing). On the positive part of the spectrum, numerous commentators—including negotiators, lawmakers,

phenomenon is compounded by issues of language and accessibility of sources that make certain legal systems (North American and European in particular) over-represented in the assessment of general principles').

⁴¹ See further Vasiliev, *International Criminal Trials* (n *), chapter 1.

and judges alike—considered that a functional and fair system of criminal procedure can be (and has been) cultivated as an novel blend of the elements of different legal traditions. As early as in 1945, Justice Robert H. Jackson reported to the US President on the negotiations in London on the text of the IMT Charter:

The significance of the charter's procedural provisions is emphasized by the fact that they represent the first tried and successful effort by lawyers from nations having profoundly different legal systems, philosophies, and traditions to amalgamate their ideas of fair procedure so as to permit a joint inquiry of judicial character into criminal charges.⁴²

More than half a century later, Judge Cassese echoed this observation in the *Erdemović* case when he famously opined that:

International criminal procedure results from the gradual decanting of national criminal concepts and rules into the international receptacle. ... It substantially results from an amalgamation of two different legal systems It is therefore only natural that international criminal proceedings do not uphold the philosophy behind one of the two national criminal systems to the exclusion of the other; nor do they result from the juxtaposition of elements of the two systems. Rather, they combine and fuse, in a fairly felicitous manner, the adversarial or accusatorial system (chiefly adopted in common-law countries) with a number of significant features of the inquisitorial approach (mostly taken in States of continental Europe and in other countries of civil-law tradition).⁴³

The sentiment that the procedural amalgamation ventured by the judges at the ICTY had been 'fairly felicitous' appears to be shared by other ICTY judges.⁴⁴

⁴² *Report of Robert H. Jackson, US Representative to the International Conference on Military Trials, London, 1945* (Washington, DC: U.S. Government Printing Office, 1949) x.

⁴³ Separate and Dissenting Opinion of Judge Cassese, Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, AC, ICTY, 7 October 1997 ('*Erdemović* dissenting opinion of Judge Cassese'), para. 4. See also Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, TC II *quater*, ICTY, 4 February 1998, para. 20 ('The general philosophy of the criminal procedure of the International Tribunal aims at maintaining a balance between the accusatory procedure of the common law systems and the inquisitorial procedure of the civil law systems; whilst at the same time ensuring the doing of justice.') and Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, TC II *quater*, ICTY, 16 November 1998, para. 159 ('a fusion and synthesis of two dominant legal traditions, these being the common law system ... and the civil law system.').

⁴⁴ Pocar, 'Common and Civil Law Traditions in the ICTY Criminal Procedure' (n 10) 443-44 ('this blending of different traditions has not led to a violent clash, but to an overall good compromise: a system of procedure specifically tailored to the peculiar features of international criminal law, and nevertheless consistent ... with the highest international standard of a fair trial') and 460 ('in the framework of the ICTY RPE, the blending of the civil law and common law traditions was carried out in a thoughtful manner, which aimed to address problems specific to the trying of international crimes, with full awareness of the need to address the tension between strict adherence to human rights standards and efficiency of international criminal justice.');

O-G. Kwon, 'The

Working from similar premises, scholars have sought to move the debate on international criminal procedure beyond the common law *v.* civil law divide. The relevance of the dichotomy was in decline in the domestic context, and at the tribunals its value was increasingly challenged by the need for the representatives of the two systems jointly to come up with creative and workable solutions to cover gaps and address the notorious inefficiency problem of international criminal proceedings.⁴⁵ This line of thought suggests that practitioners should adopt a more sober and functional approach to the ‘common law *v.* civil law’ dichotomy. Instead of debating differences between the procedural traditions, they would have to focus on their ‘common grammar’. The comparative insights about the status in domestic legal systems would still be of use in understanding the laws at work in international criminal procedure and in refining further the mixed model of international criminal procedure as a way to improve its performance in terms of fairness and efficiency.⁴⁶ Increasingly, calls have been made to let go of the ‘outdated’ *summa divisio* in procedure altogether, now that the merger between the two procedural styles had been consummated within the body of international criminal procedure.⁴⁷ Boas has argued that ‘it is in fact time to abandon the preoccupation of international criminal courts with this dichotomy and embrace the newly created system of international criminal law as a jurisdiction in its own right.’⁴⁸

On a more sceptical note, commentators have questioned whether the amalgamation of procedural cultures attempted by the tribunals has been successful or even possible at all. The ‘mild pessimists’ did not fundamentally challenge the possibility of a successful amalgamation, but pointed out that the sides to the comparative debate are yet to engage in a genuine and profound dialogue. They must truly try to make sense of the legal concepts

Challenge of an International Criminal Trial as Seen from the Bench’ (2007) 5 *Journal of International Criminal Justice* 360, at 361-62 (defining ‘internationalisation’ of criminal procedure in the ICTY context as the outcome of combining ‘different features of the common-law and civil-law systems in a unique hybrid fashion unknown to any domestic jurisdiction in the world.’).

⁴⁵ Ambos, ‘The Structure of International Criminal Procedure’ (n 10) 503 (‘national boundaries in criminal procedure may be overcome with increasing experience and practice in a system of international criminal justice which is heading towards a harmonic convergence of both, the “inquisitorial” and “adversarial” systems.’); J. Jackson, ‘Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy’ (2009) 7 *Journal of International Criminal Justice* 17, at 18-19; Jackson and Summers, *The Internationalisation of Criminal Evidence* (n 7) 28, 116, 143 (‘the boundaries between the various legal traditions are fragmenting, with the result that it is no longer accurate to think in terms of fully coherent “adversarial” and “inquisitorial” procedural traditions.’); Schuon, *International Criminal Procedure* (n 38) 11.

⁴⁶ See e.g. Kwon, ‘The Challenge of an International Criminal Trial’ (n 44) 361 (‘This new hybrid system cannot be explained solely from the perspective of one of the two systems, but must be seen in the light of both.’).

⁴⁷ E.g. G. Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge: Cambridge University Press, 2007) 286; Pocar, ‘Common and Civil Law Traditions in the ICTY Criminal Procedure’ (n 10) 438-39, 459.

⁴⁸ Boas, *The Milošević Trial* (n 47) 287.

originating in other legal traditions. In other words, so far they may have superficially familiarized themselves with the ‘phenotypes’ of analogous institutions, but not ‘genotypes’ of foreign procedural law.⁴⁹ The ideological and philosophical differences behind the diversity of procedural styles mostly remain under-rationalized and unresolved.⁵⁰ Despite the need for the legal traditions to start ‘speaking with one language’ in the construction of international criminal procedure,⁵¹ the cross-cultural dialogue may not have moved far beyond the state in which the London conferees left it in 1945 in the run up to the Nuremberg trial. In the above-mentioned report, Justice Jackson commented about the minutes of the conference debates, much of the exposition of rival legal systems is too cryptic and general to be satisfying to the student of comparative law. How much of the obvious difficulty in reaching a real meeting of minds was due to the barrier of language and how much to underlying differences in juristic principles and concepts was not always easy to estimate. But when difference was evident, from whatever source, we insisted with tedious perseverance that it be reconciled as far as possible in the closed conferences and not be glossed over only to flare up again in the public trials.⁵²

The ‘hard-line’ critics of the amalgamated procedure project go further in challenging the viability of a fair and workable *hybrid* system in the international context.⁵³ Interestingly, this echoes misgivings about legal hybrids and legal transplants registered in the comparative law literature.⁵⁴ In this regard, reference is made to irreconcilable differences in

⁴⁹ Bohlander, ‘Radbruch Redux’ (n 40) 410 (arguing the need to ‘move beyond the eternal mantras about and the lip-service to the necessity of mutual understanding of different legal concepts to actually comparing their genotypes, and not merely the phenotypes. Only in this manner will we be able to arrive at a successful amalgam of principles and rules that will recognize the special needs of complex affairs such as international trials and move beyond the constant bickering between proponents of different legal systems about the superior qualities of their own.’).

⁵⁰ Findlay, ‘Synthesis in Trial Procedures?’ (n 37) 34 (‘Commonly the ideological dissonance (at international procedural levels) is either understated or simply not thought through. This may be a factor of the political atmosphere in which the existence of international criminal justice institutions has been negotiated.’).

⁵¹ *Ibid.*, 11 (‘in order for there to be synthesis at the level of ideology international procedural practice needs to move beyond giving lip service to “speaking with one language” and genuinely challenge principles rather than simply tolerating contradictions.’).

⁵² *Report of Robert H. Jackson* (n 42) vi.

⁵³ W. Pizzi, ‘Overcoming Logistical and Structural Barriers to Fair Trials at International Criminal Tribunals’ (2007) 4(1) *International Commentary on Evidence* 1, at 2 (the ICTY ‘has shown us that convergence among western trial systems is more myth than reality’); Vogler, ‘Making International Criminal Procedure Work’ (n 11) 105 (‘Initial hopes that the scientific deliberations of the world’s leading jurists, followed by a period of rigorous testing in practice, would lead us rapidly to the holy grail of procedure which was both efficient and rights-respecting, have been dashed.’).

⁵⁴ E.g. M. Damaška, ‘The Uncertain Faith of Evidentiary Transplants: Anglo-American and Continental Experiments’ (1997) 45 *American Journal of Comparative Law* 839, at 852 (‘An arrangement stemming from a partial purchase—a legal pastiche—can produce a far less satisfactory factfinding result in practice than under either continental or Anglo-American evidentiary arrangements in their unadulterated form.’); *id.*, ‘Epistemology and Legal Regulation of Proof’ (2003) 2 *Law, Probability and Risk* 117, at 121 (‘In their natural habitat, each set of practices is part of a larger procedural whole, with its own internal coherence.... Creating a successful mixture

part of foundational notions and philosophy underpinning criminal process across national borders and legal traditions. The interpretations of procedural fairness espoused in different procedural environments and prevalent ideas about the best methods of truth-finding in criminal process diverge markedly and might simply not mix or lead to a dangerous chemical reaction when thrown into a ‘melting pot’.⁵⁵ Indeed, there exist formidable conceptual obstacles to the successful fusion of the seemingly incompatible elements within one system, provided that it is to remain fair and effective.

Accordingly, some scholars are of the view that international criminal procedure would have been better off if it could ‘go strongly in one direction or the other, rather than trying to blend procedure from the two traditions’.⁵⁶ The argument is hypothetical and there is no way of confirming this, given that in the overall context of international criminal procedure the process of hybridization seems irreversible, or at least there are no signs to the contrary. Some of the critiques of ‘amalgamation’ in procedure have referred in particular to sub-standard due process performance by the tribunals under their enforced hybrid framework or to the significant risks thereof. The international marriage between common law and civil law was occasionally seen as an unhappy one. Despite being an attempt at combining the ‘best practices’ of different legal traditions, the international procedural systems do not amount to coherent and balanced regimes, but to those in which fair trial rights and fact-finding accuracy are diluted in contrast with those elements’ original habitats.⁵⁷ The hybridization project has been compared no less than to the creation of Frankenstein’s monster.⁵⁸

is not like shopping in a boutique of detachable procedural forms, in which one is free to purchase some and reject others.’).

⁵⁵ Vogler, ‘Making International Criminal Procedure Work’ (n 11) 114 (‘procedures which are supposedly polar opposites, or “antinomies” existing in a dialectical relationship with each other ..., cannot be amalgamated. ... If the adversarial and the inquisitorial represent conflicting epistemologies, “hybridization”, makes no sense.’); Mégret, ‘Beyond “Fairness”’ (n 32) 43 (‘in many crucial aspects the traditions are at loggerheads, making satisfying reconciliation difficult’) and 46; G.S. Gordon, ‘Toward an International Criminal Procedure: Due Process Aspirations and Limitations’ (2007) 45 *Columbia Journal of Transnational Law* 635, at 705 (‘It would be tempting just to politically cherry-pick due process features in domestic jurisdictions ... and simply graft them onto the international mold. But that would not be realistic.’ Footnotes omitted.); S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003) 16 (regarding truth, pointing to ‘two opposing epistemological beliefs: while for the inquisitorial paradigm there is an objective truth that the “inquisitor” must ascertain, for the accusatorial approach the truth is the natural and logical result of a pre-determined process.’).

⁵⁶ Pizzi, ‘Overcoming Logistical and Structural Barriers’ (n 53) 2.

⁵⁷ See M. Fairlie, ‘The Marriage of Common Law and Continental Law at the ICTY and its Progeny, Due Process Deficit’ (2004) 4 *International Criminal Law Review* 243; Gordon, ‘Toward an International Criminal Procedure’ (n 55), at 639 (‘each international tribunal must harmonize the imperatives of two different, often conflicting legal systems – the common law and the civil law. Certain due process rights are unfortunately sacrificed on the altar of this artificial union.’ Footnotes omitted.)

⁵⁸ R. Skilbeck, ‘Frankenstein’s Monster: Creating a New International Procedure’ (2010) 8 *Journal of International Criminal Justice* 451.

These positions attest that the degree of success (or failure) of the project of hybridization and ‘*sui generization*’ undertaken in international criminal procedure remains contested. Nor is it agreed whether a full ‘unification’—an antithesis to the perceived eclecticism—of procedure crafted through combination or fusion of elements drawn from different legal systems is attainable. So long as the intrinsic pluralism of international criminal procedure remains the reality, it will hold more than one comparative-law identity as a legal-cultural hybrid. The method and conceptual apparatus of comparative criminal procedure will be of continued relevance. But certainly, the terms of relevance need to be defined with greater clarity than currently is the case.

On the one hand, there are good arguments for transcending the old debate on the relative advantages of common law and civil law in international criminal procedure. The ability of the practicing world and academia to ‘soar’ above the ‘grand divide’ would be a landmark of confidence and maturity of international criminal procedure as a system of law. This would facilitate the emergence of its own solid methodology that employs comparative classifications for problem-solving in a pragmatic sense, as opposed to merely reasserting the virtuous character of specific traditions on a comparative arena.⁵⁹ The emancipation of international criminal procedure from localized notions of fairness, truth, and justice will lead to a more considered and balanced practice-oriented discourse and be conducive to the progress of the international procedural model. But on the other hand, the true emancipation is not the same as a decided and total break with established comparative taxonomies, let alone giving up on the comparative method generally. Such radicalism is unnecessary, unwarranted, and rather disproves the fact of emancipation. Comparative law still can—and undoubtedly will—continue playing uniquely important functions in this field, but a more structured methodological engagement is required.

The remainder of this article outlines what such relationship between international criminal procedure and comparative law amounts to, and distinguishes the inappropriate usages of the latter from its proper use. The next section shows that international criminal lawyers’ disillusionment about comparative law and mounting challenges to its validity as a perspective on international criminal procedure have a specific cause: the ‘bad habit’ of relying on it for normative guidance. While letting go of this habit may be difficult,

⁵⁹ Boas, *The Milošević Trial* (n 47) 287 (‘Freedom from preoccupation with the common and civil law approach to legal and procedural problem-solving in international criminal law will facilitate a more clear application of principle developed in the context of that legal system and encourage lawyers and judges to look at these issues in their context, rather than through the lens of their own domestic experience.’).

recognizing the principle that comparative law has no normative function in international criminal procedure would alleviate at least some of the methodological concerns.

2. NORMATIVE YARDSTICK: USE OR ABUSE OF COMPARATIVE LAW?

As mentioned earlier, the scholarly and jurisprudential discourse on international criminal procedure has concerned itself with ways of combining the ‘best’ elements of different traditions into the tribunals’ hybrid regimes. This exercise had to be attended by the consideration of the unique institutional context and challenges faced by those institutions.⁶⁰ Unlike national systems, which have taken centuries of adjustment and reform to achieve the regulatory ‘density’ and problem-solving capacity necessary for ensuring a proper administration of justice, the tribunals have lacked a coherent legal culture to serve them as an ultimate gap-filling tool or conflict-solving method in ‘hard cases’. Arguably, such a culture is still lacking and unlikely to emerge as long as the tribunals are staffed primarily with practitioners with professional upbringing in domestic jurisdictions.⁶¹ Many continue to view the tribunals—which are neither fish nor fowl from the common law *v.* civil law angle—as culturally foreign institutions and a bizarre extension of their domestic practice. Some tend to perceive them as downgraded versions of national courts.⁶² Even though international criminal procedure indeed holds an unprecedented promise of convergence of procedural cultures, the environments of international criminal courts offer ample opportunities to the practitioners to continue labouring under entrenched views about what constitutes a fair and effective criminal process.

Unsurprisingly, the procedural culture existing in individual countries or reflecting common law and civil law traditions has often been resorted to by proponents at the tribunals to draw specific guidance on how international criminal trials should be conducted and

⁶⁰ Mégret, ‘The Sources of International Criminal Procedure’ (n 40) 70 (‘The extent to which such models can be relied on is subject to the need to adapt criminal procedure to the special demands of international justice. Domestic practices as sources of inspiration are in a sense in objective competition and often exert a stronger pull than actual sources of international law.’); Schuon, *International Criminal Procedure* (n 3) 7 (proposing that ‘when assessing the suitability of a procedural element for international criminal trials, [he] unique setting should be taken into particular consideration.’).

⁶¹ Vasiliev, *International Criminal Trials* (n *), chapter 12.

⁶² Employing a socio-legal approach in studying the performance and self-perception of actors in international criminal trials, see R. Byrne, ‘The New Public International Lawyer and the Hidden Art of International Criminal Trial Practice’ (2010) 25 *Connecticut Journal of International Law* 243; J.D. Jackson and Y. M’Boge, ‘The Effect of Legal Culture on the Development of International Evidentiary Practice: From the “Robing Room” to the “Melting Pot”’ (2013) 26(4) *Leiden Journal of International Law* 947; F.J. Pakes, ‘Styles of Trial Procedure at the International Criminal Tribunal for the Former Yugoslavia’ in P.J. Van Koppen and S.D.

evidence handled, or what role the actors are supposed to play in the proceedings and how they are to carry out their functions. Domestic models of criminal procedure have had a strong traction for the purpose of the adoption, application, and amendment of the procedural and evidentiary rules. The models prodded lawmakers and practitioners to cling to and advocate concepts that were not alien and ‘felt right’ to them. It is a well-known (and understandable) fact that criminal justice professionals naturally hold firm—and often unpronounced—beliefs that their own domestic system or the procedural tradition they are most familiar with is closer to perfection than any other, any problems notwithstanding.⁶³ They fall back on internalized notions of fairness whenever confronted with unfamiliar arrangements, legal lacunae, and issues requiring the exercise of discretion – the circumstances arising on a daily basis in international criminal adjudication. Since one’s own system invariably appears to serve the cherished values of fairness, truth, and rule of law more uncompromisingly, it is apt to be promoted and offered generously for importation as a remarkable achievement of civilization. The sides to the ‘comparative’ debate are prepared to defend ‘their’ system almost as a matter of national honour. Before the tribunals, this has often led to the ‘contest of will’ between the proponents of different procedural cultures.⁶⁴

This competitive environment creates room for ideological use (and abuse) of comparative law. In theory, its unprincipled use may also entail selectively and uncritically eulogizing a foreign system (e.g. as a justification for transplanting a foreign solution). But vouching for the superiority of one’s own system and its flipside—suspicion and acrimony about other systems—have been a more common malaise.⁶⁵ Its worst form, ‘comparative chauvinism’,⁶⁶ can be diagnosed when solutions originating from other, ‘competing’ systems

Penrod (eds), *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (New York: Plenum Press, 2003) 309.

⁶³ J. Crawford, ‘The ILC Adopts a Statute for the International Criminal Court’ (1995) 89 *American Journal of International Law* 404, at 408 (pointing to ‘the tendency of each duly socialised lawyer to prefer his own criminal justice systems’ values and institutions’); *Report of Robert H. Jackson* (n 42) x (‘Members of the legal profession acquire a rather emotional attachment to forms and customs to which they are accustomed and frequently entertain a passionate conviction that no unfamiliar procedure can be morally right. It has often been thought that because of these deep-seated differences of procedure the use of the judicial process by and among the community of nations is inherently limited.’).

⁶⁴ Mégret, ‘Beyond “Fairness”’ (n 32) 45.

⁶⁵ Delmas-Marty, ‘The Contribution of Comparative Law’ (n 7) 20 (an encounter of two systems is likely to lead to ‘confrontation aimed at mutual domination’); Vogler, ‘Making International Criminal Procedure Work’ (n 11) 122 (comparative law scholarship ‘tended to encourage the binary conception of international justice’); Mégret, ‘Beyond “Fairness”’ (n 32) 43 (‘tribunals have been seen diffusely as an opportunity to showcase the merits of particular traditions in what is a latent “regulatory competition”.’); Schuon, *International Criminal Procedure* (n 7) 12 (‘misconceptions of, or even prejudices against, a particular system’).

⁶⁶ C. van den Wyngaert (ed.), *Criminal Procedure Systems in the European Community* (London: Butterworths, 1993) i (‘It is hardly surprising that States have a tendency, not only to be chauvinistic about their own criminal justice systems, but also to be suspicious about foreign systems. Efforts towards harmonisation in this field are therefore very often considered as an unacceptable interference in their domestic affairs.’).

are dismissed as inferior by default and unworthy of consideration, i.e. without a genuine attempt to understand or impartially assess them. Aprioristic notions and reasoning are smuggled from the national domain—the primary reference framework of a ‘socialised lawyer’—into the realm of the tribunals. Whether with reference to its historical greatness or undisputed virtues, but subject to limited and reluctant criticism, the native system or its approach is nominated for unconditional adoption, regardless of what alternative solutions may be.⁶⁷ Accordingly, most debates on what constitutes the ‘better’ international criminal procedure, particularly in the formative stages, were overshadowed by the advocacy in favour or against the adoption of ‘civil law’ or ‘common law’ procedures. There has been an ‘over-investment’ in the comparative dichotomies and an unchecked takeover of the normative baggage of the respective traditions, including how ‘fairness’ is to be construed.⁶⁸

However, there are no cogent reasons why subjective preferences for rules, practices, and ideologies prevailing in, or shared among, certain domestic jurisdictions should be allowed to define the procedural arrangements in the tribunals or even be a normative yardstick in their critical appraisal. First, the election of specific jurisdictions as embodying a certain ‘model’ is difficult to justify: it is uncertain whether and to what extent specific systems can be deemed representative or typical of broader classes.⁶⁹ Second, it is hard to justify the choice of a specific model on grounds independent from the normative content intrinsic to, and inseparable from, those models (e.g. the ‘correct’ interpretations of ‘truth’ or ‘fairness’). Conclusions to the effect that international criminal procedure should be reformed to resemble one of the existing systems will tend to be (seen as) a one-way argument.⁷⁰ There is no convincing justification for using comparative data on the status in domestic jurisdictions as a source of normative criteria for critical evaluation of international procedural systems and as a compelling basis for reform.

⁶⁷ G. Mettraux, ‘Of the Need for Procedural Fairness and Certainty’, International Criminal Law Bureau Blog, 29 November 2009, < <http://www.internationalcrlawbureau.com/index.php/of-the-need-for-procedural-fairness-and-cerainty/>> (last visited 20 January 2014) (‘Un-questioned procedural narcissism has proved rather damaging in this context as domestic solutions are sometimes ill-fitted for war crimes proceedings.’).

⁶⁸ Boas, *The Milošević Trial* (n 47) 287 (‘there has been an overinvestment in the common law/civil law dichotomy and its perceived impact on the fair and expeditious conduct of international criminal proceedings. This dichotomy and its anatomical relationship with fairness and expeditiousness was critically important in the early years of developments of modern international criminal law’).

⁶⁹ See e.g. Schuon, *International Criminal Procedure* (n 3) 9-10 (justifying the use of Germany and US as appropriate case studies along similar lines).

⁷⁰ *Ibid.*, 134 (advocating a broader scope of disclosure and an open dossier approach) and 171, 192 (advocating ‘dispensing with the special need to test the adversary’s evidence’ and even ‘abandoning the adversarial style of proceedings for international criminal trials altogether’ in favour of ‘a judge-steered civil law model to further improve the proceedings’). These conclusions appear to suggest that international criminal procedure ought to gravitate towards a civil law (more specifically, German) approach.

This resonates in the view that domestic traditions are ‘repositories of certain practices rather than as a real constraint’ on international criminal procedure.⁷¹ Indeed, one fails to see why the comparative dichotomies developed to operate as a grid for classifying *domestic* systems should be normatively consequential in international criminal justice unlike, for example, with the mandatory requirement that the administration of justice be fair and effective.⁷² It should not matter from what background a rule or practice emanates to determine its eligibility for incorporation into international criminal process.⁷³ The questions should rather be whether the rule or practice, as it is expected to operate in that context: (i) is deemed necessary and capable of serving the relevant procedural objective; (ii) would be consistent with the principles and values of international justice, including fair and expeditious trial.⁷⁴

Regardless of these considerations, comparative law has often been employed in international criminal law as a tool for validating *normative* conclusions regarding the ‘best’ procedure that were reached via other route.⁷⁵ In other words, such intuitive notions remain unaffected by the input of comparative law. The ‘adversarial’ and ‘inquisitorial’ models, devised for neutrally describing and comparing procedural systems, were hijacked for mounting a normative or ideological critique and used as devices of rhetorical domination. Scholarship admittedly played some role in the polarization of the discourse.⁷⁶ It has not always sufficiently distanced itself from generalizations to the effect that some traditions are ‘better’ or ‘fairer’ than others as such or for the purpose of the tribunals.⁷⁷ However, the

⁷¹ Mégret, ‘Beyond “Fairness”’ (n 32) 47.

⁷² *Ibid.* (‘discussion about the merits of each tradition in the context of forging an international criminal procedure, while part of the discursive environment of tribunals, is unlikely to have much actual traction.’). In a similar vein, see Vogler, ‘Making International Criminal Procedure Work’ (n 11) 122 (‘the existing comparative law typologies fail to establish either a practical or a normative basis for reform. They cannot do so because they are unable to link the nature and design of the procedure which is operated with the purposes of the tribunals at each stage. It is only by identifying the essential constituencies whose conflicting interests provide the necessity for the existence of international tribunals, and analyzing their participation at each stage, that a clearer picture of the type of procedure which we need to develop can begin to emerge.’).

⁷³ See e.g. C. Warbrick, ‘International Criminal Courts and Fair Trial’ (1998) 3(1) *Journal of Conflict and Security Law* 45, at 46 (‘no imperative reason why the standards of any particular state for national trials ... should determine the answer, however relevant they might be to reaching one’).

⁷⁴ Ambos, ‘The Structure of International Criminal Procedure’ (n 10) 500.

⁷⁵ A. Cassese, ‘L’influence de la CEDH sur l’activité des Tribunaux pénaux internationaux’ in A. Cassese and M. Delmas-Marty (eds), *Juridictions nationales et crimes internationaux* (Paris: Presses Universitaires de France, 2002) 140 (‘Mon expérience est que souvent le droit comparé est utilisé pour confirmer une solution que l’on avait déjà trouvée.’).

⁷⁶ Jackson and Summers, *The Internationalisation* (n 45) 6 (‘comparative scholarship in the field has tended to reinforce the nationalist tendency of states to differentiate themselves from others by classifying systems of evidence and procedure into two discrete categories.’).

⁷⁷ See e.g. Gordon, ‘Toward an International Criminal Procedure’ (n 55) 637 (querying ‘Why has it [international criminal procedure] failed to achieve the level of due process offered by the most rights-protective countries, such as the United States?’) and 638 n6 (‘The advanced protections in those systems, particularly in the

‘normativization’ of comparative law in international criminal procedure is anything but innocuous.

First, as mentioned, this is the cause of the growing fatigue with comparative law method and apparatus among international criminal law practitioners and scholars who have learnt too well that a sound comparative law approach must be adequately specific and sophisticated.⁷⁸ ‘Comparative narcissism’ has little to do with comparative law, as it surrogates the neutral and tolerant spirit of the same, which is about debunking national prejudices, not backing them up. The ideological usage tends to ignore, oversimplify, and distort the information about other systems in support of preconceived ideas. It impoverishes the comparative discourse by focusing solely on micro-differences between the procedural forms, which overlooks the macro-similarity of underlying values and analogous ways of realizing them through criminal process. The unwillingness to discern the ‘common grammar’ of procedural law through an open inter-cultural exchange cannot but render the prospect of a unified international criminal procedure more remote.

Second, the normative reading of comparative taxonomies shifted the international criminal procedure debate away from the urgent questions of practice to the abstract issues of relative advantages of specific domestic systems over the others. The adherence to a certain model is seen as a stake in the ideological ‘global popularity contest’ between legal traditions, which also constituted a barrier in discussions between states about harmonized criminal procedure.⁷⁹ This has the effect of obfuscating the unique nature of international criminal procedure and inhibiting its evolution by rendering the related debates not constructive. The controversies between ‘common law’ and ‘civil law’ have essentially been disconnected from the practical considerations of ensuring fair and effective process in the context of the tribunals.

Getting bogged down into the contestation of the domestic models justice had a detrimental effect of distracting lawmakers and practitioners in the field of international criminal from the primary purpose – the elaboration of standards and practices that are fair

United States, will be *the normative point of repair* for this Article.’ Emphasis added.) Gordon repeatedly attributes the erosion of the rights of the accused to ‘civil law influences’ generally and in the IMT context in particular: *ibid.*, 644, 645, and 680. This is not supported by the negotiation history of the Nuremberg Charter and the IMT’s practice (see e.g. Vasiliev, *International Criminal Trials* (n *), chapter 1). See also Zappalà, *Human Rights in International Criminal Proceedings* (n 55) 16 (‘it is generally recognized that the adversarial system is more suitable when it comes to offering protection to the rights of the accused.’).

⁷⁸ Findlay, ‘Synthesis in Trial Procedures?’ (n 37) 31 (‘a productive analysis of criminal procedures ... requires more than a binary comparative analysis. It must be contextual in a detailed sense, and empirical at valid levels of comparison.’).

⁷⁹ P. Roberts, ‘Why International Criminal Evidence?’ in P. Roberts and M. Redmayne (eds), *Innovations in Evidence and Proof* (Oxford: Hart, 2007) 364

and workable in the exacting and unique setting of international criminal adjudication, regardless of the tradition which inspired them.⁸⁰ The emancipation of international criminal procedure from domestic models of process, in combination with its detachment from a coherent legal and cultural environment, should be viewed not as a disadvantage and lamentable obstacle to replicating any of the national systems in the international field, but as a source of opportunity.⁸¹ It enables—and indeed compels—the creation of procedural mechanisms uniquely attuned to the special context and needs of international criminal justice.

Third, as noted in the previous section, the non-inclusive character of legal-cultural pluralism of international criminal procedure poses a fundamental objection to comparative law being used as a *normative* argument in the formation and reform of this law. This defect should limit the ambition of the proponents to turn any of the ‘two main systems’ into the ‘master plan’ by adopting a binary vision of comparative law as a valid normative perspective.⁸² The discourse that mirrors and accepts the non-inclusive dichotomist approach to the genesis of international criminal procedure cannot seriously be making a universal normative claim. In that case, it would dangerously border at a normative dictate or domination and be vulnerable to critique on grounds of legal neo-colonialism. The results of an insufficiently pluralistic and non-inclusive comparative approach should not be vouched for as a legitimate basis for value judgements on what international criminal procedure should be like. The only way to ensure that the methodological limitations of the discourse do not taint what is to be a credible normative exercise is to refrain from using comparative law as a source of *normative* guidance in international criminal procedure.

It has been argued that comparative law scholarship has ‘signally failed’ to provide an overarching theory of international criminal procedure and, in particular, ‘to offer guidance to the international tribunals in their struggle to develop a truly global concept of justice

⁸⁰ ‘Distraction’ is the word used by the STL Prosecutor Norman Farrell when asked about the preoccupation with ‘common law v. civil law’ among the ICTY practitioners in the formative years. N. Farrell, ‘The Challenges of International Criminal Procedure’, Keynote Address, Launch event for the book *International Criminal Procedure: Principles and Rules*, The Hague Institute for Global Justice, 16 May 2013.

⁸¹ See also Schuon, *International Criminal Procedure* (n 38) 251 (‘one should use this opportunity to endeavour to deliberate on which procedural devices suit the special needs of international criminal procedure in a more open manner, unfettered by one’s own legal tradition.’) and 308 (‘This circumstance permits freedom from unduly aligning oneself with the practices and procedures of one’s own legal system, so that they can be considered anew in light of the specific setting and tasks of international criminal trials’).

⁸² See e.g. C. Safferling, *Towards an International Criminal Procedure* (Oxford: Oxford University Press, 2001) 5 (‘The search for an international criminal procedure has to be based on the two main systems of national criminal procedure, namely the Anglo-American and the Continental European tradition.’); G. Gordon, ‘Toward an International Criminal Procedure: Due Process Aspirations and Limitations’ (2007) 45(3) *Columbia Journal*

capable of mobilizing universal aspirations for the defeat of impunity for grave crimes.’⁸³ However, it is questionable whether it is legitimate at all to ascribe to the comparative law discipline the function of providing such guidance. If any conclusion can be drawn from the debates in international criminal procedure, it is that this approach would rather perpetuate the detrimental divisiveness that has long been a hallmark in this field.

Strictly speaking, comparative criminal procedure is not a suitable or appropriate normative framework in international criminal procedure.⁸⁴ Its dichotomies and models are meant to facilitate the understanding and classifications of national systems and do not speak to the optimal translations of values, needs, and challenges of the enterprise of international criminal justice into procedural arrangements. If comparative law is invoked in the critical appraisal of procedural law and practice of international criminal tribunals or as guidance for reform, it has to be supplemented by considerations with a normative import.⁸⁵ Whilst international criminal procedure can conclusively be critiqued from the ‘adversarial’ perspective or ‘inquisitorial’ perspectives, any such evaluation will be bereft of credibility in the absence of a justification for adopting that perspective as the frame of reference.⁸⁶ Insofar as the superiority of the system is grounded on the normative ideas internal to it, such justification will not be forthcoming.

That said, one must neither discard completely the potential of the comparative law discipline in educating and enriching the perspectives of present and future international criminal lawyers nor unfairly diminish its contributions to the conceptualization and development of international criminal justice. On the contrary, a more hopeful view is

of Transnational Law 635, at 707 (‘truly international criminal procedure’ as an attempt to ‘mix and match the best features that each system (the adversarial and inquisitorial) has to offer.’).

⁸³ Vogler, ‘Making International Criminal Procedure Work’ (n 11) 105 and 121. See also *id.*, *A World View of Criminal Justice* (n 37) 2 (pointing to the ‘historical failure of the academic community to provide any consistent guidance on criminal justice process’ and noting that ‘the field of criminal procedure is largely underdeveloped and continues to be dominated by sterile and atheoretical debates over the supposed opposition between different “systems” of justice.’).

⁸⁴ Editors, ‘Introduction’ (n 2) 28-29 (for the purpose of the project, allowing comparative law to feature among assessment criteria, but ‘without expecting that it would, in itself, result in strong value judgements on any of the contested issues’); G. Sluiter, ‘Trends in the Development of a Unified Law of International Criminal Procedure’, in C. Stahn and L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (Hague: T.M.C. Asser Press, 2010) 598 (proposing national law as a part of evaluative framework for international criminal procedure, but according it with ‘less of a corrective role’).

⁸⁵ In a similar vein, H. Friman, H. Brady, M. Costi, F. Guariglia, and C.-F. Stuckenberg, ‘Charges’ in Sluiter *et al.* (eds), *International Criminal Procedure* (n **Erro! Indicador não definido.**) 460 (‘a normative assessment of a particular solution on comparative grounds would require a qualitative evaluation of the adversarial and the inquisitorial models as such against some chosen parameters.’); Mégret, ‘The Sources of International Criminal Procedure’ (n 40) 70 (‘The extent to which such models can be relied on is subject to the need to adapt criminal procedure to the special demands of international justice.’ Footnote omitted.)

warranted: its methodological functions will and should continue in international criminal procedure.⁸⁷ International criminal justice scholars and practitioners ought not to throw the baby out with the bathwater by abandoning it; as long as it is not invoked as a criterion for qualitative evaluation, its use is not objectionable. The next section shows that there are several ways in which it can still benefit the discipline.

3. BEYOND ‘ADVERSARIAL’ AND ‘INQUISITORIAL’ MODELS – HOW FAR?

The previous section postulated that comparative law categories and models are ill-fitting evaluative criteria and procedural reform guidelines. Reliance on them for those purposes is a methodological abuse of comparative law and a disservice to international criminal procedure. However, these are not the only usages of the comparative law discipline. When nuanced, comparative legal analysis enables one to ‘cut through’ the established labels, models, and dichotomies.⁸⁸ It is possible to discern at least three interrelated usages of comparative law and data that are justifiable and potentially constructive.

3.1 (IMPERFECT) DESCRIPTIVE TOOL

One continuing function of comparative law in the epistemology of international criminal procedure is that of a descriptive or associative tool. It is widely known that procedural systems embodying the ‘pure’ forms of ‘adversarial’ and ‘inquisitorial’ process do

⁸⁶ Jackson, ‘Finding the Best Epistemic Fit’ (n 45) 19 (‘it is not immediately clear that either an “adversarial” or “inquisitorial” approach should be taken towards international criminal procedure as a matter of *a priori* principle.’).

⁸⁷ Roberts, ‘Comparative Law for International Criminal Justice’ (n 11) 354 (‘comparative analysis should help to dispel all-too-familiar caricatures of domestic legal systems as inflexibly static, exclusively parochial, ciphers of national mores.’); Findlay, ‘Synthesis in Trial Procedures?’ (n 37) 31-32 (‘A unique dimension of the comparative project is its potential to ground aspirations for law reform in an understanding of the criminal trial in its practical context, beyond models and rhetoric.’).

⁸⁸ P. Roberts, ‘Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?’ (2011) 11(2) *Human Rights Law Review* 213, at 229 (praising, in another context, ‘a more systematic and methodologically sophisticated approach to comparative legal analysis, drawing distinctions at a fairly refined level of doctrinal detail *within* as well as between the conventional procedural ‘families’ (common law versus civilian law; adversarial procedure versus inquisitorial procedure, etc.)’ as ‘further evidence of the growing importance of comparative legal method in an era of cosmopolitan legality’); W. Pizzi, ‘The American “Adversary System”?’ (1998) 100 *West Virginia Law Review* 847, at 852 (‘Comparative study is a way of cutting through these labels and slogans to help us see our system more clearly.’).

not exist (anymore) at the domestic level.⁸⁹ This is in part due to the global processes of cross-fertilization and legal transplantation between different procedural traditions, leading to a degree of legal-cultural approximation between them.⁹⁰ Most of the modern systems are hybrid as a result of this process. The ‘adversarial’ and ‘inquisitorial’ descriptors of the styles prevailing in certain classes of domestic jurisdictions are increasingly disconnected from their historical and geographic origins and incapable of capturing the complex reality and the mixed character of contemporary procedural systems.⁹¹ This is even more so for international and hybrid criminal tribunals whose procedural regimes have been conceived and developed as hybrids and hence are not—and cannot be—purely ‘inquisitorial’ or ‘adversarial’.⁹²

A further difficulty with applying the ‘adversarial’ and ‘inquisitorial’ labels in international criminal procedure is that there are not agreed definitions of these categories. An exhaustive inventory of *defining*— as opposed to *incidental*—features of the respective models has yet to be drawn. In other words, the typical permanent and immutable elements that would unmistakably indicate that a given legal system is either one or the other are unknown. The procedure in international criminal tribunals has sometimes been described as ‘inquisitorial’ or ‘adversarial’ in some degree (‘largely adversarial’ or ‘more inquisitorial than adversarial’) or with reference to its evolution over the time (e.g. indicating a ‘shift from adversarial towards inquisitorial process’). These qualifications veil the uncertainty about the nature of procedure and do not add anything except for rendering the attempted description even more imprecise. The established terminology is a substandard descriptive framework for international criminal procedure and practice. Therefore, the related labels should not be affixed to international procedural systems generally; they will never capture their true nature and identity.

⁸⁹ E.g. Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 9) 1440-41; Pocar, ‘Common and Civil Law Traditions in the ICTY Criminal Procedure’ (n 10) 437 and 438 (‘although most of the modern legal systems have attributes of both the civil law and the common law traditions, they are usually based *predominantly* on one or the other.’).

⁹⁰ See among others F. Tulken, ‘Main Comparable Features of the Different European Criminal Justice Systems’ in M. Delmas-Marty (ed.), *The Criminal Process and Human Rights: Towards a European Consciousness* (Dordrecht: Martinus Nijhoff, 1995) 8; D.M. Amann, ‘Harmonic Convergence? Constitutional Criminal Procedure in an International Context’, (2000) 75 *Indiana Law Journal* 809; G.S. Reamey, ‘Innovation or Renovation in Criminal Procedure: Is the World Moving toward a New Model of Adjudication?’ (2010) 27 *Arizona Journal of International and Comparative Law* 693.

⁹¹ Jackson and Summers, *The Internationalisation* (n 45) 8 (‘the dichotomy is increasingly unhelpful in describing actual systems of justice and as a heuristic tool for gauging whether or not systems are converging’) and 9 (‘[t]he adversarial/inquisitorial dichotomy has had a particularly baneful effect on evidence scholarship.’); Findlay, ‘Synthesis in Trial Procedures?’ (n 37) 28-9 (‘Significant derivations within each main style (and the political systems they support) make the comparative evaluation and exploration of actual and potential synthesis intricate.’).

⁹² See, among others, *Erdemović* dissenting opinion of Judge Cassese (n 43) para. 4.

At the same time, it is incontrovertible that most elements of those systems resemble and can be traced back to their precursors and analogues in domestic criminal procedure. Unavoidably, the categories associated with domestic traditions and models developed by comparatists have routinely been used to describe the aspects of international criminal proceedings. For convenience's sake, such usage of the comparative perspective persists even where the 'common law v. civil law' and 'adversarial v. inquisitorial' dichotomies are deliberately dismissed or reserved a limited role.⁹³ These associative labels form an integral part of the comparative vocabulary and are handy, even if simplistic, shortcuts that convey a general impression about specific procedural arrangements or allude to their origins in certain traditions. Such usage of terms is admissible, as long as one keeps in mind that they are inherently *imperfect descriptors* of contemporaneous domestic—and *a fortiori* international—procedural regimes.

Any more sophisticated effort to accurately describe the tribunals' procedure along these lines would amount to a research exercise on its own and is likely to expose the fact that such a straightforward characterization of any given procedural system as a whole is impossible. Other than providing an insight into the provenance of some of its aspects and identifying major influences that shaped them, the use of comparative law labels for uncovering their rationales and systemic functions of specific arrangements is not apt to lead to revealing or useful conclusions. As Friman and co-authors have pointed out, a comparative study will primarily expose differences and allow conclusions as to whether the chosen solution for a particular international criminal institution is closer to one or the other legal tradition. The conclusion that the process of the SCSL is clearly influenced by adversarial (and common law) principles, and that the ECCC is more reflective of French law (and the civil law tradition) is self-evident and of limited interest.⁹⁴

Thus, while the 'civil law' and 'common law' categories could be used to refer to the origins of, and influence on, certain arrangements in international criminal process, the 'inquisitorial' and 'adversarial' categories still serve a limited descriptive function. They also conjure associations explaining the general character and purport of those arrangements in the context of a procedural system. But to be helpful, the categories should be understood at a higher level of abstraction, as ideal-types or models not inextricably linked to the historical

⁹³ E.g. Boas, *The Milošević Trial* (n 47) 286 ('It is apparent that international criminal law is infrastructurally adversarial but that it has many civil law overlays which can or do impact profoundly on the conduct of proceedings.').

origins or legal-cultural identity of the procedures, and denoting, respectively, the judge-led and party-driven process.

3.2 ANALYTICAL AND HEURISTIC FRAMEWORK

Another usage of comparative law discernible both in the literature and the jurisprudence of international criminal tribunals is the reliance thereon as an *analytical and heuristic framework*. Comparative law is a repository of empirical data on the historical and current status of national laws of criminal procedure, along with the appraisals of their operation in practice, in a broad range of jurisdictions.⁹⁵ It teaches us about what coherence and logic mean within a procedural system, and how fundamental values underlying the criminal process can effectively be promoted through different procedural arrangements aligned with the interpretations of those values. The comparative models developed by induction from the observations of national criminal justice may wield a significant explanatory power as to the rationales and functions of procedural arrangements within a system as a whole.⁹⁶ Comparative legal knowledge is instructive as regards the advantages and risks associated with the use of those elements, along with available safeguards and compensatory mechanisms.

By analogy, the comparative insights into the regularities at work—for example, the interplay between the structure and format of trial and the typical roles of actors, or between the law of evidence and the composition of the bench—provide informed guesses as to what might or might not make sense for international criminal tribunals.⁹⁷ The comparative legal studies can therefore serve as a helpful framework for the analysis of international criminal practice. Mégret has noted that

There is no doubt the traditions provide a rich way of interrogating international procedure as it stands, testing its internal coherence, and determining its overall soundness from a doctrinal, practical, or principled

⁹⁴ Friman *et al.*, ‘Charges’ (n **Erro! Indicador não definido.**) 460.

⁹⁵ In this sense, Roberts, ‘Comparative Law for International Criminal Justice’ (n 11) 354 (discussing the contribution of comparative law as ‘an indispensable reference-library of ‘do’s and don’t’s’ and ‘invaluable models, experiences and juridical resources for robust institution-building at the international level.’).

⁹⁶ In a similar vein, see M. Caianiello, ‘First Decisions on the Admission of Evidence at ICC Trials’ (2011) 9 *Journal of International Criminal Justice* 385, at 386 (a procedural system is ‘a highly complex instrument, a multifaceted mechanism, in which each single act, in a broader or lesser way, connected to the others. To govern such a mechanism and to give it cohesion ... theoretical models play a decisive role.’).

⁹⁷ Findlay, ‘Synthesis in Trial Procedures?’ (n **Erro! Indicador não definido.**) 32 (‘the internal consistency governing legal procedural styles needs to be recognised and worked within.’).

point of view. ... The role of different traditions is certainly an important factor in the genesis of international procedure, if only because they provide a number of more or less ready-made blueprints for what criminal procedure should be.⁹⁸

In this sense, comparative law goes some way toward confirming or disproving ontological uncertainties of international criminal procedure. As noted, one of them is the ostensible impossibility of constructing credible and operational mixed systems through the synthesis of elements typically associated with either one or the other influential model. But the existence and performance of both experimentally and historically formed hybrid systems attest that they are not mere theorizations but emulate functional, albeit by no means flawless, regimes. The examples are Italy after the landmark 1988 reform of Criminal Procedure Code⁹⁹ and Nordic countries whose trial regimes are deemed to incorporate both inquisitorial and adversarial features (e.g. Sweden and Norway).¹⁰⁰ One is well-advised to turn to the—uniquely different—experience of those systems when seeking to combine, within international criminal procedure, the elements appearing incongruent or incompatible. Thus, the combination of, on the one hand, the ‘adversarial’ trial format based on the two-case approach to the presentation of evidence and the order of questioning witnesses and, on the other hand, the characteristically flexible ‘inquisitorial’ admissibility regime is a distinctive aspect of the tribunals’ process.¹⁰¹ It is also a known source of anxiety caused by the perceived incongruence and eclecticism of their amalgamated procedure and a target of value-based critiques relating to fairness and truth-finding.¹⁰²

⁹⁸ Mégret, ‘Beyond “Fairness”’ (n 32) 43.

⁹⁹ See further W.T. Pizzi and M. Montagna, ‘The Battle to Establish an Adversarial Trial System in Italy’ (2004) 25 *Michigan Journal of International Law* 429; Pocar, ‘Common and Civil Law Traditions in the ICTY Criminal Procedure’ (n 47) 437 n3.

¹⁰⁰ Norway combines an ‘adversarial style’ of trial process whereby the parties are responsible for presenting their cases, with features such as the liberal regime for the admission of evidence, the preference for a narrative style of witness testimony, the judicial power to intervene in and even take over questioning from the parties, and the arrangement that the defendant should respond to the charges before witnesses are called. See Pizzi, ‘The American “Adversary System”?’ (n **Erro! Indicador não definido.**) 848-49.

¹⁰¹ Jackson and Summers, *The Internationalisation* (n 45), at 119 (‘One of the most striking is the tendency for adversarial features of party control to be mixed with flexible rules of admissibility.’); N.A. Combs, ‘Evidence’, in W.A. Schabas and N. Bernaz (eds), *The Routledge Handbook of International Criminal Law* (London and New York: Routledge, 2011) 329.

¹⁰² Jackson, ‘Finding the Best Epistemic Fit’ (n 45), at 33 (‘the adversarial system of party presentation combined with the ever increasing admission of written statements taken by the prosecution ... has restricted ... its [defence’s] ability to challenge evidence.’); Caianiello, ‘First Decisions’ (n **Erro! Indicador não definido.**) 402-3 (‘the ICC system appears flawed’ because ‘notwithstanding its general accusatorial framework, the rules governing admissibility are more proximate to the inquisitorial model.’); P. Murphy, ‘No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence Is a Serious Flaw in International Criminal Trials’ (2010) 8 *Journal of International Criminal Justice* 539, at 540 (‘In the context of adversarial trial proceedings, “free proof” is an euphemism for a systemic failure of judicial discrimination in admitting evidence without inquiring its apparent provenance or reliability’).

The status in those domestic systems—whether originally or purposefully mixed—debunks the idea that constructing a hybrid regime for international criminal tribunals is fictitious, or that such a regime is bound to be wanting in respect of fairness or efficiency. The use of comparative law for analytical purposes invites a change of perspective on (international) procedural hybrids. As mentioned previously, international criminal procedure has largely been developed by judges coming from different backgrounds and faced with the daunting task of ensuring fair and effective trials in extremely complex and voluminous cases. What is seen as the problematic ‘eclecticism’ of procedure then takes contours of a creative combination of ingredients and solutions put together pragmatically through dialogue, mutual learning cross-fertilization, and borrowing.¹⁰³ When viewed through this prism, this set of solutions is as homogenous as it can get in the ‘pressure pan’ of complex cases and operational realities of the tribunals. At least, this is a genuine search for the new coherence.

The intellectual comfort gained from observing the mixed systems operating at the national level should not mislead one into thinking that a fail-proof blueprint has been found. Like any others, those systems ought not to be romanticized. Although unique in many respects, the Italian experience demonstrates that grafting a foreign procedural philosophy onto an entrenched culture that rests on different premises, with its features surviving despite reforms, requires strenuous efforts. It has taken considerable time to overcome systemic resistance and to bridge that gap between the reformed legal framework, on the one hand, and the actual practice, on the other hand. Furthermore, it is important to closely monitor the functioning of international hybrids, which are also of artificial making. The notorious fact-finding impediments and challenges of ensuring fairness that are associated with the peculiarities of the tribunals’ institutional setup and operational realities present problems that are unparalleled in the mixed domestic systems and require tailored solutions.¹⁰⁴

To turn to their possible heuristic value in international criminal procedure, the ‘adversarial’ and ‘inquisitorial’ models, supplemented by the insights into how the systems that embody them have functioned in common law and civil law jurisdictions, remain useful

¹⁰³ See e.g. Kwon, ‘The Challenge of an International Criminal Trial’ (n 44) 364 (‘This infusion of civil-law evidentiary principles into an essentially common-law framework is, in my view, a testament to the judges’ willingness to cooperate, to learn from one another and to recognize the utility and effectiveness of approaches taken in national legal systems other than their own.’).

¹⁰⁴ Jackson and Summers, *The Internationalisation* (n 45), at 140 (arguing that ‘the adversarial system of party presentation combined with the ever-increasing admission of written statements taken by the prosecution within a context in which it is difficult for the defence to make their own investigations has restricted defence access to information and its ability to challenge evidence.’) and 146 (‘the hybrid of adversarial presentation combined with relatively free admission of evidence has not provided the best means of enhancing the principles of equality of arms and adversarial procedure.’).

aids in discovering the historical origins, rationales, and functions of the various components of procedure.¹⁰⁵ They facilitate the understanding of how national systems are organized and what factors account for their running smoothly and fairly (or otherwise). Provided that comparison or analogy with international criminal procedure is justifiable, domestic experiences can be consulted as a way to anticipate potential problems in the tribunals' context.¹⁰⁶ Comparative research into domestic procedure allows appreciating the procedural coherency laws at work in international hybrid structures.¹⁰⁷

In addition, the phenomenon of 'path-dependence'—referring to the idea that the initial choices in terms of a specific character of process to a large extent predetermines (and narrows) the direction of further reforms—informs the evolution of international criminal procedure, just as it does that of national criminal process.¹⁰⁸ Or perhaps even more so, given the specifics of procedural law-making by international judges who have proved to be pragmatic legislators least likely to be radical reformists.¹⁰⁹ If procedure is to work as it should, the legislative choices made at the outset entail the need for procedural modules associated with it as a part of the package to be incorporated almost—the qualification is essential—by definition.

The identification of 'cracks' in the individual regimes of international criminal procedure and analyses of related problems in light of comparative law admittedly come close to a quasi-normative task. For them to remain methodologically sound, in line with the rejection of comparative law as a valid normative perspective, any analogizing and extrapolation between national and international legal orders must not amount to a boundless exercise. The important check is that attention needs to be paid to the unique legal-cultural and operational context of international criminal tribunals, and to the fact that their underlying procedural philosophy may be markedly different.¹¹⁰

¹⁰⁵ N. Jörg, S. Field, and C. Brants, 'Are Inquisitorial and Adversarial Systems Converging?' in P. Fennell, C. Harding, N. Jörg, and B. Swart (eds), *Criminal Justice in Europe: A Comparative Study* (Oxford: Oxford University Press, 1995) 41; Jackson and Summers, *The Internationalisation* (n 45) 6.

¹⁰⁶ Roberts, 'Comparative Law for International Criminal Justice' (n 11) 354 ('Microscopic examination of proof-taking and evidence-testing at the domestic level is required to identify the comparative strengths and weaknesses of procedural mechanisms, and to assess their capacity for extrapolation to the international context.').

¹⁰⁷ Kwon, 'The Challenge of an International Criminal Trials' (n 44) 362.

¹⁰⁸ On 'path-dependency' at the ICTY, see Langer, 'The Rise of Managerial Judging in International Criminal Law' (n 7) 905-8.

¹⁰⁹ In more detail, see Vasiliev, *International Criminal Trials* (n *), chapter 1.

¹¹⁰ See also *Erdemović* dissenting opinion of Judge Cassese (n 43) paras 2 ('legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings') and 4 ('This combination or amalgamation is unique and begets a legal logic that is qualitatively different from that of each of the two national criminal systems: the philosophy behind international trials is markedly at variance with that underpinning each of those

In creating, applying, and reforming their *sui generis* procedure, the tribunals have had not only to ‘reinvent the wheel’ but, on numerous occasions, to devise a whole new way of conducting the proceedings. What may work at the national level might prove unworkable in an international system. Governed by own context-driven procedural logic and subject to distinct regularities, the transplanted institutions, rules, and practices often acquire a life of their own within a receiving system. This may lead to unanticipated results, i.e. those borrowed components may operate not as expected and exert different effects within the procedural system.¹¹¹ Like variations in the DNA code cause genetic diversity, there are no two identical procedural systems because, even if composed of similar building blocks, their functions and implications are dependent on the overall structure in which they are embedded. As Mirjan Damaška has eloquently put it, ‘the music of the law changes ... when the musical instruments and the players are no longer the same’.¹¹²

A detailed discussion cannot be afforded here, but a limited example could demonstrate this point, namely the consequences of the absence of jury in international criminal trials for the trial advocacy style.¹¹³ International trials are conducted by professional judges whose legal minds need not be ‘conquered’ by combative partisan advocacy usual in non-evidentiary parts of common law trials. However, international trials are factually complex and require the presentation of enormous volume of evidence in the long of several months at least for each party’s case. Hence, opening statements and closing arguments that precede and succeed the hearing of evidence, respectively, acquire a particular importance. These components of the process provide the court with an opportunity to get an early insight, or roadmap into the parties’ evidence as well as to become apprised of structured and detailed submissions by the parties on the entirety of evidence at the end of the trial. From a court’s perspective, opening statements and closing arguments in international trials are less of advocacy devices than at common law and should be effective with respect to pragmatic functions of facilitating the comprehension and evaluation of evidence with view to establishing the truth.

national systems.... [I]t would be inappropriate mechanically to incorporate into international criminal proceedings ideas, legal constructs, concepts or terms of art which only belong, and are unique, to a specific group of national legal systems, say, common-law or civil-law systems.’).

¹¹¹ Jackson and Summers, *The Internationalisation* (n 45) 7 (‘Institutional and cultural resistance within the receiving system sometimes proves too strong to achieve the impact intended, with the result that the character of the imported practice or procedure is altered in the new procedural environment.’).

¹¹² Damaška, ‘The Uncertain Faith of Evidentiary Transplants’ (n 54) 840.

¹¹³ The structure of the court has, of course, broader implications affecting various aspects of the process, not least the regime for the admission of evidence.

To sum up, comparative law falls short of prescribing how the experiential knowledge of regularities in the operation of national criminal procedure is to be used in the cognition of international procedural systems. Despite some commonalities between domestic criminal justice and international tribunals, the former do not lend a ready-made explanation of how international systems (should) function or develop, let alone provide an authoritative guidance or incontrovertible blueprints for reforming them. Considering how international criminal procedure is enacted and amended, its semblance with national procedure may be caused by occasional factors rather than by any sense of obligation. It may also be a consequence of the normative import and imperatives of international human rights law, which has a compelling, albeit mediated and indirect, effect on international criminal procedure. The latter can replicate principles and rules reflecting a degree of convergence in domestic criminal procedure, but not necessarily *because* that procedure is determinative of its international counterpart.¹¹⁴ The experience of constructing procedure at the international criminal tribunals shows that, despite the important role comparative epistemology has played in that process, it has not been ‘strictly causal in making international criminal procedure what it is’.¹¹⁵ At the same time, strict causality is not the only way for national procedures to exert influence. Such influence may occur when national rules and practices are ‘cherry-picked’ to be used as building blocks and gap-fillers in completing the edifice of international criminal procedure. The next section briefly turns to this procreant function of comparative law.

3.3 CONSTRUCTION MATERIAL

The data on comparative criminal procedure have regularly served the judges at the ICTY, ICTR, and other courts, as well as state delegations in the negotiations leading to the adoption of the ICC Statute and Rules, as indispensable construction material when devising and refining the applicable procedure. As noted previously, international criminal procedure is an outgrowth of longstanding efforts by various actors to construct fair and workable systems of process within multiple and distinct institutional regimes. The main modality in carrying

¹¹⁴ See also Friman *et al.*, ‘Charges’ (n **Erro! Indicador não definido.**) 460 (‘when many domestic systems apply similar rules or principles with respect to a particular issue, regardless of the legal tradition and the adversarial or inquisitorial nature of the procedures, normative conclusions may be allowed without a preference for a certain model being a pre-requisite.’).

¹¹⁵ Mégret, ‘Beyond “Fairness”’ (n 32) 43.

out this task was by way of combining and fusing national rules and practices and adjusting the resulting mix to the unique circumstances of the international tribunals. Comparative law has therefore been the primary source of inspiration in deliberations on procedure and a repository of practices from which procedural solutions have been drawn.¹¹⁶ In this respect, it is apt to recall Judge Cassese's fitting characterization of the process leading to the emergence of international criminal procedure as 'the gradual decanting of national criminal concepts and rules into the international receptacle'.¹¹⁷

Undoubtedly, this 'generative usage' of comparative law will continue in the fine-tuning of the mechanisms at the existing courts as well as when devising procedure for the purpose of any future tribunals. Comparative data are indispensable in developing the synthesized *sui generis* systems of procedure because they provide legislators with elementary building blocks.¹¹⁸ They are supplemented and increasingly ousted by the international criminal justice institutions' own insights gained from the previous exercises in the 'comparative international criminal procedure'. Of course, the relevant experiences of creating amalgamated procedural systems specifically tailored to the needs and circumstances of international tribunals present ready-to-use points of reference and convenient aids in the subsequent rounds of legislating criminal procedure at the international level. This is seen, for instance, from the recent 2013 amendments to ICC Rule 68 regarding the admission of prior recorded testimony. Its current language draws heavily from that of ICTY Rules 92*bis* through 92*quinquies*, rather from any domestic legislation.¹¹⁹ Be it as it may, this trend does not discard the continuing value of comparative legal discipline as the 'basic grammar' of criminal process. It remains the reservoir of particles of which the DNA of international criminal procedure is constructed and which are discernible in each of its forms found in individual tribunals.

¹¹⁶ Mégret, 'The Sources of International Criminal Procedure' (n 40) 70 ('The "source of inspiration" (rather than source *stricto sensu*) for international criminal procedure lies in several models of criminal procedure (common and civil law mostly). Footnotes omitted); Caianiello, 'First Decisions' (n **Erro! Indicador não definido.**) 386 ('source of various technical solutions for applying the political and ideological values at the basis of any system; values that, because of their intrinsic nature, need careful blending and balancing to achieve a harmonious outcome.').

¹¹⁷ Erdemović dissenting opinion of Judge Cassese (n 43) para. 4.

¹¹⁸ M. Delmas-Marty, 'Reflections on the "Hybridization" of Criminal Procedure' in J.D. Jackson, M. Langer, and P. Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (Oxford and Portland: Hart Publishing, 2008) 251 ('only a comparative study makes it possible to develop truly "common" norms, that is, norms defined not by the unilateral transplantation of a dominant system, but a pluralist combination of the best of each national tradition, through synthesis or even "hybridization"').

¹¹⁹ Rule 68(2) and (3) ICC RPE; Resolution ICC-ASP/12/Res.7, 'Amendments to the Rules of Procedure and Evidence', adopted at the 12th plenary meeting, on 27 November 2013, by consensus.

This brings us to the last point before we conclude. The use of comparative law method and knowledge is not merely a matter of convenience in constructing the hybrid regimes in international tribunals but also a necessity. The intrinsic pluralism of international criminal procedure is not a fruit of capricious voluntarism but of normative compulsion. From the outset, the inter-cultural exchange and joint search for workable compromises and creative solutions have been the permanent aspects of its development. The continuous amalgamation and experimentation were required to ensure that the hybrid procedure enables fair and expeditious proceedings. The idea of a culturally hybrid procedure was not merely a policy or academic choice by the international criminal courts' architects, but in a direct sense a political precondition for their establishment and international acceptance and legitimacy. The conversing legal cultures, along with their cherished values and translations into preferred forms of process, had to be accommodated and represented, to the extent possible, in the resulting hybrid regimes. This necessitated procedural synthesis and compromise, even if at the cost of 'coherency', as it is understood in the paternal domestic regimes.

As a result, at the present stage of the project, it is neither possible to renegotiate the need for a compromise between the major legal traditions nor to undo the Sisyphean effort of synthesizing procedural cultures invested in making that compromise work. But on the contrary, the fundamental critiques, touched upon above, that take issue with the insufficient cultural pluralism of international criminal procedure exert a strong normative pull in the opposite direction. In other words, there seems to be no way back towards comparative purism. As some scholars have pointed out, the positions refusing to accommodate the comparative legal diversity and asserting that either one or the other domestic tradition would have been a better choice for the tribunals are untenable.¹²⁰ Others still remain critical of international criminal procedure as the 'Procrustean melding of the civil and common law traditions' but seem to acknowledge the reality that that the output of such melding has taken

¹²⁰ See also Findlay, 'Synthesis in Trial Procedures?' (n **Erro! Indicador não definido.**) 51 ('Synthesis of institutional and procedural form is a reality in the international tribunals [I]t seems that in trial practice the synthesis takes the form of compromise, and procedural difference (or claims back to comfort in either of the originating traditions) are arbitrated by the trial chamber. To this extent, synthesis is a necessary feature of trial practice but it operates within an overriding potential to claim and activate procedural (and interpretative) difference. '); Jackson and Summers, *The Internationalisation* (n 45) 143 ('The risk again ... is that by expressing a preference for one established model over the other, the protagonists involved are asked to think only in terms of established domestic procedures. The danger here is that the choice of criminal procedure becomes a kind of "global popularity contest" between domestic legal traditions where the most celebrated features of one tradition are transplanted into the international context in a "one-size-fits-all" paradigm.'). But cf. Murphy, 'No Free Lunch, No Free Proof' (n **Erro! Indicador não definido.**) (arguing for the adoption by the tribunals of the (common law) rules for the exclusion of evidence, with reference to their excellent domestic performance).

root and can hardly be revisited.¹²¹ Indeed, no advocacy for a wholesale return to one ‘pure’ system is going to be taken seriously and succeed at this stage. It is not clear why a specific ‘pure’ model (and not its alternative) is to be picked as a blueprint and, much less, what purity even means in the age of globalized procedural legality.¹²² The only realistic way forward in international criminal procedure would be to continue improving and experimenting with mixed systems.

Importantly, however, the national procedural traditions are—and can only be—the points of departure in that amalgamation exercise. Their influence on international criminal procedure does not go further than offering possible, *i.e.* not mandatory, starting positions. Whenever a procedural rule or practice is extrapolated onto the international context to form part of international criminal procedure, its functions, effects, and, indeed, character will be informed and possibly modified by the system in which it is set to work. Like with the borrowing of procedures across national borders, their transposition in most cases will amount to ‘legal translation’ rather than ‘transplantation’, or ‘reinterpretation’ rather than ‘plagiarism’.¹²³ The rules and practices ‘translated’ in this fashion will eventually have to be adjusted to the ‘genotype’ of the receiving system. The ‘phenotype’ of procedural arrangements is an elusive and unreliable indicator of their systemic nature and functions. Fundamental differences may lurk beneath the semblance whilst procedures that do not appear analogous to one another may in fact pursue a similar rationale and comparable functions in the context of a procedural system.

CONCLUSION

The article has explored the methodological functions of comparative law in international criminal procedure, both as a law and a legal discipline. Its distinct nature and peculiarities of evolution have been illustrated through the prism of ‘pluralism’. In order to explain the potential and limitations of the comparative legal discourse in this domain, the

¹²¹ E.g. Gordon, ‘Toward an International Criminal Procedure’ (n **Erro! Indicador não definido.**) 707 (‘a Procrustean melding of the civil and common law traditions will not reverse the current trend. Instead, with due process as its policy lodestar, international criminal procedure must judiciously mix and match the best features that each system has to offer.’).

¹²² Damaška, ‘Models of Criminal Procedure’ (n 35) 481 (‘In order to recognize mixtures one needs, of course, an idea of what constitutes a pristine procedural model: one cannot recognize a mongrel without an idea of pure breed.’).

distinction has been drawn between the extrinsic and intrinsic pluralism of international criminal procedure. The former refers to the current diversity of procedural forms as an inevitable outgrowth of the plurality of institutional frameworks in which international criminal procedure has been developed and applied. Since the law-making autonomy of distinct institutional regimes does not rule out a degree of legal unity, the extrinsic pluralism does not turn international criminal procedure into a normative chaos. On the contrary, it arguably remains a system of ‘ordered pluralism’ whose coherency is fastened by fundamental and common standards that permeate the body of context-specific and disparate laws and practices. The findings from the sub-discipline of ‘comparative international criminal procedure’ confirm that such standards, existing and migrating across the institutional borders of individual tribunals, keep the system from disintegration and define the boundaries of procedural legality. The existence of this sub-discipline in itself is evidence of the crucial importance of the legal comparative method as an elementary heuristic in international criminal procedure.

Another face of pluralism of international criminal procedure—intrinsic pluralism—stands for its congenital legal-cultural complexity and competition, resulting from its anchorage in different domestic traditions. This is an aspect of international criminal procedure inherited and reinforced at every round of its consolidation as a body of law and practice, from the early experiments at Nuremberg after World War II to the modern forms of internationalized criminal justice. This procedure is pluralistic by nature and by origin, being a hybrid that is expected and required to accommodate values and elements drawn from different national legal cultures through creative compromise and ceaseless amalgamation of domestic ingredients. One of the more formidable challenges to its legitimacy is that ‘intrinsic pluralism’ is deficient and insufficiently integrates non-Western perspectives. While true, living up to the ‘pluralism ideal’ has never been the real objective of procedural law-making in this context, at least in the same way as the goal of quickly putting in place a procedural regime that could deliver in terms of fairness and efficiency. This acknowledgement, however, undercuts the universalist ambitions of the proponents of specific domestic traditions and the validity of the comparative law discipline as a normative perspective in international criminal procedure.

¹²³ M. Langer, ‘From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure’, (2004) 45 *Harvard International Law Journal* 1, at 29-35; Pocar, ‘Common and Civil Law Traditions in the ICTY Procedure’ (n 47) 438.

Whether the same is sufficiently pluralistic or otherwise, there are those who endorse and believe in the idea of a culturally unified and homogenous international criminal procedure. At the same time, many doubt that such a prospect is realistic or should be viewed as an objective, given the difficulty of reconciling the competing interpretations of fairness and truth in different procedural systems. Ultimately, it appears that success or failure of the amalgamation exercise undertaken at the tribunals, as well as the degree of systemic coherency of their procedural systems, are matters of perception and perspective. In any event, therefore, comparative law will continue to play an essential role in the conceptualization and analyses of the inter-cultural dynamics within international criminal procedure, as a consequence of its intrinsic pluralism.

Having presented these ‘pluralism’ perspectives on international criminal procedure as the points of entry of comparative law, the essay then turned to its usages in this domain. It set out and evaluated some of the main modes of resorting to comparative criminal procedure in the scholarship and in the practice of legislating, applying, and reforming international criminal procedure. Far from every known usage of the comparative method and findings about the domestic jurisdictions is serviceable and methodologically justified. The present discourse about and within international criminal tribunals is landmarked by the increased suspicion about the comparative law discipline and a noticeable decline in its perceived relevance. The author explains its falling out of favour among international criminal lawyers by the past tendency to abuse its methods, terminological apparatus, and substantive content. Too often, what was supposed to be a detached, open-minded, and adequately sophisticated thinking about, and analysis of, the similarities and differences between the domestic systems of criminal procedure was tainted by ulterior and unscrupulous motives of promoting one’s own system and asserting its decisive influence in an international forum.

Whether well-intentioned or not, ‘comparative chauvinism’ is deeply at odds with the spirit of comparative law discipline, insofar as its method, models, and findings are thus apt to be manipulated as weapons in an ideological legal struggle. Such usage of comparative law is utterly problematic, not least from the legitimacy perspective, and it should by all means be avoided in the future. The article has argued that comparative criminal procedure is not an appropriate normative perspective to be relied upon for the evaluation of international criminal procedure. It is misconceived to employ the normatively neutral domestic models of criminal procedure for forming and substantiating value-ridden judgements on what procedural arrangements are good for international criminal tribunals, whether in justification of the *status quo* or proposed reforms. The comparative perspective is inconclusive for the

purpose of determining an optimal procedure. Such determination should instead be premised on considerations that truly possess a normative power and serve as legitimate determinants. Most importantly, this includes the compliance of procedural arrangements with the applicable human rights standards and the operational efficiency of international criminal justice.

As this article has shown, the ideological use of the comparative legal discipline has not been uncommon in international criminal procedure, leading to its established, albeit by no means flawless, classifications and models being discredited to some degree. However, international criminal justice practitioners and scholars should not rush to turn their backs on comparative law, as it is still highly relevant to their work. Provided that it is not seen as a normative tool, the insights offered by comparative research into national criminal procedure are material in several important respects. It holds a significant explanatory power in relation to the origins and development of key institutions and notions of criminal process that are still present, in different combinations and in modified forms, in the DNA of international criminal procedure.

Despite being subpar descriptive tools (and especially so in relation to the tribunals' procedural regimes), the seasoned categories and dichotomies of comparative procedure are helpful in elucidating the character and provenance of the practices inherited by the tribunals from paternal domestic regimes. They also help discern fundamental values underlying the operation of criminal justice and the range of ways to promote them through criminal process. It is therefore not advisable to deprive the methodology of international criminal procedure of this essential heuristic and analytical framework. In this capacity, comparative procedure holds a promise of endowing the students of international criminal procedure with a better understanding of the context-dependent rationales of the arrangements taken over from national jurisdictions. It will also enable them to deduce the basic regularities at work within a procedural system and to learn the 'elementary grammar' of criminal process.

Finally, it would have been a waste, indeed, to discard comparative law whose value in international criminal law as a treasure trove of domestic standards and practices to be used by the tribunals as building blocks of their procedure is difficult to overestimate. Put simply, national criminal procedure and practice are the bricks of which the edifice of international criminal procedure is constructed, given the initial lack of the better construction material. Subject to the necessary checks regarding necessity, anticipated fairness, and aptitude in international criminal procedure, the domestic procedures may admissibly be considered for 'translation' into the tribunals' regimes in order to patch up any legal gaps in their structure

and to address any discontents. The waning of interest on the part of the tribunals in the borrowed solutions from the domestic jurisdictions is predictable, given the increased availability of their own responses tailored to the unique challenges and needs of international criminal adjudication. Nonetheless, comparative law will continue sponsoring international criminal procedure with the elementary ‘construction material’ that can be used and experimented with in this context. It bears emphasizing that it offers—and as a matter of principle should offer—no authoritative guidance as to when and which building blocks are to be picked and how they are to be put together. Comparative law is in a position neither to impose an architectural plan upon international criminal process nor to measure the aesthetic quality of any eventual choices. In the discipline and legal field of international criminal procedure, it serves only as a basic grammar, sieved with exceptions as it were. It is also the vocabulary – imperfect but essential for getting a grip of the original and acquired rationales of procedural rules and practices in use at the international criminal tribunals.

Finally, more than ever before, the ‘methodological stage’ in international criminal justice invites a careful reflection on the underlying assumptions of international criminal procedure. Our hope is that the continued interaction and dialogue between the disciplines of international criminal procedure and comparative law proceeds at a new qualitative level of awareness and to their mutual benefit. International criminal procedure is indebted to comparative law for all the analytical devices and empirical data that have been indispensable to it at the formative stages. In turn, it pays back by the unique experiential insights into the operation of hybrid procedural systems that are of enormous value to the comparative legal studies. It has also reinvigorated the longstanding project of cultivating a progressive and effective procedural system in an enlightened effort of amalgamating legal cultures around the ‘common grammar’ of criminal procedure. But this interaction of disciplines will only be mutually enriching if the trappings of the objectionable usages of comparative law are avoided. Therefore, the problems raised by its methodological role in international criminal law call for closer attention on the part of international criminal lawyers and comparative scholars alike.

Nota do Autor

This article draws upon the research presented in this author’s book *International Criminal Trials: A Normative Theory* (2014).