

# Language, intellectual culture, legal traditions and international criminal justice

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## Abstract

Our view of the world is to a large degree a function of our own language and culture. English has become the *lingua franca* in international legal academic and practical dialogue, and there is a related concern that the English – or its direct descendant, Anglo-American – intellectual and legal culture has drawn a thick veneer over the canvas of international criminal law as well. The differences in linguistic and cultural influence need attention as they are a primary determinant of that dialogue, not merely in form but possibly also in substance. The conversation, even in the *lingua franca*, does not seem to happen with the same intensity from all sides to the exchange, because in addition to the question of ability to engage there seems to be a difference in willingness or interest based not merely on lack of language command, but possibly also on cultural aversion. The main systemic divide in the conversations in international criminal law still is the dichotomy between common and civil law, and coinciding with that between a practical/pragmatic approach on the one hand, and a doctrinal/principled attitude on the other. This paper will attempt to elaborate on some of the conceptual and cultural differences, beyond the superficial labels often used in the discussion, such as “adversarial vs. inquisitorial”, “statute vs. judge-made law” etc., as they may impact on the creation of international criminal law.

Keywords: Language; intellectual culture; legal tradition; international criminal justice; civil law; common law; doctrine; pragmatism.

## Introduction

As Wittgenstein rightly emphasised when he said “*the limits of my language are the limits of my world*”<sup>1</sup>, our view of the world is to a large degree a function of our own language<sup>2</sup> and culture. English has become<sup>3</sup> the *lingua franca* in international legal academic and practical dialogue, and there is a related concern that the English – or its direct descendant, Anglo-American – intellectual and legal culture has drawn a thick veneer over the canvas of international criminal law as well. The differences in linguistic and cultural influence need

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<sup>1</sup> Wittgenstein, *Tractatus Logico-Philosophicus*, Proposition 5.6 (1933).

<sup>2</sup> Guy Deutscher, *Through the Language Glass: Why The World Looks Different In Other Languages*, 2011.

<sup>3</sup> How long it will remain so is open to question, see Nicholas Ostler, *The Last Lingua Franca: The Rise and Fall of World Languages*, 2011.

attention as they are a primary determinant of that dialogue, not merely in form but possibly also in substance. The need for a better understanding spans diverse communities: Academia as a research community, international organisations, parliaments and governments, the courts and the legal profession(s) as well as the support professions such as court interpreters as a practical community, and lastly the undergraduate and postgraduate (law) student community which feeds all of the above, and whose exposure to the language and culture of other systems is thus absolutely critical. The conversation, even in the *lingua franca*, does not seem to happen with the same intensity from all sides to the exchange, because in addition to the question of ability to engage there seems to be a difference in willingness or interest based not merely on lack of language command, but possibly also on cultural aversion. This has a direct impact on the level of international criminal law, as I explained elsewhere<sup>4</sup>. The main systemic divide in the conversations in international criminal law still is the dichotomy between common and civil law, and coinciding with that between a practical/pragmatic approach on the one hand, and a doctrinal/principled attitude on the other. This paper will attempt to elaborate on some of the conceptual and cultural differences, beyond the superficial nuts-and-bolts labels often used in the discussion, such as “adversarial vs. inquisitorial”, “statute vs. judge-made law” etc., as they may impact on the creation of international criminal law<sup>5</sup>. Due to reasons of space, the article can only serve to highlight several areas worthy of further investigation<sup>6</sup>.

It is, however, necessary to insert a fundamental disclaimer at this early stage: There is no such thing as “the” common or civil law system. Over the course of history the countries belonging to each of those families of legal systems have all given their idiosyncratic national cultural imprint to any template they may have inherited through political affiliation or colonial influence. Moreover, none of the two systems has survived in its pristinely pure

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<sup>4</sup> Radbruch Redux: The need for revisiting the conversation between common and civil law at root level at the example of international criminal justice. (2011) *Leiden Journal of International Law*, 393.

<sup>5</sup> There have been earlier publications in the linguistic/cultural context and/or on the adversarial-inquisitorial divide, see, for example, in this journal only Almqvist, The Impact of Cultural Diversity on International Criminal Proceedings, JICJ (2006) 745, who touches upon both the internal workings of the tribunals and on the wider cultural interface points with their end-users; or Acquaviva, At the Origins of Crimes against Humanity – Clues to a Proper Understanding of the *Nullum Crimen* Principle in the Nuremberg Judgment, JICJ (2011) 881 and Saxon, International Criminal Procedure: The Interface of Civil Law and Common Law (2013) Cambridge Law Journal (publication review). - However, this paper argues for a root-and-branch revised empirical approach describing the state of affairs in more detail than was done heretofore.

<sup>6</sup> In this context it may be apposite to mention that the three principals of the International Criminal Court (President, Prosecutor and Registrar) have agreed to support officially a planned major empirical linguistic-cultural study by the author of the Court - Letter from President Song of 13 December 2013 – Ref. 2013/PRES/00310-2 – on file with the author. Nor is it the aim of this paper to provide a discussion of material concepts of law addressed in the argument below.

form. However, in order to bring out the main diverging characteristics it is not necessary to engage in an all-out survey of all legal systems belonging to one family<sup>7</sup> or the other: Almost all the points worth making in an outline context like the present one can be extracted from looking at the relatively pure mother system of the common law, namely the law of England and Wales, and comparing it, where appropriate, to one of the major and doctrinally sophisticated continental jurisdictions, Germany.

## **Definitions<sup>8</sup>**

For ease of reference, it is helpful to set out again two pithy definitions of both common and civil law while stressing at the same time that their summary character bears in itself the potential for distortion by oversimplification. They need to be read against the background of what follows.

### *Common law – concept and main jurisdictions*

Common law in the meaning referred to in this context is the family of systems based on the historical colonial spheres of influence of the British Empire, and is typically characterised in substantive law by a reliance on case-by-case judicial law-making and the absence of comprehensive codifications<sup>9</sup> as opposed to statutes regulating individual areas, and a certain aversion to ex-ante doctrinal investigations of the underlying principles; it is thus in essence an inductive system. In procedural law, common law is most often affiliated with a heavy lay involvement in judicial decision-making<sup>10</sup> and the adversarial procedural model, with the ensuing reduced role of the judge in the trial process. The main common law jurisdictions can be found in the Commonwealth, the United States and other former colonies of the British Empire, yet in recent years especially in procedural terms the adversarial system and the use of lay judges have exerted a certain appeal in, for example, the Central Asian Republics who

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<sup>7</sup> See for the often neglected system of Islamic law Bohlander/Hedayati-Kakhki, Criminal Justice under Shari'ah in the 21st Century - An Inter-Cultural View. (2009) *Arab Law Quarterly*. 417.

<sup>8</sup> See Patrick Glenn, Legal traditions of the world, 4<sup>th</sup> ed., 2010.

<sup>9</sup> But see Bohlander/Birkett, Codification of Criminal Law. International Library of Essays in Criminal Law, 2013.

<sup>10</sup> This is, however, overall not an accurate picture. See on the lay involvement in Europe the table in Bohlander, Laienrichter in der Strafjustiz - Ein Vergleich am Beispiel der Rechtsordnungen von England, Spanien und Frankreich, in Marutschke (ed.) Laienrichter in Japan, Deutschland und Europa - Japanisch-Deutsches Symposium, Doshisha University Law School, Kyoto, 15 May 2005, 62 at 64 – 65, and the more up-to-date country reports regarding the EU Member States at [https://e-justice.europa.eu/content\\_ordinary\\_courts-18-en.do](https://e-justice.europa.eu/content_ordinary_courts-18-en.do).

are considering their adoption in one form or another<sup>11</sup>, not least through the efforts of organisations such as the American Bar Association's (ABA) CEELI (Central and Eastern European Law Initiative) programme, now called the ABA Rule of Law Initiative.<sup>12</sup> Italy in 1988 also moved towards an adversarial procedural model.<sup>13</sup>

### *Civil law – concept and main jurisdictions*

Civil law jurisdictions are often called continental law systems, because their origins stem from the major legal traditions of the European continent, mainly from French and German law, which in turn have borrowed over history from Roman law to differing degrees. Civil law systems are often connected in substantive law to comprehensive codifications, a more restricted judicial role in law-making and a penchant for ex-ante doctrinal study with a stronger academic influence<sup>14</sup>. Procedurally, they are frequently linked to a prevalence of professional judges over the lay element and the so-called inquisitorial – better: judge-led – procedural model, which emphasises the central and pro-active role of the judge. Civil law systems can be found in the continental European jurisdictions and their previous colonies. Since Germany never had a similarly large colonial or trade empire compared to Britain, France, the Netherlands, Spain or Portugal, it is worth noting that German substantive criminal law doctrine nonetheless enjoys high respect in Spain and many of the Latin American countries.

### **Relevance of this particular dichotomy**

Prior to 1993 one might have said with some justification that the study of these diverse models was a matter of academic interest, with few real-world applications. However, with the advent of the modern international criminal tribunals such as the ICTY, ICTR and lastly

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<sup>11</sup> Schroeder/Kudratov, *Das strafprozessuale Vorverfahren in Zentralasien zwischen inquisitorischem und adversatorischem Modell*, 2012.

<sup>12</sup> [http://www.americanbar.org/advocacy/rule\\_of\\_law.html](http://www.americanbar.org/advocacy/rule_of_law.html).

<sup>13</sup> Maiwald, *Einführung in das italienische Strafrecht und Strafprozeßrecht*, 2009, 169 ff..

<sup>14</sup> See e.g. Vogenauer, 'An Empire of Light? II: Learning and Lawmaking in Germany Today' (2006) 26 *Oxford Journal of Legal Studies*, 627; and 'An Empire of Light? Learning and Lawmaking in the History of German Law' (2005) 64 *Cambridge Law Journal*, 481.

the ICC, comparative criminal law research – and the common law/civil law divide in particular – was pushed into the limelight. Similarly, the increasing criminal law competence of the European Union meant that a deeper mutual understanding of the major traditions of its Member States became necessary.

### *Common and civil law as the major comparator systems in international criminal law*

Prior research by the author and others<sup>15</sup> has shown that while finding general sources of international law, absent a specific negotiated statute such as the Rome Statute of the ICC, involves a review of all major legal systems of the world according to Article 38 of the Statute of the International Court of Justice, there is nonetheless a concentration of sources emanating from common and civil law systems, and more often than not the majority of them is extracted from citations in English and from a common law background. Similar comments may be made in the context of Article 21 of the ICC Statute. Not even the much more densely regulated legal environment of the ICC is a closed and legally autarkic system, a fact which any argument questioning the need for the judges and other actors to engage in comparative work in the wider sense fails to appreciate. Examples of sources drawn from major regions and countries which do not use Western European languages or Latin script, for example Arabic, Chinese, Japanese and Russian, are few and far between. In practice, therefore, the dichotomy of “common vs. civil law” is the dominant paradigm for the systemic conversation in international courts and tribunals, if only for reasons of language<sup>16</sup>.

### *Doctrinal conflicts in international criminal law*

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<sup>15</sup> Bohlander/Findlay, The use of domestic sources as a basis for international criminal law principles, (2002) *The Global Community, Yearbook of International Law and Jurisprudence*, 3; Bohlander, The influence of academic research on the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia – A first overview (2003) *The Global Community: Yearbook of International Law and Jurisprudence*, 195; Bohlander, The General Part: Judicial Developments, in Bassiouni (ed.) *International Criminal Law*, vol. III: 517.

<sup>16</sup> There is, however, a suspicion that especially Arabic sources are neglected insofar as they refer to the Shari’ah, a system seen by many as anachronistic and in substance irreconcilable with modern analytical legal discourse.

The above-mentioned dichotomy which may to a large extent be based on linguistic selection, results in the clash of doctrines and sometimes fundamental attitudes inherited by the representatives of the jurisdictions making up the spectrum of opinions at any international criminal court. Despite the fact that on the surface substantive criminal law concepts in common law and civil law seem to be similar, a deeper analysis will show that this is far from being the case.<sup>17</sup> One of the major fields of debate in recent years, ever since the landmark decision in the appeals judgment of the ICTY in *Prosecutor v Tadic* of 15 July 1999<sup>18</sup>, has been the emergence of two different schools of thought regarding the manner in which the participation of multiple offenders in a crime should be treated. The ICTY started a line of reasoning in *Tadic* that applied joint criminal enterprise (JCE) doctrine to hierarchical structures and more common scenarios of a joint commission, in a loose form of extrapolation from common law sources. Later cases looked at the concept of the “control over the act” (*Tatherrschaft*) theory, created mainly by the German scholar Claus Roxin<sup>19</sup>, who became famous for his doctrinal figure of the “perpetrator behind the perpetrator”<sup>20</sup> which made it possible to treat the mastermind of an operation who was not present at the scene of the crime as a principal and not as a mere secondary participant. In German law, this classification has direct implications for both conviction and sentence, whereas English law, for example, under s. 8 Aiders and Abettors Act 1861, treats all participants alike as far as the conviction is concerned but allows for differences in the sentence – as long as there is not a mandatory sentence attached, as there is for murder. The ICC, especially its Pre-Trial Chamber, had from the beginning expressed a stronger inclination towards the Roxin model, possibly influenced by the provenance of some of the Chamber’s legal support staff<sup>21</sup>. The Trial Chamber in its judgment in *Lubanga*<sup>22</sup> had followed this approach, yet two judges, Fulford in a separate opinion to *Lubanga*<sup>23</sup>, and van den Wyngaert in her concurring opinion in *Chui*<sup>24</sup>, have criticised the methodological approach of relying almost exclusively on one academic school from one particular jurisdiction as a means of interpreting an international document such as the Rome Statute. Fulford in particular makes the point about the need or

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<sup>17</sup> See my paper *Nullum crimen sine poena – Zur Unberechenbarkeit völkerstrafrechtlicher Lehrenbildung* in Alwart (ed.) *Freiheitsverluste im Recht* (forthcoming 2014).

<sup>18</sup> Available online at <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

<sup>19</sup> *Täterschaft und Tatherrschaft*, 8th ed., 2006

<sup>20</sup> See also Bohlander, *Principles of German Criminal Law*, 2009, 158 on the clandestine adoption of that approach by the German judiciary.

<sup>21</sup> See above fn. 17.

<sup>22</sup> Available online at <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

<sup>23</sup> Available online at <http://www.icc-cpi.int/iccdocs/doc/doc1379838-A.pdf>.

<sup>24</sup> Available online at <http://www.icc-cpi.int/iccdocs/doc/doc1529537.pdf>.

not of attaching any significance to doctrinal classifications of modes of participation as far as sentencing is concerned, which is in a similar vein as s. 8 Aiders and Abettors Act 1861. This paper will not engage in the discussion of which approach is the better view, yet it is obvious that it is highly undesirable in a fledgling system such as international criminal law and the enhanced need to create legal certainty to have such widely diverging judicial opinions. This is another example of the potentially nefarious consequences of the use of so-called “constructive ambiguity” or delegation of judicial interpretation so often favoured by diplomatic negotiators who do not always think through what this ambiguity might lead to in practice<sup>25</sup>.

*Judicial command and use of language: “...the English version being authentic?”*

Directly connected to the previous point is the question of the linguistic abilities of the judges. After all, they decide which citations make it into a decision and qualify as proper sources of international law. Previous related research<sup>26</sup> by the author on the ICTY paints a bleak picture in that respect as far as common law judges are concerned: They display a command of foreign languages to a clearly lesser degree than their civil law counterparts. Many of them only speak English as the official language of their home country, and their local home dialect which will often not be used for legal work in their country of origin. The decisions issued in international tribunals, especially the ICTY and ICTR, had a final notice which stated which language was to be authoritative for its interpretation – mostly it was English<sup>27</sup>. In the case of members of the Commonwealth, this linguistic phenomenon can be directly linked to the effects of colonisation. In order to update the picture, a survey of the language abilities of all the judges at the ICC since the first elections in 2003 was conducted,

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<sup>25</sup> See the ECCC judgment in *Prosecutor v. Kaing Guek Eav*, Case 001, of 26 July 2010 – online verfügbar unter <http://www.eccc.gov.kh/en/documents/court/judgement-case-001> (and on JCE in general <http://www.eccc.gov.kh/en/topic/373>), which opined that the so-called JCE III was not part of customary international law.

<sup>26</sup> See fn. 15 above for references.

<sup>27</sup> One judge from Canada criticised this practice early on, yet to no avail, see *Prosecutor v Tadic*, Case. No. IT-94-1-AR.72, A.Ch., Separate Declaration of Judge J. Deschênes on the Defence Motion for Interlocutory Appeal on Jurisdiction, of 2 October 1995.

based on the CVs and statements put forward during the election process<sup>28</sup>, resulting in Table 1 (current as of May 2013).

(Insert Table 1 about here)

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<sup>28</sup> See the materials available/referenced online at [http://untreaty.un.org/cod/icc/asp/1stsession/report/english/add1/annex\\_listofdocs\\_e.pdf](http://untreaty.un.org/cod/icc/asp/1stsession/report/english/add1/annex_listofdocs_e.pdf) and [www.icc-cpi.int/en\\_menus/asp/elections/Pages/elections.aspx](http://www.icc-cpi.int/en_menus/asp/elections/Pages/elections.aspx).



Table 1  
Languages spoken by the former and current judges of the ICC (May 2013)

Name	Home country	Languages spoken
1. Aluoch	Kenya	E, Dho, F, Kis
2. Blattmann	Bolivia	E, F, Ger, S
3. Carmona	Trinidad and Tobago	E, S
4. Cotte	France	E, F
5. Defensor-Santiago	Philippines	E, Fil
6. Diarra	Mali	E, F
7. Eboe-Osuji	Nigeria	E, F, Ibo
8. Fernandez de Gurmendi	Argentina	E, F, S
9. Fremr	Czech Republic	E, Cze, F, R
10. Fulford	United Kingdom	E
11. Harding Clark	Ireland	E, F
12. Herrera Carbuccia	Dominican Republic	E, F, S
13. Hudson-Philipp	Trinidad and Tobago	E
14. Jorda	France	E, F, S
15. Kaul	Germany	E, F, Ger, Nor
16. Kirsch	Canada	E, F, S
17. Koroula	Finland	D, E, F, Fin, Ger, R, S, Swe
18. Kuneheiya	Ghana	E, F
19. Monageng	Botswana	E, Set, Ika
20. Morrison	United Kingdom	E, F
21. Nsereko	Uganda	E, Ger, Lug, Kis, Kin
22. Odio Benito	Costa Rica	E, F, S
23. Ozaki	Japan	E, F, J
24. Pikis	Cyprus	E, Gre
25. Pillay	South Africa	E
26. Politi	Italy	E, F, I
27. Saiga	Japan	E, J
28. Shahabuddeen	Guyana	E
29. Slade	Samoa	E
30. Song	South Korea	E, F, Kor
31. Steiner	Brazil	E, F, P, S
32. Tarfusser	Italy	E, F, Ger, I
33. Trendafilova	Bulgaria	Bul, E, Ger, R
34. Usacka	Latvia	E, Lat, R
35. Van den Wyngaert	Belgium	E, F, D, Ger, I, S

Note:

Bul = Bulgarian; Cze = Czech; E = English; D = Dutch; Dho = Dholuo; F = French; Fil = Filipino; Fin = Finnish; Ger = German; Gre = Greek; I = Italian; Ibo = Ibo; Ika = Ikalanga; J = Japanese; Kin = Kinyarwanda; Kis = Kiswahili; Kor = Korean; Lat = Latvian; Lug = Luganda; Nor = Norwegian; P = Portuguese; R= Russian; S = Spanish; Set = Setswana; Swe = Swedish.

This table shows a massive preponderance of two languages among the ICC judges: English and French, as summarised in Table 2.

(Insert Table 2 about here)

Table 2  
Preponderance of languages spoken by judges at the ICC

Language	Number of judges who speak it
English	35
French	22
Spanish	8
German	7
Russian	4
Italian	3
Dutch	2
Japanese	2
Kiswahili	2
Bulgarian	1
Czech	1
Dholuo	1
Finnish	1
Greek	1
Ibo	1
Ikalanga	1
Kinyarwanda	1
Korean	1
Latvian	1
Norwegian	1
Portuguese	1
Setswana	1
Swedish	1

The gap between those two and the next most commonly spoken language, Spanish, is very wide. In percentages (n = 93 as the sum of all languages times the number of judges who speak them) this means that English makes up for 37.6% of all the languages represented among the judiciary and is at the same time the only language which achieves 100% coverage across the entire judiciary. French accounts for 23.7%, Spanish for 8.6%, German for 7.5%, Russian for 4.3%, Italian for 3.2%, Dutch, Japanese and Kiswahili for 2.2% each and the remaining 14 languages (1.1% each) for 15.4%. English is thus more than twice as frequent as the last 14 languages represented only once each, it accounts for more than the sum of all other multiple languages except French. English and French together are roughly double the percentage of the other multiple languages and still about 15% above the sum of *all* other languages. In any event, the languages spoken by the judges do not correlate directly to those spoken by their assistants or clerks. Nothing beyond the anecdotal was known about the latter so far, and we need to remind ourselves that it is the judges who (should) decide which sources merit inclusion as proper sources, not their assistants. The tables alone, however, show us that they would not be in a position to evaluate sources in major languages such as, for example, Chinese and Arabic, even if their assistants could. However, during the writing of this paper the author conducted a survey among the 35 legal officers working in Chambers at the ICC<sup>29</sup> and succeeded in getting an impression of the use of languages by them. The results are set out in Table 3.

(Insert Table 3 about here)

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<sup>29</sup> The author would like to thank the Division Presidents of the ICC for agreeing to the survey being carried out, the legal assistants who responded, and particularly Dr Philipp Ambach, Special Advisor to the ICC President, for facilitating the logistical side.

Table 3  
Languages used by legal officers in Chambers at the ICC

Respondent	Q 1	Q 2	Q 3 a)	Q 3 b)
1	D, E, F, G, S	E, F, G, S	E	E
2	E, F	E	F	F
3	E, F, G, S	E, F	E, G	E, F
4	E, F, S	E, F, S	E, S	E
5	E, F, I	E	E	E
6	E, F	E	E	E
7	E, F	E, F	E, F	E, F
8	E, F	E, F	E	E
9	E	E	E	E
10	E, F, G	E, F, G	E, G	E

Notes:

1. n = 35, the return rate is thus 28.6% and not statistically significant. The table thus provides merely an impressionist snapshot.

2. The questions were:

- 1) Which languages do you speak to a level that allows you to engage in legal research for the ICC?
- 2) Which languages do you regularly use for your research in the ICC?
- 3) Which languages do you use when corresponding with the ICC judges you work for about your research?
  - a) Between you and individual judges of a Chamber unofficially during the course of a research project?
  - b) Between you and the judges acting officially as a Chamber?

It becomes apparent from the table that there appears to exist a definite filtering effect from the array of languages spoken by legal officers, through the languages used by them for research, for communication with the individual judges they worked for and finally the Chamber as a whole. Most curious is the apparent self-censure by some legal staff with regard to which languages they use for research. At the final stage, the language that is left is mostly English and some French. With mixed background panels, it would almost appear that English trumps all other languages as long as there is one judge on the panel who does not speak any language but English.

A related question is the availability of materials in the ICC Library: If – apart from any online resources – the library itself stocked materials from certain jurisdictions or languages and not others, this would restrict the available materials. The question was put to the ICC Librarian and this was the reply<sup>30</sup>:

“On a general level we collect mainly in the following languages: English, French, Spanish, German, Portuguese, Italian, Arabic.

However we do also have a few books in the following languages: Japanese, Chinese, Russian, Polish, Czech, Romanian, Hebrew, Finnish, Norwegian, Swedish, Dutch, Danish. We would have some dictionaries in African languages, Swahili, for example. Also we have a Latin dictionary.

We would not have many items in any other languages not mentioned above, that I may have omitted.

In short, we would include in our collection relevant books in any language, bearing in mind the State Parties and their languages. However, we do have difficulty purchasing material in some languages, and they are received mostly by donation eg collections donated by Judges or The Prosecutor when they leave the Court.

In our online catalogue, under Advanced search you can choose a language to see if we hold anything in that language.”

The majority of the active library acquisition thus focusses on seven languages of which Arabic and Portuguese do not feature in the selection of languages used by the legal officers in their research in the sample above. Arabic is not spoken by a single judge. To which extent the library acquisition is related to requests from the Office of the Prosecutor or other organs of the ICC or even the ASP is unclear at this point – it would be another useful exercise to study the filings of the OTP or other parties to see whether they use such sources. It is further noticeable that it cannot be guided by the six official languages of the ICC, either, since Chinese and Russian are not included in the main acquisition – not surprising from a practical point of view, maybe, since neither China nor Russia are States Parties to the Rome Statute, yet the Statute lists these languages regardless of the fact of ASP membership. In any event,

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<sup>30</sup> Email from Philipp Ambach, ICC, to the author of 30 May 2013 – on file with author. – Outside access to the advanced search feature was not available to the author.

there appears to be a partly rather haphazard approach to acquiring literature, with donations by judges and staff leaving the ICC being relied upon. It stands to reason that the works so donated will to a large extent not be the latest editions. This may all, however, be less of a problem in practice given the vastly improved online resource access available these days. Nonetheless, it is a matter worth investigating in more detail.

It would naturally be interesting to correlate this picture with the actual mode of citation in all of the judicial decisions of the ICC so far, but that is beyond the scope of this paper and must be reserved for another time. However, the author checked the sources used in the *Lubanga Trial Judgment*<sup>31</sup> (Judges Fulford, Odio-Benito and Blattmann) including the separate/dissenting opinions by Judges Fulford and Odio-Benito, to perform this exercise at least on one major document (624 pages). The following picture emerges:

(Insert Table 4 about here)

Table 4  
Sources by type and language – Lubanga trial judgment

Language	Judicial	Academic	Statute	Other	Total
E	-	55	1	9	65
F	-	1	-	-	1
G	-	13	-	-	13
S	-	2	-	-	2

These sources did not include ICC decisions or those by other international courts or tribunals, nor UN documents or international treaties – which made up a large share of the sources overall and were all in English because the original source was already operating a choice of working languages (mainly English and French) in an international setting, rather than a language of natural domestic origin. Not one citation was made to a judicial source which was not from an international court. The others include multiple citations of the *Oxford Dictionary of the English Language*. The vast majority of the academic references are multiple citations of the commentaries or textbooks by Triffterer, Dörmann, Pictet, Schabas, Lee and Werle on the ICC or international criminal/humanitarian law. The majority of the

<sup>31</sup> Available online at <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

German citations are to Roxin's *Täterschaft und Tatherrschaft* – and many of these are actually found in Judge Fulford's opinion who did not agree with the Roxin-based view to begin with – which got a few more references in substance but not by mention by the Trial Chamber's reference to a Pre-Trial Chamber decision on the issue. In percentages, with n = 81, this means that 80.3 % of the sources used in the judgment were in English, 1.2% in French, 16 % in German and 2.4 % in Spanish. Judge Fulford speaks only English, but both other judges also speak French and Spanish, Judge Blattmann also speaks German. In sum, this judgment, including the separate/dissenting opinions, used less than 20 different sources in total and over 4/5 of them were in English. 88 % of the sources overall were academic sources, i.e. those on the lowest tier of the hierarchy of Article 38(1) ICJ Statute and Article 21 ICC Statute. Furthermore, it is highly questionable whether the commentaries and the textbook cited are sources from common law systems qua English language: They refer to international law topics such as the ICC Statute or International Humanitarian Law and collect the material available on them, with a heavy emphasis on analysing the previous case law of the international tribunals and courts and to a greater or lesser extent, of the relevant academic literature. They are also written by contributors from a number of national backgrounds, from both common and civil law jurisdictions, who are well-versed and respected in the field either through prior practical affiliation with the institutions or through academia. In effect, the international criminal justice system as presented in *Lubanga* seems to have become or at least to be on its way to being self-referencing and self-reinforcing. The degree of analytical critique of and extrapolation from that case law or the lack thereof in those works, however, could be a material indicator of a preponderance of either a civil law or a common law approach, i.e. the more critical analysis and extrapolation, the more civil law leaning the attitude.

### **Modes of law-making, argument and terminology**

Common and civil law jurisdictions do not only differ in substance, both as far as substantive and procedural law are concerned, but also in the approach they take when dealing with making law, arguing about the application of law, and the terminology they use in these contexts. Anecdotal evidence suggests that there is a distinct difference of systemic self-perception, both as far as the roots of and the paradigms behind the development of legal

principles are concerned. There may thus be a deeper cultural rift between common and civil lawyers which goes beyond the typically highlighted codification debate.

### *Intellectual styles of argument*

One of those anecdotal pieces of evidence for a deeper cultural rift is the distinction between what one might call definitions based on the phenotype of a legal problem and the genotype, with the common law following the former, the civil law the latter. This is intricately linked to the role of procedure in arriving at a definition or in coining a legal concept, and the role intellectual thinking plays in a society overall. Procedural thinking is by its very nature pragmatic thinking: Criminal procedure is about real-life problems that await a real-life solution through a real-life process, not an academic dissection of concepts. Such pragmatism, however, also pervades the discussion about substantive law in the common law environment. This fashion of finding the law has a lot to do with the emphasis on lay participation in criminal proceedings, especially in the form of the juror as the sole fact-finder who pronounces on guilt and innocence after having been instructed and guided by the professional judge on the law. This makes it simply nonsensical and undesirable to develop intellectually sophisticated doctrinal structures which by their very purpose are unfit for the untrained layman and only make sense in an environment of legally trained professionals with their own code of conversation<sup>32</sup>. George Fletcher has made the connection between this procedural manner of reasoning and the terminology in Anglo-American law<sup>33</sup>.

Common law, *cum grano salis*, thus stresses the need for making sure the *procedural rules are complied with*, historically flowing from the task of the professional judge of *facilitating a reasonable decision by lay persons on questions of fact*; civil law, however, emphasises the *intellectual logic and coherence of the nature of the substantive law*, which is the very domain of the *professional judges*, who typically *decide on questions of fact and law*. The common law system – and here again we must naturally warn against generalisations – based on its original culture has thus only a limited interest in doctrinalisation, as opposed to abstract legal theory and philosophy of law. In other words, it has a tendency of neglecting

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<sup>32</sup> See Mirjan Damaska, *The Faces of Justice and State Authority* (1986), 28

<sup>33</sup> George Fletcher, *The Grammar of Criminal Law*, Vol. 1 (2007), 136 and 141.



the middle level between the lower rung of “mere” practice and the higher rung of totally abstract thinking about law. This middle level is what goes – among other things – in German terminology by the name of *Rechtswissenschaft*, a word often translated as “legal science” and almost invariably given a somewhat pejorative connotation<sup>34</sup>.

The author submits that there is no direct equivalent to this German concept, for example, in English law and the systems it spawned and which still closely adhere to it. In fact, as recently as 2012, a UK Supreme Court Justice, Lord Sumption, expressed the view that it was better for aspiring lawyers to read for a non-law degree rather than study law. He said verbatim:

"Appreciating how to fit legal principles to particular facts is a real skill. Understanding the social or business background to legal problems is essential. I'm not sure current law degrees train you for that, nor really are they designed to. "This is not a criticism of the course. It's simply a recognition of the fact that a command of reasoning skills, an ability to understand and use evidence, and broad literary culture are all tremendously valuable to any advocate. "If you don't have them you are going to find it difficult to practise. If you don't know any law that is not a problem; you can find out."<sup>35</sup>.

There are differences in degree, especially if one looks at United States legal academia, but in principle this is where a major difference seems to exist between common and civil law – which is not to say that the civil law does not know of differences in this respect, too: The “obsession” with doctrinal argument, if one wished to call it that, is almost equally high in the Spanish and Latin American countries, and to some extent in the Netherlands, Austria, Switzerland and Poland, for example, but not quite as ardently followed in France<sup>36</sup>.

All of this, in turn, has to do with general and culturally conditioned modes of thinking, especially among the intellectual elites. The sociologist Johan Galtung in a seminal 1981 essay<sup>37</sup> on intellectual styles in the British/American, German, French and Japanese traditions (which he calls Saxon, Teutonic, Gallic and Nipponic in order to avoid linking them to any one country in a given place and time in history and politics) created an overview of four

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<sup>34</sup> See Bartie, The lingering core of legal scholarship, (2010) *Legal Studies*, 345.

<sup>35</sup> See <http://www.telegraph.co.uk/news/uknews/law-and-order/9384619/The-best-lawyers-are-not-law-graduates-claims-judge.html#>.

<sup>36</sup> See Jung, *Recht und kulturelle Identität*, (2009) *ZStW* 467; and id., *Rechtsvergleich oder Kulturvergleich*, in Freund/Murmann et al (eds.) *Grundlagen und Dogmatik des gesamten Strafrechtssystems*, 2013, 1467 and earlier Saleilles, *Conception et objet de la science du droit comparé*, (1900) *Bulletin de la Société de Législation Comparée*, 383..

<sup>37</sup> Galtung, *Structure, culture and intellectual style: An essay comparing saxon, teutonic, gallic and nipponic approaches*, (1981) *Social Science Informations*, 817.

major intellectual styles (based on his own experience and not meant to be exhaustive) reproduced in Table 4 which would lend some support to the thesis expressed above:

(Insert Table 5 about here)

Table 5

A guide to intellectual styles

	Saxonic	Teutonic	Gallic	Nipponic
Paradigm analysis	Weak	Strong	Strong	Weak
Descriptions: proposition-production	Very strong	Weak	Weak	Strong
Explanations: theory-formation	Weak	Very strong	Very strong	Weak
Commentary on other intellectuals: <ul style="list-style-type: none"> <li>• Paradigms</li> <li>• Propositions</li> <li>• Theories</li> </ul>	Strong	Strong	Strong	Very strong

Source: Galtung, *ibid.*, 823.

Galtung argues in particular that the Saxonic style of argument is driven by discursive process and exchange of views with no attempt to establish what he calls “pyramids” of theoretical constructs which aim at establishing an ordered vision of “truth”, not infrequently to the exclusion of other views, something he says is the hallmark of the Teutonic intellectual style<sup>38</sup>. However, while the Teutonic style may possess a tendency to exclude thought-constructs of a different provenance, in his view (after all from 1981!) the Saxonic fact-driven style – which he characterises as “rich in documentation and very meagre in theory, rich in formal language and poor in elegance”<sup>39</sup> – is bolstered by the increased use of information technology and the reliance of present-day (inter-)governmental authorities on research which create massive data collections combined with joint research group efforts. Galtung particularly singles out the United Nations as susceptible to this way of research and argument<sup>40</sup>, not least based on the formal equality of the member states which in principle

<sup>38</sup> *Ibid.*, 828.

<sup>39</sup> *Ibid.*, 849.

<sup>40</sup> *Ibid.*, 848 – 849.

militates against mutually exclusive positions. The Saxon style and diplomatic comity thus go together much better than the latter and the Teutonic approach which is less interested in keeping things in the balance than in demonstrating the “substantive truth” and demanding obedience to the principles so found, regardless of whether that may mean having to best one or even all of the other parties to a debate and prove them “wrong”<sup>41</sup>. The common law in its own domestic context manages to sustain even highly controversial issues in a suspended balance of tension by giving public policy considerations precedence over any efforts at producing systemic coherence<sup>42</sup>. Galtung ventures into contemplating the question of whether there is a move towards the development of a global intellectual style, with the many differing styles “giving to the entire intellectual system a somewhat schizophrenic character”<sup>43</sup>. His prognosis? “What comes out of this in the long term remains to be seen; but it may be a saxonian Trojan horse”<sup>44</sup>. At least in this author’s view, Galtung might find himself very much at home with that attitude in the modern international criminal law environment.

Returning to what we said above about the distinction between the common law’s phenotypic approach and the genotypic stance of the civil law, in other words form vs. substance, let us look at an early post-war landmark decision of the German Federal Court of Justice on the as a counter-example to the procedure-driven terminology of the common law<sup>45</sup>. One of the central tenets of the German approach is the *Schuldprinzip*, i.e. the requirement of personal guilt and blameworthiness as the determining parameters for liability and punishment. Combined with the lack of acceptance of any reverse burdens of proof in procedural law, the first obvious consequence is that German law rejects any idea of strict liability. The *Schuldprinzip* was famously established by the judgment of the Great Senate of the *Bundesgerichtshof* (BGH), the Federal Court of Justice, of 18 March 1952. In this case, a defence counsel had taken on the case of a lady without first agreeing on a fee. He then approached his client on the morning of the trial and asked her to pay him 50 Deutsche Mark (DEM) or he would decline to represent her, and when she paid him on the next day, he used the same threat to make her sign a fee note of 400 DEM. He was convicted of an offence

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<sup>41</sup> Ibid., 827.

<sup>42</sup> See examples in LJIL,

<sup>43</sup> Ibid., 848

<sup>44</sup> Ibid.

<sup>45</sup> Modified excerpt from my Principles of German Criminal Law, Hart, 2009, 21 f, which also has the German original text.

under § 240, *Nötigung*, which is akin to blackmail, but applies to any act or omission, not just financial or property transactions, to which the victim is coerced by the defendant under the use of threats or physical force. Apparently, his line of defence was that he thought he was entitled to ask that sum of her and thus did not know that he was acting unlawfully or *rechtswidrig*. The trial court convicted him based on the traditional Roman-law-based approach coined previously by the *Reichsgericht*, that a mistake about the criminal law, as opposed to errors about civil law underlying an offence which it treated as a mistake of fact,<sup>46</sup> did not provide a defence. The term ‘*rechtswidrig*’ in § 240 was not seen as an element of the *actus reus*, but as an expression of the general requirement of unlawfulness. The law at the time did only provide for mistakes of fact. Under the *Reichsgericht*’s jurisprudence, the defendant had no defence. The question which the BGH asked itself was whether this approach was still correct and decided it was not. Its judgment contains the following classic passage,<sup>47</sup> which in its almost philosophical and in places rather convoluted diction typical of the time, is also a wonderful example of the cultural differences in the style of judicial reasoning:

“Punishment is premised on guilt. Guilt means blameworthiness. By finding a defendant guilty we blame him for not having acted lawfully, for having chosen to break the law, although he could have acted lawfully, could have chosen to abide by the law. The inner reason for the judgment of guilt lies in the fact that man’s nature is grounded in the freedom and responsibility of moral self-determination, and that he is therefore capable to decide for the law and against injustice, to model his actions on the norms of the legal commands and to avoid that which is forbidden by law, as soon as he has gained moral maturity and as long as the natural capacity of moral self-determination is not temporarily paralysed or permanently destroyed by the illnesses mentioned in § 51 StGB. The pre-condition for a free and responsible human choice for the law, based on moral self-determination, is the knowledge of the law and of the forbidden. He who knows that what he chooses to do in freedom is unlawful, acts blameworthy if he does so despite this insight. That knowledge may be lacking because the defendant is unable, based on the illnesses mentioned in § 51(1) StGB, to appreciate the unlawfulness of his actions. In such a case the lack of knowledge is the consequence of an unavoidable fate. He cannot be blamed for it and incurs no guilt. He lacks mental responsibility under the criminal law. The awareness of acting unlawfully may, in individual cases, also be absent in an otherwise mentally competent person, because he does not know or fully comprehend the law prohibiting his actions. In this case of a mistake of law, too, the defendant is not in a position to make a choice against what is forbidden. Yet, not every mistake of law excludes blameworthiness. Gaps in one’s knowledge can to a certain extent be remedied. Because of his capacity for free moral self-determination, man must at all times make the responsible choice to act according to the law, as a participant in the legal community, and to avoid the unlawful. He does not live up to this obligation if he only abstains from doing that which he clearly perceives as unlawful. On the contrary, he must make himself aware in all of his plans whether they comply with the principles of what is required by the law. Doubts must be eradicated through reflection or consultation. What is required is a diligent effort of conscience, the measure of which depends on the circumstances of the case in question and the personal and professional background of each individual. If, despite having duly so exerted his conscience, he could not recognise the unlawfulness of his actions, the error was insuperable, the crime unavoidable. In such a case he cannot be found blameworthy. If, however, the offender could have realised the unlawfulness of his actions, had he but

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<sup>46</sup> Incidentally much like English law, see *Smith* [1974] QB 354 (CA).

<sup>47</sup> BGHSt 2, 194 at 201 f (my translation).

duly exerted his conscience, the mistake of law will not exclude blameworthiness. Yet, depending on the degree to which the offender lacked the due diligence to exert his conscience, the degree of blame may be mitigated. Awareness of unlawfulness does, however, never require the knowledge of the fact that the action is punishable, nor the knowledge of the law that contains the prohibition. Moreover it is not sufficient that the offender is aware of the moral turpitude of his actions. Rather, he must recognise or be able to recognise with due diligence, the unlawfulness of his actions, not necessarily in the technical, juridical fashion, but in a general evaluation according to his intellectual abilities.”

There is a marked difference in approach to the personal(ised) judicial opinions in common law appellate courts which under the *stare decisis* rule by necessity often focus on a rehashing of the previous case law. The above excerpt could as such just as well have been taken from a German criminal law textbook. It uses abstract and theoretical language aimed at establishing sound general principles which later courts will be able to apply, and it is not attributed to any one judge<sup>48</sup> - not least because German law does not allow for separate or dissenting opinions below the level of the Federal Constitutional Court.

*Common law, public policy, aversion to (ex-ante) doctrinal systematisation and lack of systemic coherence*

Gustav Radbruch wrote in 1947 about the English approach to law-making in ‘*Der Geist des englischen Rechts*’ that the English were averse to building doctrinal structures ex-ante<sup>49</sup>. Radbruch pointed out that even where such codifications happen, they soon become overgrown with a layer of case law that quickly pushes the letter of the law aside as the prime source of reference.<sup>50</sup> It is, in this context, a telling experience from the author’s own teaching at the law school of a highly respected UK university with a very selective entry threshold for its undergraduate degree, that virtually all students will without fail immediately refer to case law even if there is a statute in point and they have a copy of it in the tutorial or exam; it is enormously difficult for most of them to grasp and get used to the process of subsuming facts to the elements of an offence, to apply that simple synallagmatic process consistently and to use the case law only to interpret the statutory elements – something with which German law students grow up from day one of their law studies and for the omission of which in an exam they will be docked serious points. Similar issues about logical

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<sup>48</sup> For further examples of German judicial style see my *Principles of German Criminal Procedure*, 2012, 290 ff.

<sup>49</sup> See fn. 4 above.

<sup>50</sup> *Ibid.*

coherence arose in the development of the so-called<sup>51</sup> partial defences to murder, loss of control and diminished responsibility<sup>52</sup>, with the very idea of having “defences” that only apply to murder and to no other offence being something alien to a German mind. The Sexual Offences Act 2003 re-introduced a different standard of belief which a defendant would have to comply with to raise mistake of fact only in the context of sexual offences, leaving a different standard for all others, i.e. the dichotomy of honest vs. reasonable belief<sup>53</sup>. The urban myth of the flexible common law and the inflexible codified law, the superiority of inductive vs. deductive law-making, the often farcical game of circumventing unwanted effects of the rule of *stare decisis* by distinguishing and re-interpretation are also part of the arsenal of the debate in this context<sup>54</sup>.

Because the law had to be used by lay persons as fact-finders, judges tried to remain as close as possible to ‘common sense’ when instructing them on the law, an attitude that had ramifications into the appellate case law and can even lead to the rejection of the appeal of logic. A particularly worrying recent example of a Supreme Court pandering to public opinion is the 2011 case of *R v. Gnango*<sup>55</sup>, which concerned an instance of gang violence. It was decided by the UK Supreme Court in a thinly – if at all – veiled application of public policy arguments over doctrinal concerns: A and B, members of two rival gangs, had engaged in a shootout in a public place during which C, a passer-by, was hit and killed. The bullet came from B’s gun, but only A could be arrested. There were doctrinal issues around joint criminal enterprise and transferred malice, and the Court of Appeal reversed A’s conviction for murder. The Supreme Court, however, was clearly uneasy with the idea of letting A go free on doctrinal technicalities and reinstated the conviction for murder, entailing a mandatory life sentence. The underlying public policy attitude aimed at curbing gang violence is best brought out in the separate opinion of Lord Brown:

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<sup>51</sup> They are in effect mere typified sentencing considerations, see my paper Transferred malice and transferred defenses: A critique of the traditional doctrine and arguments for a change in paradigm. (2010) *New Criminal Law Review*, 555.

<sup>52</sup> See overall Reed/Bohlander Loss of Control and Diminished Responsibility - Domestic, Comparative and International Perspectives, 2011 and more specifically my paper Battered Women and Failed Attempts to Kill the Abuser – Labelling and Doctrinal Inconsistency in English Homicide Law. (2011) *Journal of Criminal Law* 279.

<sup>53</sup> See my article Mistaken consent to sex, political correctness and correct policy. (2007) *Journal of Criminal Law* 71, 412.

<sup>54</sup> See Bohlander/Birkett at fn. 9 above.

<sup>55</sup> [2011] UKSC 59. – See the critique by Bob Sullivan, Accessories and Principals after *Gnango*, in Reed/Bohlander (eds.) Participation in Crime - Domestic and Comparative Perspectives, 2013, 25.

[T]o my mind the all-important consideration here is that both A and B were intentionally engaged in a potentially lethal unlawful gunfight ... in the course of which an innocent passerby [sic!] was killed. The general public would in my opinion be astonished and appalled if in those circumstances the law attached liability for the death only to the gunman who actually fired the fatal shot (which, indeed, it would not always be possible to determine). Is he alone to be regarded as guilty of the victim's murder? Is the other gunman really to be regarded as blameless and exonerated from all criminal liability for that killing? Does the decision of the Court of Appeal here, allowing A's appeal against his conviction for murder, really represent the law of the land? To my mind the answer to these questions is a plain "no". ...<sup>56</sup>

Another example of political meddling with doctrinal clarity is the campaign by the Tory Government in 2012/13 to amend the law of self-defence against burglars for homeowners and, on the face of it, to allow disproportionate force, as long as it was not grossly disproportionate – but only in that context. This campaign was carried to its successful conclusion with s. 43 of the Crime and Courts Act 2013<sup>57</sup>. A personal encounter of the author with the Law Commission's approach to solving doctrinal anomalies concerned a proposal to remedy two areas of doctrinal incoherence which could cause injustice to some – admittedly not many – defendants, namely that of transferred malice<sup>58</sup> and the Serious Crime Act 2007<sup>59</sup>, in the context of invitations issued to UK academics by the Commission to identify areas of reform for their 11<sup>th</sup> Programme of Law Reform. The proposal received a

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<sup>56</sup> Ibid., at paras 68 f.

<sup>57</sup> It reads in the relevant parts:

Use of force in self-defence at place of residence

(1) Section 76 of the Criminal Justice and Immigration Act 2008 (use of reasonable force for purposes of self-defence etc) is amended as follows. .

(2) Before subsection (6) (force not regarded as reasonable if it was disproportionate) insert— .

“(5A) In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.” .

(3) In subsection (6) at the beginning insert “In a case other than a householder case,”.

The remaining definitional clauses can be found at [www.legislation.gov.uk/ukpga/2013/22/section/43/enacted](http://www.legislation.gov.uk/ukpga/2013/22/section/43/enacted). A similar nod to householders' interests had already occurred in s. 148 of the Sentencing and Punishment of Offenders Act 2012. For a comment on the political pandering to the British householders involved in the campaign, see Simester/Sullivan et al., *Criminal Law – Theory and Doctrine*, 5<sup>th</sup> ed., 2013, at v and 789. Unlike the latter, who seem to see this as a mere re-statement of the previous law, I think that the standard has actually been lowered for burglary cases but they are right that we will have to wait and see what instructions trial judges will give to juries.

<sup>58</sup> See fn. 51 above and Bohlander, Problems of Transferred Malice in Multiple-Actor Scenarios, (2010) *Journal of Criminal Law*, 145.

<sup>59</sup> Bohlander, The Conflict between the Serious Crime Act 2007 and section 1(4)(b) Criminal Attempts Act 1981 – A missed repeal?, *Criminal Law Review* 6: 483-488 – but see for a UK comment Fortson, Inchoate Liability and the Part 2 Offences under the Serious Crime Act 2007, in Bohlander/Reed (eds.) at fn. 53 above, 2013, 173 at 200: “Bohlander's analysis is compelling but one answer, as a matter of criminal practice, is that there will rarely be cases where the issue [arises] at trial...”. Fortson then continues to say that despite the “compelling” analysis he does not think the existence of a conflicting section of the 2007 Act should have a bearing on whether the doctrinally irreconcilable Criminal Attempts Act 1981 provision “should be retained or not” – *ibid.*, at 201.

negative reply mainly based – understandably – on lack of resources, but also contained the following passage:

“Although we understand the problems you identify in the current law, we cannot identify sufficient potential benefits which would flow from reform. The issues you identify, while of academic interest, rarely if ever arise in practice and there is no evidence that they cause significant practical problems.”<sup>60</sup>

Apparently, the concept of prosecutorial discretion<sup>61</sup>, so often trotted out by policy-makers (and practitioners as well as judges) in England and Wales, is meant to take care of these rare cases<sup>62</sup>. Doctrinal concerns are considered harmless and “academic” unless there is material injustice or “unfairness” being done to the accused in the actual case, and if there is such a danger, the proceedings can be discontinued etc. However, this approach – from a Teutonic view in the sense described by Galtung – takes the second step before the first: One can only exercise discretion whether or not to prosecute if there actually is something which would be a basis for prosecution in the first place. Doctrine comes before procedure and any exercise of procedural discretion: Fairness in a legal as opposed to a moral environment is decided on the basis of existing doctrinal parameters, not as an autonomous concept detached from its frame of reference. Not surprisingly, the Law Commission has now abandoned the ambitious codification project from the 1980s – for a reform by a thousand deaths<sup>63</sup>.

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<sup>60</sup> Letter from the Law Commission to the author of 18 March 2011 – on file with the author.

<sup>61</sup> As stated in 1951 by former Attorney-General Shawcross: “It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution”. Prosecution should ensue “wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest”. - House of Commons Debates, vol. 483, 29 January 1951.

<sup>62</sup> Incidentally, some comments by the anonymous reviewer of this paper serve to highlight this general attitude yet again, when s/he writes: “The second aspect is that - after the interesting discussion of the languages and the intellectual styles of argument - the reader feels the need for some concrete examples taken from international criminal practice. While it seems instinctively right that “the most devastating effects of the ‘common law/civil law’ divide today occur in international criminal practice and may have a bearing on how acts by defendants are classified and treated under (the) law”, it would be useful to have a few examples where the use of one system over the other (or any confusion flowing from the interaction of different systems and cultures) actually sent an accused to jail undeservedly. The closest the author comes to this is in his cursory discussion of JCE and ICC practice on Article 25. Yet, none of the elements or jurisprudence cited in the article convinces the reader that the theoretical problems posed have actually created unfairness in any given case.” – Email from the journal editor of 17 February 2014, on file with the author. – It was not the aim of this paper to set out in detail instances where unfairness occurred, nor was there enough space to do so – notwithstanding the general stance adopted by the author (see the text above) that the doctrinal issue is a flaw in and of itself. However, if the reader indeed needs additional examples where unfairness could have been created in a slightly altered scenario, she is referred to my previous papers [The use of domestic sources as a basis for international criminal law principles](#), (2002) *The Global Community, Yearbook of International Law and Jurisprudence*, 3 (with Findlay) on the interpretation of the Rule 98bis procedure in *Jelusic*, and [Death of an Appellant – The termination of the appellate proceedings in the case of Rasim Delic at the ICTY](#). (2010) *Criminal Law Forum* 495, on the consequences of divergent understandings of the effects of the appellate procedure and the presumption of innocence..

<sup>63</sup> Bohlander/Birkett fn. 9 above.



**“We are the Borg. Resistance is futile.” – Galtung’s “saxonic Trojan horse” and systemic assimilation**

But all that is on the surface of the world. Underneath the styles will live on: the teutons will continue to be irritated when the gauls become too lyrical... and the gauls will continue to be bored by teutonic pedantry. Both of them will be grasping for perspectives and forms of understanding that will put some order into the untidy saxonic landscape of stubborn facts, and the saxons will get restless when the teutons and the gauls speed off into outer space, leaving a thin trail of data behind. Some of them will learn from the others what they do not master themselves, but by and large what is the virtue of one will continue to be the vice of the other. ... And that is all to the good: it would be dreadful if the entire human intellectual enterprise were to be guided by the same intellectual style.<sup>64</sup>

One wishes one could simply agree with the conclusion in Galtung’s quote above. It seems so culturally all-encompassing and multifaceted in its approach, despite the intriguing fact – if not outright give-away – that in his final analysis the nipponic style no longer appears as a factor in the comparison and all is reduced to juxtaposing the representatives of the major civil and common law systems. In a purely academic context that happy multicultural résumé may be apposite, yet the most devastating effects of the “common law/civil law” divide today occur in international criminal practice and may have a bearing on how acts by defendants are classified and treated under law, in an area where the exactitude of the principles still leaves very much to be desired, as the perennial struggle over the concept of participation in crime, to name but one example, has shown. One needs to remember that people can go to prison for very long periods based on such inexact systemic parameters. The invocations of the august spirit of progress within the process of shaping a new and *sui generis* system of law on the international level not infrequently come from people whose practical experience in criminal proceedings is limited. The litmus test would appear to lie in the answer to the question of whether any of the proponents of that new world order would wish to be adjudicated under a legal system in their own countries which was similarly lacking in contours. Given the notorious populist resistance of, for example, the UK against the ECtHR’s (and EU’s) intrusion into the domestic law<sup>65</sup> and practice and the similarly stark aversion of the US to the egalitarian demands of international law, one wonders whether some nations’ cultures of law do not take a more robust stance on these matters, to the detriment of an approach which could truly lead to a new development on the international

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<sup>64</sup> Galtung, *ibid.*, 849.

<sup>65</sup> See the references in my paper Retrospective reductions in the severity of substantive criminal law – The lex mitior principle and the impact of *Scoppola v Italy No. 2*, (2011) *Criminal Law Review*, 627 at 638 ff.

level. After all, why should lesser standards apply in the cases of the most serious crimes imaginable? It is not outlandish to think that even the ICC Statute might not pass constitutional muster in the jurisdictions of all the States Parties if it was to be used there as a basis for domestic criminal law and procedure. If the friction between the two major relevant legal systems is in part to blame for that, then reinforced efforts should be made to arrive at a well-defined system of substantive and procedural law that does justice to the needs of the international criminal justice system, both in terms of legal certainty, efficiency and protection of defence rights.

Whether the inductive, unprincipled common law approach and especially the adversarial model it brought with it are suitable for that endeavour is – certainly for this German author who has taught and written about English criminal law for almost a decade now – open to question. However, the international criminal law community currently still seems to be overwhelmingly speaking the language of the common law, not least, as we said, because it can much more easily form a kind of legal Esperanto with the spirit of flexibility, if not to say malleability, so prized in the international diplomatic community than, for example, the rigid, rule-bound, truth-seeking and theorising German(ic) approach. It also links much more easily with a system of judicial selection<sup>66</sup> that does not put the exclusive emphasis on solid criminal (judicial) trial experience and thus allows persons to populate the international bench who are used to the relaxed reflective ruminations of academia or to pragmatic political practices of diplomacy or government. They do not need to be in control of the proceedings and on top of the evidential material in a case because the system allows them to be presented with it by the parties, who are running the case, and to retreat into the role of a more or less watchful umpire. Nor do they need to be in full command of the law themselves, because they have their legal officers to rely on for research into the more intricate legal problems, with all the consequences that entails<sup>67</sup>. The author's first-hand observations in the international criminal justice environment have convinced him that in such a conversation the common law native speakers – using “native speaker” both literally and figuratively – trained in the cut and thrust of their own adversarial legal culture will almost always have the advantage over the former. With English at present being the main *lingua franca* there is a

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<sup>66</sup> See e.g. Bohlander, *Pride and Prejudice or Sense and Sensibility? A pragmatic proposal for the recruitment of judges at the ICC and other international criminal courts.* (2009) *New Criminal Law Review*, 529 and id., *No Country for Old Men? - Age limits for judges at international criminal tribunals.* (2010) *Indian Yearbook of International Law and Policy*, 327.

<sup>67</sup> Bohlander/Findlay (fn. 15 above).

danger that international criminal justice will continue to see itself through the eyes of that language of law and all the cultural luggage that comes with it. Academia in the civil law and other non-common law jurisdictions has an important role to play in ensuring that these two are progressively disconnected, not merely on the level of legal philosophy and theory, but on the level of practically useful and critical doctrinal debate. In essence, what is needed is an international criminal law *Rechtswissenschaft* that speaks English<sup>68</sup> but which is not bound by the conceptual and traditional limits of the historical English-speaking culture.

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<sup>68</sup> While still useful for a domestic debate, publications in languages other than English do not stand a serious chance of being noticed and cited on the international level. If authors from non-Anglophone countries want to influence the international discussion, they will have to use the common idiom.