EVIDENCE ILLEGALLY OBTAINED BY PRIVATE INVESTIGATORS AND ITS USE BEFORE INTERNATIONAL CRIMINAL TRIBUNALS

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This article examines the rationales to exclude evidence before International Criminal Tribunals that has been illegally obtained by private investigators. The appeal of private investigations has now reached the level of international criminal justice, with the establishment of the Commission for International Justice and Accountability. Investigative staff at the International Criminal Court and other International Criminal Tribunals are dependent on the work undertaken in the field by human rights monitors as fact finders, employed by IGOs, NGOs, and, in some cases, by governmental agencies. Considering the importance of private investigators for the administration of those Tribunals, potential dangers of such a cooperation easily take a backseat in a car that is driven by the anti-impunity agenda. Scenarios of investigators offering money to witnesses in return for information about a suspect and his or her criminal activities are a reality. While case law has addressed the topic of illegally obtained evidence by national authorities, the fate of evidence collected by private individuals in breach of human rights has rather been neglected. This article provides a conceptual basis for the exclusion or admission of this evidence.

Keywords: *international criminal law, private investigations, evidence, exclusionary rules*

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INTRODUCTION

Considering the importance of private investigators for the administration of International Criminal Tribunals (ICTs),[1] potential dangers of such a cooperation easily take a backseat in a car that is driven by the anti-impunity agenda. Prosecutors of both national courts and ICTs become taciturn when confronted with illegal behavior by their most important aids. At most, they refer to their supervision and the fact that all witness statements have to be repeated in front of them anyway, let alone that evidence collected by private investigators is merely used as lead evidence. Yet, once the cooperation between an ICT and private individuals[2] in the collection of evidence becomes public, which is often the case when something went wrong, reality speaks a different language: in the *Lubanga* case before the International Criminal Court (ICC), the suspicion arose that certain so-called intermediaries had bribed various persons to prepare false evidence for alleged former child soldiers.[3] In another instance, still in the same case, the Office of the Prosecutor (OTP) was supposed to use material only as lead evidence but did the opposite.[4] At the International Criminal Tribunal for the Former Yugoslavia (ICTY), in the case against Nikolić, the accused, living in what was then the Federal Republic of

1. Alexander Heinze, "Private International Criminal Investigations," *Zeitschrift für internationale Strafrechtsdogmatik* 14, no. 2 (2019): 169–81; Marina Aksenova, Morten Bergsmo, and Carsten Stahn, "Non-Criminal Justice Fact-Work in the Age of Accountability," in *Quality Control in Fact-Finding*, ed. Morten Bergsmo and Carsten Stahn (Brussels: Torkel Opsahl Academic EPublisher [TOAEP], 2nd ed. 2020), 9–12. For an instructive overview of the practicalities of NGO fact-finding, see Wolfang Kaleck and Carolijn Terwindt, "Non-Governmental Organisation Fact-Work: Not Only a Technical Problem," in *Quality Control in Fact-Finding*, 417 ff.

2. The term "individual" shall be preferred over "actor," since the focus of this article is on *private* conduct. The term "actors" will be used to describe agents acting for or on behalf of certain institutions and organizations. Individual actors—or individuals—have the ability to act reflexively, but in doing so "they are significantly constrained by the structures in which they operate"; Nerida Chazal, *The International Criminal Court and Global Social Control* (London: Routledge, 2016), 4.

3. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-T-146-Red-ENG, Transcript of Hearing on Mar. 13, 2009, 3 ll. 11–18; *Lubanga*, Case No. ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, ¶ 16 (May 31, 2010).

4. *Lubanga*, Case No. ICC-01/04–01/06-1401, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Art. 54(3)(e) Agreements, ¶ 93 (June 15, 2008).

Yugoslavia, "was taken forcibly and against his will and transported into the territory of Bosnia and Herzegovina [. . .] by unknown individuals having no connection with SFOR and/or the Tribunal."[5] In Bosnia and Herzegovina, Nikolić was then arrested and detained by the Stabilisation Force (SFOR), and delivered to the ICTY.[6]

This article is about these instances; it is about illegal conduct of private investigators; and it is ultimately about the proposal of a compass for private investigators. Concretely, let us suppose a private investigator offers money to a witness in return for information about a suspect or person of interest[7] and his or her criminal activities.[8] After all, it has become public that the OTP of the Special Court for Sierra Leone had an extensive practice of paying both informants and witnesses in return for information and statements.[9] The scenario is thus real and can be transferred to the private level. Or even more extreme: the investigator tortures that witness to get the desired information.

I. INVESTIGATORY CONTEXTS

It lies within the nature of international criminal proceedings that the roots of certain pieces of information can be traced back to other investigatory contexts. This investigatory context can be nonexistent: A private individual collects evidence that is then offered to an ICT. The evaluation of the context as "nonexistent" stems from the (albeit semantic, not necessarily conceptual) premise that an investigation is always conducted by State

5. Prosecutor v. Nikolić, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, ¶ 21 (October 9, 2002).

6. *Ibid*. For more examples, see Aksenova et al., *supra* note 1, at 9 ff.

7. Investigators, especially at UN investigative mechanisms, seem to prefer to use the weaker term of "person of interest" over "suspect" or "target of the investigation."

8. Other examples, convened by Robertson for the context of interviews: leading questions, "brainwashing" the witness, persuasion, the private investigator is a national of the State under investigation; see Geoffrey Robertson, "Human Rights Fact-Finding: Some Legal and Ethical Dilemmas," in *Quality Control in Fact-Finding*, ed. Morten Bergsmo and Carsten Stahn (Brussels: TOAEP, 2nd ed. 2020), 491–507.

9. In detail the eye-opening account of Wayne Jordash, *Insiders: The Special Court for Sierra Leone's Dirty Laundry* (April 30, 2020), https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/44201-insiders-the-special-court-for-sierra-leone-s-dirty-laundry.html.

authorities, whereas a private person could only conduct an "examination"[10] or make an "inquiry."[11]

Moreover, the context can also be a domestic investigation (evidence obtained legally under domestic law would be obtained illegally under the law of the ICT; entrapment by a law enforcement official of another jurisdiction)[12] or even an international investigation, where a third party working for an organ of the respective ICT (UN peacekeeping forces, for instance) obtains evidence through illegal means. For the purpose of this article, these contexts shall be labelled the *inter-investigatory context* (international investigation/domestic investigation); the *intra-investigatory context* (internal investigation by a private individual or another third actor); and the *extra-investigatory context* (collection of evidence by a private individual outside any ICT investigation). Spatial restrictions dictate a dietary approach to those contexts.

A. The Inter-Investigatory Context

The inter-investigatory context has been dealt with by ICTs in the past; national authorities obtained evidence in violation of the suspect's rights applicable before the Tribunals. In one instance, at the trial against Mucic, the defense contended that Austrian authorities denied the suspect Mucic the right to counsel and the right to remain silent, and induced him to

10. See Laura Christiane Nienaber, *Umfang, Grenzen und Verwertbarkeit compliance-basierter unternehmensinterner Ermittlungen* (Baden-Baden: Nomos, 2019), 47–48.

11. See Ulrich Eisenberg, *Beweisrecht der StPO—Spezialkommentar* (Munich: C.H. Beck, 10th ed. 2017), mn.395. De Vries provides a rather broad interpretation of the term "investigation" that seems to be based on the functional reading of decisions of regional human rights courts, albeit ignoring the procedural context of the decisions; see Barry de Vries, "Could International Fact-Finding Missions Possibly Render a Case Inadmissible for the ICC? Remarks on the Ongoing Attempts to Include International Criminal Law in Fact-finding," *Journal of Conflict and Security Law* 24 (2019): 605 ("capable of leading to the identification and punishment of those responsible"). For a definition of the term "fact-finding," albeit from an epistemological perspective and not from an institutional one, see Simon De Smet, "Justified Belief in the Unbelievable," in *Quality Control in Fact-Finding*, ed. Morten Bergsmo and Carsten Stahn (Brussels: TOAEP, 2nd ed. 2020), 83 ff. Several forms of fact-finding exercises are listed by Robertson, *supra* note 8, at 480–82.

12. Antony Duff et al., *The Trial on Trial—Towards a Normative Theory of the Criminal Trial* (Oxford: Hart, 2007), 3:242.

make a confession.[13] At that time, Austrian law did not provide for a right to counsel during questioning, which the ICTY evaluated as "not strange and not in violation of fundamental human rights or the European Convention on human rights."[14] The ICTY felt—unsurprisingly—it was not bound by the law of a different investigatory context.[15] It was in the discretion of the Chamber, though, whether it "may apply such rules."[16] As a result, the Trial Chamber held that the Austrian procedure was in breach of the right to counsel according to Article 18(3) of the ICTY Statute,[17] and therefore the statement before the police was inadmissible at trial.[18] A similar situation occurred before the International Criminal Tribunal for Rwanda (ICTR): On April 15, 1996, the authorities of Cameroon arrested and detained Barayagwiza and several other suspects on suspicion of having committed genocide and crimes against humanity in Rwanda in 1994.[19] Barayagwiza later argued that his pre-trial detention in Cameroon was excessive and that he was not promptly informed of the charges brought against him. He maintained that his otherwise lawful arrest was unlawful and constituted an obstacle to the Tribunal's personal jurisdiction on the basis of the "abuse of process doctrine."[20]

In the ICC Statute,[21] the inter-investigatory context was taken into account via Article 69(8): "When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law." The provision clarifies a rather simple insight:

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13. Prosecutor v. Delalic et al., Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, ¶ 8 (Sept. 2, 1997); see also the analysis in Kelly Pitcher, *Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings* (Berlin, Heidelberg: Asser Press, Springer, 2018), 289, and Rod Rastan, "Can the ICC function without state compliance," in *The Elgar Companion to the International Criminal Court*, ed. Margaret M. DeGuzman and Valerie Oosterveld (Cheltenham, UK, and Northampton, MA, US: Elgar 2020), 159 ff.

14. *Delalic et al.*, *supra* note 13, at ¶ 46.

15. *Ibid.*, at ¶ 49: "The Trial Chamber is not bound by national rules of evidence—Subrule 89(A)."

16. *Ibid.*

17. ICTY Statute, https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

18. *Ibid.*, at ¶ 52.

19. Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Decision, Introduction, ¶ 5 (Nov. 3, 1999), .

20. *Delalic et al.*, *supra* note 13, at ¶¶ 13 f.

21. ICC Statute, https://www.icc-cpi.int/Publications/Rome-Statute.pdf.

that the ICC is supposed to apply its own law when deciding upon the admissibility of evidence.[22] Article 69(8) is thus a concretization of Article 10: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."[23]

The inter-investigatory context at the ICC played a role in the case against Katanga and Ngudjolo: The Defense argued that one of Katanga's statements was taken in violation of his right to remain silent, "insofar as it is alleged that Mr Katanga was not informed of his right to have counsel present during the interrogation," and pointed out "that Mr Katanga had such a right under the Statute, under existing norms of internationally recognized human rights and under the Constitution" of the Democratic Republic of Congo (DRC).[24] As a result, the Defense claimed that "the admission of the *procès-verbal* would be antithetical to, and would seriously damage, the integrity of the proceedings."[25] Drawing on Article 69(7) that provides for a mandatory exclusion of evidence if it was obtained by means of human rights violations, the Chamber emphasized "that the provisions of the DRC Constitution cannot apply in the context of admissibility decisions," and that

> the violation has to impact on international, as opposed to national, standards on human rights. [...] Therefore, evidence obtained in breach of national procedural laws, even though those rules may implement national standards protecting human rights, does not automatically trigger the application of Article 69(7) of the Statute.[26]

The inter-investigatory context became also relevant at the ICC in the face of a stay of the proceedings after the suspect's/defendant's rights have been violated. In this article, I neglect this remedy for space reasons but addressed it elsewhere in detail.[27] To provide just one example: In the *L.*

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22. Pitcher, *supra* note 13, at 325.

23. More concretely, Alexander Heinze, "Article 10," in *Rome Statute of the International Criminal Court—A Commentary*, ed. Kai Ambos (Munich: C.H. Beck / Hart, 4th ed. 2021), mn.16.

24. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-2635, Decision on the Prosecutor's Bar Table Motions, ¶ 55 (fn. omitted) (Dec. 17, 2010).

25. *Ibid.*, at ¶ 56 (fn. omitted).

26. *Ibid.*, at ¶ 58 (fn. omitted).

27. Alexander Heinze, "Private International Criminal Investigations and Integrity," in *Integrity in International Justice*, ed. Morten Bergsmo and Viviane Dittrich (Brussels: TOAEP, 2020), 721 ff.

Gbagbo case, Pre-Trial Chamber I found that the violation of the rights of the defendant during his detention in the state and prior to his transfer to the ICC has an impact on the trial (with the result that a stay may be imposed) only insofar as the violation can be attributed to the Court.[28] This attribution is implied in both the inter- and intra-investigatory context, i.e., where "the act of violation of fundamental rights is: (i) either directly perpetrated by persons associated with the Court; or (ii) perpetrated by third persons in collusion with the Court."[29] By contrast, in the extra-investigatory context, namely "where no such link with the Court" has been established, the Pre-Trial Chamber's mere focus on the person or party that causes the violation leads to an "unavailability" of the remedy.[30] This finding, recently confirmed by Trial Chamber X in *Al Hassan*,[31] cannot be overstated: That "staying the proceedings is not available" makes this remedy *formally* dependent on the person causing the violation and leaves no discretion for the Chamber to stay the proceedings based on a contextual effect the violation may have on a later trial.

B. The Intra-Investigatory and Extra-Investigatory Context

Evidence collected by private individuals that enters a trial before ICTs may occur both in the intra-investigatory and extra-investigatory context. In the former, there is an attribution of the private individual to an organ of the ICT (usually the OTP). That may occur rather openly through a utilization of the individual in the collection process, that is, *ab initio*, or through an *ex post* attribution, when the individual acted in the interest of the organ.[32] In the latter, the person acts independently of an ICT organ

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28. *L. Gbagbo*, Case No. ICC-02/11-01/11-212, Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of Articles 12(3), 19(2), 21(3), 55, and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)," ¶ 92 (Aug. 15, 2012).

29. *L. Gbagbo*, *supra* note 28, ¶ 92.

30. *Ibid.*

31. *Al Hassan*, Case No. ICC-01/12-01/18-1009-Red, Public redacted version of "Decision on the Defence request to terminate the proceedings and related requests," ¶ 57 (Aug. 27, 2020). A public redacted version was filed on October 29, 2020.

32. German scholars want to apply exclusionary rules when the private investigation was initiated by a state organ; see Martina Matula, *Private Ermittlungen* (Hamburg: Kovac, 2012), 101 with further references.

and outside an investigation. The extra-investigatory context is of particular relevance for the purpose of this article.[33]

1. Procedural Rules and the Extra-Investigatory Context

The particularity of this context lies in the lack of an investigatory context and the ensuing lack of rules that regulate the collection of evidence in such a context. But let us pause for moment here. The lack of investigatory rules in an extra-investigatory context is not as clear as it seems on its face: First, because legislators may decide to regulate private conduct in an extra-investigatory context.[34] Second, because the inapplicability of procedural rules to private conduct requires an explanation. It goes to nothing less than the question whom procedural rules are addressed to. The source of exclusionary rules can be constitutions, codes, or case law, and in the words of Thaman and Brodowski, "can be formulated in absolute terms, strictly requiring the exclusion of any evidence gathered in violation of 'the law' or of certain constitutional or fundamental rights, or can be formulated so as to allow judges discretion in deciding whether to admit or exclude illegally gathered evidence."[35] Take, for instance, § 136a(3) cl. 2 of the German Code of Criminal Procedure (Strafprozessordnung, StPO),[36] barring the use of evidence obtained through prohibited methods of examination (such as "physical interference, administration of drugs, torment, deception or hypnosis").

Already in 1952 the German Higher Regional Court (Oberlandesgericht, OLG) Oldenburg decided that § 136a StPO only addresses State organs.[37] This is also the prevailing view in German legal literature.[38] Illegally

33. About the intra-investigatory context: Peter Duff, "Admissibility of Improperly Obtained Physical Evidence in the Scottish Criminal Trial: The Search for Principle," *Edinburgh Law Review* 8 (2004): 163–64, with case examples from Scotland.

34. Heinze, *supra* note 1, at 181.

35. Stephen C. Thaman and Dominik Brodowski, "Exclusion or Non-Use of Illegally Gathered Evidence in the Criminal Process: Focus on Common Law and German Approaches," in *Core Concepts in Criminal Law and Justice*, ed. Kai Ambos et al. (Cambridge: Cambridge University Press, 2020), 1:437 (fn. omitted).

36. German Code of Criminal Procedure in the official translation by Brian Duffett et al., https://www.gesetze-im-internet.de/englisch_stpo/index.html.

37. Higher Regional Court (*Oberlandesgericht* [OLG]) Oldenburg, *Neue Juristische Wochenschrift* (*NJW*) (1953): 1237; Matula, *supra* note 32, at 97.

38. Rainer Gundlach, "§ 136a StPO," in *Kommentar zur Strafprozessordung—Reihe Alternativkommentare*, ed. Rudolf Wassermann (Neuwied: Luchterhand, 1992), 2: mn.13; Matula, *supra* note 32, at 100 with further references; Werner Leitner,

obtained evidence by private individuals can generally be admitted and is not automatically excluded.[39] The German Federal Court of Justice (Bundesgerichtshof, BGH) confirmed this view.[40] Once a private individual obtains evidence and hands it over to a State agency, the Federal Court of Justice sees no reason to exclude that evidence.[41] The BGH justifies this with a reference to the search for truth.[42] It does not even suggest that the illegally obtained evidence may be treated with caution or may have a lower probative value, as the OLG Oldenburg did.[43]

The question of whom procedural rules addressed to is crucial. If addressed merely to State organs,[44] the exclusion of illegally obtained evidence by private individuals is harder to justify than if the rules were addressed to both State organs and individuals.

2. Addressees of Procedural Rules

The question of whom a legal text is addressed to is first and foremost a question of definition. Strictly speaking, the drafters of the text determine its addressees. Yet, laws are rarely very informative when it comes to the addressees. In fact, they are rather vague. Thus, it is left to the addressees themselves to determine whether they are in fact addressed by a law. Unsurprisingly, attempts to determine the addressee of a law in general terms remain controversial: from the "interested lay person,"[45] to the person affected by the law (probably the broadest category of addressees),[46]

"Unternehmensinterne Ermittlungen im Konzern," in *Festschrift für Wolf Schiller: zum 65 Geburtstag am 12 Januar 2014*, ed. Klaus Lüderssen et al. (Baden-Baden: Nomos, 2014), 432.

39. Matula, *supra* note 32, at 97.

40. German Federal Court of Justice, Decisions in Criminal Matters (*Bundesgerichtshof, Entscheidungen in Strafsachen* [BGHSt]), 27: 357; *id.*, 34: 52; Matula, *supra* note 32, at 97.

41. BGH, *NJW* (1989): 843, at 844; Matula, *supra* note 32, at 97.

42. BGH, *supra* note 41, at 845.

43. OLG Oldenburg, *supra* note 37, at 1237; also OLG Celle, *NJW* (1985): 641.

44. In this vein, albeit without any attempt to provide proof for this premise: Rafael Braga da Silva, "Sherlock at the ICC? Regulating Third-Party Investigations of International Crimes in the Rome Statute Legal Framework," *Journal of International Criminal Justice* 18 (2020): 64.

45. Uwe Krüger, *Der Adressat des Gesetzgebers* (Berlin: Duncker & Humblot, 1969).

46. Peter Noll, *Gesetzgebungslehre* (Reinbek bei Hamburg: Rowohlt, 1973), 172 ff.

to those who potentially "use" the law, that is, the decision makers,[47] the arguments are manifold. It thus seems more like a claim than a justified argument that an exclusionary rule (such as § 136a StPO) is directed at State organs. Behind the question of whom exclusionary rules are addressed to looms the larger question of what procedural rules are (compared to rules of substantive criminal law). Space restrictions pose limits to an in-depth elaboration of this point.

a. The Relationship Between Procedural and Substantive Law. The traditional separation between substantive and procedural law (and the ensuing question of whom they are addressed to) is particularly fruitless in the face of exclusionary rules. Malcai and Levine-Schnur made this point very well: "The court's decision on a procedural question may be necessary as a logical requirement for the adjudication of the substantive issue. For example, it will never be the case that a court will announce the verdict first and then rule on the (in)admissibility of evidence on which the verdict relies."[48] This is an argument Schreiber already made in 1968: Procedural rules, especially rules of evidence, have a considerable impact on the substantive issue of punishment.[49] And yet, inadmissibility due to a violation of a person's rights might still be ignored when it is morally justified not to acquit the defendant.[50] This touches upon the balancing exercise so many courts in the world conduct between the severity of the rights violation and the alleged crime with which the accused is charged.[51] Malcai and Levine-Schnur call this the "*ex-post* and *ex-ante* perspectives" of "substance-procedure dilemmas," which in the case of exclusionary rules (they do provide illuminating other examples) is "creating significant incentives to avoid the violation of rights without making the substantive outcome of trial strictly

47. Eberhard Baden, *Gesetzgebung und Gesetzesanwendung im Kommunikationsprozeß* (Baden-Baden: Nomos, 1977), 69.

48. Ofer Malcai and Ronit Levine-Schnur, "When Procedure Takes Priority: A Theoretical Evaluation of the Contemporary Trends in Criminal Procedure and Evidence Law," *Canadian Journal of Law and Jurisprudence* 30 (2017): 194.

49. Hans-Ludwig Schreiber, "Die Zulässigkeit der rückwirkenden Verlängerung von Verjährungsfristen früher begangener Delikte," *Zeitschrift für die gesamte Strafrechtswissenschaft* 80 (1968): 366; see also Klaus Volk, *Prozeßvoraussetzungen im Strafrecht* (Ebelsbach: Verlag Rolf Gremer, 1978), 56.

50. Malcai and Levine-Schnur, *supra* note 48, at 201.

51. Liz Campbell et al., *The Criminal Process* (Oxford: Oxford University Press, 5th ed. 2019), 42 ff.

conditional on the legality or constitutionality of the (probative) evidence."

German courts have addressed this dilemma by embracing it and drawing (or at least attempting to draw) a clear line between procedure and substance: The main reason for a rejection of any exclusionary rule in the case of private acts is a plain reference to the fact that private individuals who act illegally against other persons commit crimes.[52] Thus, there would be no need for other means of sanctions. This argument, however, cannot be transferred to the situation at hand (private individuals, non-official investigation, international context) because: First, the international or transnational context makes an identification of the respective criminal offense considerably difficult. Second, and more importantly, what this view lays bare is the premise—probably influenced by German *Dogmatik*[53]—of a clear distinction between substantive and procedural law.[54] In reality, the argument goes like this: We have a sanction from substantive law, why apply a procedural one? This distinction, however, is not only domestically controversial, but even more controversial on an international level.[55]

b. Exclusionary Rules: Conduct Rules, Decision Rules, or Both? A conceptual visualization of these dilemmas is provided by Meir Dan-Cohen's

52. Matula, *supra* note 32, at 150 with further references.

53. The contours of *Rechtsdogmatik* are soft and its definition is thus controversial. The objective of *Rechtsdogmatik* is to build a bridge between the law and its application through a complex, manageable, and transparent concretization of the law, e.g., by creating definitions and abstractions; see Walter Kargl, *Strafrecht* (Baden-Baden: Nomos, 2019), 315 ("Die Rechtsdogmatik sichert das Gesetzlichkeitsprinzip dadurch, dass sie die Kluft zwischen Gesetz und Gesetzesanwendung durch komplexe, aber handhabbare und durchsichtige Konkretisierungen der Gesetze—z.B. durch Definitionen sowie durch Verallgemeinerungen der Fälle—überbrückt." [footnotes omitted]); from a comparative perspective, Hein Kötz, "Rechtsvergleichung und Rechtsdogmatik," *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 54 (1990): 204 ff. Put differently, the goals of *Rechtsdogmatik* are systematization, coherence, and consistency; see Chien-Liang Lee, "Die Bedeutung der Rechtsdogmatik für die Rechtsvergleichung," in *Rechtsvergleichung—Sprache—Rechtsdogmatik*, ed. Frank Schorkopf and Christian Starck (Baden-Baden: Nomos, 2019), 21.

54. In that vein, see Theodor Kleinknecht, "Die Beweisverbote im Strafprozeß," *NJW* (1966): 1542.

55. In more detail Heinze, *infra* note 73, at 947 ff.

(albeit controversial)[56] distinction between "decision rules" *vis-à-vis* "conduct rules." Drawing on previous dichotomies (or, less strictly, distinctions) as outlined above, for Dan-Cohen there are laws addressed to the general public—the citizens—that are designed to shape people's behavior (conduct control) and laws that are addressed to officials that provide guidelines for their decisions. The former is done both by instructing the public about the required conduct and by issuing threats to secure compliance. The latter are made "with respect" to members of the general public. They are designed to authorize, constrain, or otherwise guide officials in the wielding of the State's power ("power control"). Dan-Cohen emphasizes that "communicating to legally trained officials suggests a different style than communicating to the legally untutored general public." Thus, the guidelines "may be enhanced by the use of a technical, esoteric terminology that is incomprehensible to the public at large."

Taking these characteristics of decision rules together, on its face, rules of procedure and evidence fall into the category of decision rules, "on the grounds that they concern the basis for the legal conduct of trials as interpreted by judges and lawyers."[57] If this were the case, procedural rules would not be addressed to private individuals. Yet, this general observation might be ill-suited for exclusionary rules, since those do regulate a conduct. It is thus the question whether exclusionary rules are addressed to public officials, regardless of their conduct regulation—in which case they are decisions rules; or whether they regulate a conduct, regardless of their nature as procedural rules that generally addresses public officials—in which case they are conduct rules. To be fair, upon application of Dan-Cohen's theoretical model, the characteristics of exclusionary rules overwhelmingly seem to point in the direction of decision rules. Yet, Dan-Cohen himself admits that his dichotomy is theoretical and unfolds in a more nuanced fashion in the "real world." Thus, the question of whether exclusionary rules are conduct rules or decision rules might not have a clear answer after all. As Dan-Cohen puts it: "Any given rule may be

56. See the critical comments of Kyron Huigens, Samuel W. Buell, Anne M. Coughlin, Luís Duarte d'Almeida, Adil Ahmad Hague, Eric J. Miller, and Malcolm Thorburn, *Criminal Law Conversations*, ed. Paul H. Robinson et al. (Oxford: Oxford University Press, 2009), 12 ff.

57. A. Duff et al., *supra* note 12, at 276.

a conduct rule, a decision rule, or both. The mere linguistic form in which a legal rule is cast does not determine the category to which it belongs."[58]

A central element for the differing appearance of both conduct rules and decision rules is what Dan-Cohen calls "acoustic separation," which—at least theoretically—"ensures that conduct rules cannot, as such, affect decisions; similarly, decision rules cannot, as such, influence conduct."[59] This is different in the real world: "Here, officials are aware of the system's conduct rules and may take them into account in making decisions, and individuals may consider decision rules in shaping their conduct. Real-world decision rules are accordingly likely to have conduct side effects, and real-world conduct rules are likely to have decisional side effects."[60] This is true for (real world) exclusionary rules: they are addressed to the courts as guidelines for decision making and to the person conducting (for instance) the interview to prescribe a certain behavior. Still, whether this person must be a public official still remains unanswered. Applying Dan-Cohen's model, Malcei and Levine-Schnur decide affirmatively.[61] Yet, to follow from the design of a rule (technical, power control, and so on) and the relationship among rules (acoustic separation) to an addressee seems to put the cart before the horse. It is presumably also not what Dan-Cohen envisaged. In fact, he himself acknowledged the difficulty to apply his model in reality (or in "the real world," as he expressed it).[62]

This is especially true at the international level. As illustrated elsewhere,[63] though applying the law, a procedural question before the ICC can be decided differently by different Chambers. The reason for this phenomenon is that the drafters of the ICC Statute relied on the "constructive ambiguity" of legal texts.[64]

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58. Meir Dan-Cohen, "Decision Rules and Conduct Rules—On Acoustic Separation in Criminal Law," in *Criminal Law Conversations*, ed. Paul H. Robinson et al. (Oxford: Oxford University Press, 2009), 4.

59. *Ibid*.

60. *Ibid*.

61. Malcai and Levine-Schnur, *supra* note 48, at 201 (with fn.55).

62. Dan-Cohen, *supra* note 58, at 634–35.

63. Alexander Heinze, *International Criminal Procedure and Disclosure* (Berlin: Duncker & Humblot, 2014), 34 ff.

64. Christoph Safferling, *International Criminal Procedure* (Oxford: Oxford University Press, 2012), 112.

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

> does not imply, however, that such rules need not be comprehensible to citizens; indeed, the comprehensibility of the proceedings is still a precondition of a just public trial. If the trial is to address citizens in legal and moral terms which they can understand, the rules for courts must also be rules for citizens, in that they must be articulated in a way that connects appropriately with the ethical language of participants in the trial.[65]

Methodically, Duff *et al*. evade a by-effect of the application of Dan-Cohen's models: to miss the forest for the trees. It is tempting to dive into the theoretical characteristics of decision rules and conduct rules, thereby easily losing sight of what procedural law is really about: a process and a trial, respectively. The question of *whom* procedural rules are addressed to can therefore not be answered without the question of *what* procedural rules are addressed to. It is unconvincing to rely on a principle according to which "the legal process should signify its insistence that those who enforce the law should also obey the law."[66] The *argumentum e contrario* that those who do *not* enforce the law are *not* obliged to obey the law demonstrates the fallacy of the principle and calls for a holistic view to the addressee issue.

c. The Holistic View: The Criminal Process as a System. This holistic view to the addressee issue has roots in Luhmann's systems theory. The theory has a threefold effect on the addressee issue. First: Procedural law does not just delineate a bipolar relationship between the law and its addressees, but is a system. The late Luhmann especially promoted the idea of sociological systems, where communication is a central feature.[67] Luhmann relied on

65. A. Duff et al., *supra* note 12, at 276.

66. Per Lord Griffiths in UK HL, R v. Horseferry Road Magistrates Court, ex parte Bennett, Case No. 1 AC 42 (1994); Andrew Ashworth, "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice," in *Criminal Law Theory: Doctrines of the General Part*, ed. Stephen Shute and Andrew P. Simester (Oxford: Oxford University Press, 2002), 318.

67. Niklas Luhmann, *Einführung in die Systemtheorie*, ed. Dirk Baecker (Heidelberg: Carl-Auer, 4th ed. 2008), 100 ff.; Richard Nobles and David Schiff, "Taking the Complexity of Complex Systems Seriously," *The Modern Law Review* 83 (2020), 662.

theories of systems, as they had been developed within biology and cybernetics. Law, within this theory, is one of society's subsystems.[68] Teubner has taken this further, drawing on Luhmann's version of systems theory—autopoietic systems theory—to observe a wide range of linked legal or potentially legal issues such as juridification, pluralism, transnational law, justice, and the role of law in inter-social subsystem conflict, among others.[69] Applying Luhmann's systems theory, laws are not addressed so much to individuals but to closed systems—systems that cannot be influenced but merely motivated by external factors.[70] According to Luhmann, "the social system consists of meaningful communications—only of communications, and of all communications,"[71] and "the legal system, too, consists only of communicative actions which engender legal consequences."[72] Understood this way, the addressees of exclusionary rules are not so much either public officials or private citizens or both, but everyone who factually conducts an investigation.

Second: The procedural, investigatory context is the closed system. At the same time, the criminal process is part of the (broader) criminal justice system.[73] Luhmann also admitted that there are communications that transgress a closed system.[74] Hamel has taken this point further and demonstrated that the judgment as a form of speech act is the autopoietic operation of the criminal justice system that—through its effects, especially

68. Luhmann, *supra* note 67, at 100 ff.; Dietmar Braun, "Rationalisierungskonzepte in der Systemtheorie Niklas Luhmanns und in der Handlungstheorie Hartmut Essers: Ein Theorienvergleich," in *Integrative Sozialtheorie?*, ed. Rainer Greshoff and Uwe Schimank (Wiesbaden: VS Verlag, 2006), 377 (with fn.13).

69. See, for example, Gunther Teubner, "Altera pars audiatur: Law in the Collision of Discourses," in *Law, Society and Economy*, ed. Richard Rawlings (Oxford: Oxford University Press [Clarendon Press], 1997), chap. 7.

70. Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt a.M.: Suhrkamp, 1993/1997), 43; Theresa F. Schweiger, *Prozedurales Strafrecht: Zur Bedeutung von Verfahren und Form im Strafrecht* (Baden-Baden: Nomos, 2018), 113.

71. Gunther Teubner, "Evolution of Autopoietic Law," in *Autopoietic Law: a New Approach to Law and Society*, ed. Gunther Teubner (Berlin, New York: Walter de Gruyter, 1988), 17.

72. *Ibid.*, at 18; Mark van Hoecke, *Law as Communication* (Oxford, Portland: Hart, 2012), 117.

73. Campbell et al., *supra* note 51, at 2, 11–12; Heinze, *supra* note 63, at 114 ff.; Alexander Heinze, "Bridge over Troubled Water—A Semantic Approach to Purposes and Goals in International Criminal Justice," *International Criminal Law Review* 18 (2018): 937.

74. Luhmann, *supra* note 70, at 34.

the *res iudicata*—communicates to society and thereby transgresses the closed system.[75] This is nothing less than the connection between a judgment of a criminal court and the expressive or communicative effects of punishment. Concretely, a judgment that is based on illegally obtained evidence and therefore has a questionable moral authority might also have an effect on the expressive function of punishment. We will get back to this a little later, since this connection becomes vital in international criminal law.

Third: When considering the procedural system and the investigatory process as a closed system,[76] where everyone is addressed by the relevant rules, the next step would be to determine the parameters of such a system. Drawing on a detailed analysis elsewhere, not only with regard to national systems of criminal procedure[77] but especially with a view to international criminal procedure, some brief remarks shall suffice: The relevant attempts to model a procedural system can generally be divided into descriptive and normative models, although not all of them fit into this distinction, and many of them seem to encompass both a rather descriptive or a rather normative take.[78] The most prominent example of the former category is Packer's Crime Control and Due Process Models. Packer's bifurcated approach focuses, on the one hand, on the efficient suppression of crime and, on the other, on fair trial rights and the concept of limited governmental power.[79] Thus, while under "crime control" speed, efficiency, and finality are the overriding values, and any rule or measure compromising such values is deemed inappropriate;[80] "due process" aims at the protection of the "most disadvantaged" and thus demands equal treatment regardless

75. Roman Hamel, *Strafen als Sprechakt* (Berlin: Duncker & Humblot, 2009), 81–82.

76. About procedural law (more concretely, evidence law) as a system, see Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford: Oxford University Press, 2nd ed 2010), chap. 1 and p. 188.

77. Heinze, *supra* note 63, at 92 ff.

78. In more detail, see *ibid*., at 133 ff.

79. Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford, CA, and Oxford: Stanford University Press/Oxford University Press, 1969), 149–53; see also the accounts of Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford: Oxford University Press, 2016), 9–10; Katja Šugman Stubbs, "An Increasingly Blurred Division between Criminal and Administrative Law," in *Visions of Justice—Liber Amicorum Mirjan Damaška*, ed. Bruce Ackerman, Kai Ambos, and Hrvoje Sikirić (Berlin: Duncker & Humblot, 2016) 351–70, 353; Campbell *et al.*, *supra* note 51, at 39 ff.

80. Heinze, *supra* note 63, at 134.

of wealth or social status.[81] Under Packer's Crime Control Model, the authority of the criminal justice system is derived from the laws passed by legislatures, whereas under his Due Process Model, authority is derived from the Supreme Court.

It would be within the spirit of Packer's Crime Control Model to admit illegally obtained evidence by private individuals and not apply exclusionary rules. In fact, the model would even admit illegally obtained evidence by public officials.[82] Moreover, according to this model illegally seized evidence should be admissible at trial, too.[83]

The Due Process Model, by contrast, is not concerned with "factual guilt" but with "legal guilt."[84] It aims at the protection of the "most disadvantaged" and thus demands equal treatment regardless of wealth or social status,[85] places much less emphasis on efficiency and guilty pleas than the Crime Control Model, and strives to avoid police abuses.[86] Procedural rights like the right to remain silent and the right to contact counsel are seen as most important.[87] Unlike the Crime Control Model, the Due Process Model does not allow separate civil, disciplinary, or criminal actions in cases of prosecutorial or police abuses.[88] Therefore, the model provides for "prophylactic and deterrent"[89] exclusionary rules because much police abuse will never reach the stage of a criminal trial.[90] Guilty pleas are not encouraged;[91] the criminal trial—conceivably based on Luhmann[92]—has an intrinsic value and is detached from substantive

81. See Packer, *supra* note 79, at 168.

82. *Ibid*., at 167–68.

83. *Ibid*., at 199.

84. Packer, *supra* note 79, at 167.

85. *Ibid*., at 168.

86. *Ibid*., at 180.

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

88. *Ibid*., at 180; about disciplinary sanctions with respect to disclosure failures, see Heinze, *supra* note 63, at 421 ff.

89. *Ibid*., at 168.

90. *Ibid*., at 180.

91. *Ibid*.

92. Niklas Luhmann, *Legitimation durch Verfahren* (Frankfurt a.M.: Suhrkamp, 1983), 30–31; see also Gerson Trüg, "Die Position des Opfers im Völkerstrafverfahren vor dem

law.[93] The Luhmannesque notion of a trial (and of proceedings) renders it possible that within the confines of the Due Process Model, exclusionary rules also apply when evidence was illegally obtained by private individuals.

C. Intermediate Conclusion

There are different investigatory contexts when private individuals collect evidence that eventually may be used before an ICT: the inter-investigatory context (international investigation/domestic investigation), the intra-investigatory context (internal investigation by a private individual), and the extra-investigatory context (collection of evidence by a private individual outside any investigation). The question has been raised whether the procedural regime, especially exclusionary rules, may be applicable in each context. The inter-investigatory context turned out to be the least problematic. In the intra-investigatory context, there is an attribution of the private individual to an organ of the ICT (usually the OTP) that may occur rather openly through a utilization of the individual in the collection process, that is, *ab initio*, or through an *ex post* attribution, when the individual acted in the interest of the organ. In the latter, a person acts independently of an ICT organ and outside an investigation. It is the extra-investigatory context that is the neuralgic point of exclusionary rules applied before ICTs. This section was merely concerned with the admittedly rather simple question of whether exclusionary rules apply in this setting. As demonstrated, the allegedly simple question unfolded into an analysis that entered the depth of procedural law theory. Through norm-theory (Dan-Cohen) and systems theory (Luhmann and Teubner), combined with procedural theory (Packer), a wide-ranging controversy about the addressees of procedural rules has been laid bare. In conclusion, a bipolar legislator-addressee relationship is fruitless. Instead, the addressee of procedural law is the process as a system. Rules apply to everyone within that system—and might even apply beyond that system through transgressive communication (just as the judgment communicates not only with the accused and victim but with society as a whole). Even when we divide the procedural law into Crime Control and Due Process functions, with the

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IStGH—Ein Beitrag zu einer opferbezogenen verfahrenstheoretischen Bestandsaufnahme," *Zeitschrift für die gesamte Strafrechtswissenschaft* 125 (2013): 78.

93. See Packer, *supra* note 79, at 217.

former being addressed to the police and prosecution, the latter applies to everyone who is involved in the investigatory process when this involvement eventually has an effect on Due Process. Understood this way, the exclusionary rules also apply to private conduct.

II. RATIONALES FOR THE EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE BEFORE ICTS IN THE FACE OF PRIVATE CONDUCT

Due to the controversy around the application of exclusionary rules to the extra-investigatory context, the rationales for exclusionary rules again become the focus of attention—on its face because of the theoretical gap the controversy leaves with a view to the application of exclusionary rules.

A. The Deterrence Theory within the Extra-Investigatory Context

The deterrence theory assigns to exclusionary rules a deterrent effect on future behavior of the person collecting evidence.[94] Apart from the theoretical doubts that are voiced as to the justification of such a deterrence theory,[95] it is even more questionable whether this theory may have any effect in the extra-investigatory context. Before going into the four arguments against the utility of the deterrence theory in the extra-investigatory context, however, one popular argument must be refuted *ab initio*: "If the exclusionary discretion is based on a disciplinary rationale, there is no reason for not admitting this evidence [that is, evidence a civilian obtained]. The authorities have done nothing wrong and the public interest in admitting the evidence may be very great."[96] The remark that "authorities have done nothing wrong" in cases when private individuals illegally obtained evidence somehow insinuates that exclusionary rules are exclusively addressed to those authorities. Any such argument carries the requirement to elaborate on the addressee question of procedural rules. It has been demonstrated in detail why exclusionary rules do in fact apply in an extra-investigatory context.

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94. In more detail, see Heinze, *supra* note 27, at 649 ff.
95. *Ibid*.
96. P. Duff, *supra* note 33, at 162.

More convincing arguments to question the utility of the deterrence rationale within an extra-investigatory context are these: First, even in the case of police conduct, it was remarked that there are other ways to "police the police," such as disciplinary proceedings or criminal prosecution of law enforcement officials.[97] When private individuals act, the criminal prosecution option becomes even more relevant, as is one of the prevailing objections against exclusionary rules in an extra-investigatory context in Germany. However, the criminal prosecution argument must be treated with caution on the international level because the international or transnational context makes an identification of the respective criminal offense considerably difficult.

Second, it is doubtful whether the exclusion of evidence is really the best vindication for police wrongdoing, especially when the individual officer is more concerned with making an arrest and/or has no personal interest in a conviction.[98] Considering the individual motivations of private investigators, acting in the interests of their donors, this counter-argument is even stronger on the international level.

Third, in many criminal justice systems, officials who violate an exclusionary rule never learn whether or not the evidence they obtained is excluded.[99] This argument is especially true on the international level—for instance, when the Commission for International Justice and Accountability (CIJA) collects evidence,[100] and it is unclear before which court (national or international) this evidence might be used.[101] This leads to the fourth counter-argument: when it is already doubtful in the domestic context whether public officials know in fact the exclusionary rule that might apply, these doubts are potentiated on an international level in the extra-investigatory context, where an investigator does not know in which court or tribunal the evidence will be submitted (and hopefully admitted).

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97. As is the case in Germany; see Thaman and Brodowski, *supra* note 35, at 458.

98. Thaman and Brodowski, *supra* note 35, at 458; Sabine Gless and Laura Macula, "Exclusionary Rules—Is It Time For Change?," *IUS Gentium* 74 (2019): 355.

99. *Ibid.*

100. CIJA especially focuses on the linkage evidence and defers the crime base evidence to other institutions; see William H. Wiley, "International(ised) Criminal Justice at a Crossroads: The Role of Civil Society in the Investigation of Core International Crimes and the 'CIJA Model'," in *Quality Control in Fact-Finding*, ed. Morten Bergsmo and Carsten Stahn (Brussels: TOAEP, 2nd ed. 2020), 547 ff.

101. In more detail, see Heinze, *supra* note 1, at 171 ff.; Wiley, *supra* note 100, at 547 ff.

ICTs have reacted to the weakness of the deterrence theory, albeit in the inter-investigatory context: In *Brdjanin*, a trial chamber admitted transcripts of illegally intercepted telephone conversations by the security forces of Bosnia and Herzegovina with the argument that the "function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence."[102]

B. The Theory of Remedies in the Extra-Investigatory Context

The first rationale that does provide useful guidance for the collection of evidence by private individuals on the international level is the theory of remedies.[103] This rationale is tailored, so to say, for the irrelevance of the interrogator's status. As George Christie remarks, "a right to one's bodily integrity, either against the state or against private persons, is only a right that neither state officials nor private persons may invade one's bodily integrity; and, if they do, that the law will give one a remedy against them."[104]

1. The Punishment Remedy

One possible remedy is a punishment of the interrogator according to substantive criminal law. Yet, as demonstrated in the previous section, shifting the remedial possibilities of the suspect to substantive law presupposes a clear difference between substantive and procedural law, which is at least questionable on the international level.

2. Human Rights as Sword and Shield

Rogall refers to the State's obligation to protect individuals.[105] This State obligation would be incomplete if it does not apply when private

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102. See Prosecutor v. Radoslav Brdjanin, Case No. IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence," ¶ 63 (Oct. 3, 2003); see also Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Transcript, 13671 (Feb. 2, 2000): "It's not the duty of this Tribunal to discipline armies or anything of that sort"; Pitcher, *supra* note 13, at 291 with further references.

103. In more detail, see Heinze, *supra* note 27, at 651 ff.

104. George C. Christie, *Philosopher Kings? The Adjudication of Conflicting Human Rights and Social Values* (Oxford: Oxford University Press, 2011), 15.

105. Klaus Rogall, "§ 136a StPO," in *Systematischer Kommentar zur Strafprozessordnung—§§ 94–136a StPO*, ed. Hans-Joachim Rudolphi (Köln: Wolters Kluwer [Carl Heymanns], 5th ed. 2016), 2: mn.13.

individuals obtain illegal evidence.[106] At the same time, this shield function of human rights collides with its sword function: The State is also obliged to ensure that justice is done and, indirectly, that the human rights of potential victims are protected.[107]

The argumentative force and even effectiveness of the remedy theory on the international level is underlined by the central role of human rights. Article 21(3) ICC Statute forms part of the provisions that identify the applicable law of the Court. It states that the

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

ICC judges therefore draw from a large body of human rights law with ample discretion to guarantee the most basic and important protections.[108] Article 21(3) thus reflects support for the view "that the nature of human rights is such that they may have a certain special status or, at a minimum, a permeating role within international law."[109]

Within the context of the ICC Statute, human rights reached the status of basic rights. In this context, human rights violations "are no longer condemned and fought from the moral point of view in an unmediated way, but are rather prosecuted as criminal actions within the framework of state-organised legal order according to the institutionalised legal procedures."[110] The Statute translates general human rights norms "into

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106. *Ibid.*, at mn.13.

107. *Ibid.*, at mn.14.

108. See also Adrian Bos, "1948–1998: The Universal Declaration of Human Rights and the Statute of the International Criminal Court," *Fordham International Law Journal* 22 (1998–99): 229, 234.

109. Rebecca Young, "'Internationally Recognized Human Rights' Before the International Criminal Court," *International & Comparative Law Quarterly* 60 (2011): 189–90; see also Alexander Heinze, "The Statute of the International Criminal Court as a Kantian Constitution," in *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, ed. Morten Bergsmo and Emiliano J. Buis (Brussels: TOAEP, 2018), 396 with further references.

110. Jürgen Habermas, "Kant's Idea of Perpetual Peace with the Benefit of 200 Years' Hindsight," in *Perpetual Peace—Essays on Kant's Cosmopolitan Ideal*, ed. James Bohman and Matthias Lutz-Bachmann (Cambridge, MA: MIT Press, 1997), 140.

the language of criminal law," not only by defining the core international crimes, but also by providing procedural guarantees and a canonical formulation of the role of internationally recognized human rights.[111] In turn, this language is reiterated in the admissibility provision of Article 69, where integrity from the perspective of the suspect is visibly enshrined in paragraph 7: "Evidence obtained by means of a violation of this Statute *or internationally recognized human rights* shall not be admissible if [. . .] [t]he admission of the evidence would be antithetical to and would seriously damage the *integrity of the proceedings*." At the same time, the integrity of the person ("internationally recognized human rights") is interlocked with integrity from the perspective of the process.

C. The Integrity of the Process in the Extra-Investigatory Context

At the heart of exclusionary rules within the extra-investigatory context lies the integrity of international criminal procedure itself.[112] Illegally obtained evidence by private individuals questions the moral authority of the verdict and its legitimacy. The evidence may be unreliable. Admitting such evidence might violate the rule of law. These are the raw claims. The basis of the integrity of the process is fairness, as elaborated elsewhere.[113]

The interrelationship between criminal justice and fairness is obvious. A judicial or administrative body is tasked with serving the public, and in serving the public, a government body's most important higher-order goal is to treat every member of the public fairly. The juxtaposition of procedural and substantive fairness is vital for private investigations. Procedural fairness can be assessed based on a system's rules[114] and is translated into integrity once this system is the (criminal) process. Rights that are guaranteed by procedures "allow for a system of law to emerge out of a set of

111. ICC Statute, art. 21(3): "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights."

112. Heinze, *supra* note 27, at 653.

113. Alexander Heinze and Shannon Fyfe, "The Role of the Prosecutor," in *Core Concepts in Criminal Law and Justice*, ed. Kai Ambos et al. (Cambridge: Cambridge University Press, 2020), 1:345 ff.; Alexander Heinze and Shannon Fyfe, "Prosecutorial Ethics and Preliminary Examinations at the ICC," in *Quality Control in Preliminary Examination*, ed. Morten Bergsmo und Carsten Stahn (Brussels: TOAEP, 2018), 2:3 ff.

114. See, for example, Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, rev. ed. 1969), 81; McDermott, *supra* note 79.

substantive rules and [. . .] minimize arbitrariness."[115] If the same established rules and procedures are applied to all defendants and suspects (or potential suspects) without bias, then a system can be said to be procedurally fair, regardless of outcomes. To provide an extreme example: The accused is acquitted due to illegally obtained evidence, even though this evidence proofs his or her guilt beyond reasonable doubt—a popular counter-argument against the remedy rationale.[116] However, "equal treatment involves at one extreme the impartial application of existing rules and procedures, regardless of the outcome (procedural justice), and at the other, the idea that any policies or procedures that have the effect of punishing or controlling a higher proportion of one social group than another are unjust."[117] Substantive fairness involves the protection of substantive rights, such as the right to bodily autonomy, liberty from confinement, or a trial that does not result in a mistaken conviction.[118] A trial that results in an absurd outcome or one that is intuitively immoral would be considered substantively unfair.[119]

The public generally thinks about fairness in terms of substantive justice, in that a just result of trial is one in which the guilty are convicted, and the innocent acquitted. Law enforcement officers, for instance, "have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime."[120] Yet this result-based, substantive view of fairness can also be hard to achieve, depending on the availability and admissibility of evidence. Considering the debate around illegally obtained evidence and the rationale for its exclusion: illegally obtained evidence might not only be procedurally

115. Larry May, *Global Justice and Due Process* (Cambridge: Cambridge University Press, 2011), 52.

116. Adrian A.S. Zuckerman, "Illegally-Obtained Evidence—Discretion as a Guardian of Legitimacy," *40 Current Legal Problems* (1987): 58.

117. Loraine Gelsthorpe and Nicola Padfield, "Introduction," in *Exercising Discretion: Decision-making in the criminal justice system and beyond*, ed. Loraine Gelsthorpe and Nicola Padfield (New York: Willian Publishing, 2003), 12. See also Rebecca E. Hollander-Blumoff, "Fairness Beyond the Adversary System," *Fordham Law Review* 85 (2017): 2081–95.

118. See, for example, Larry Alexander, "Are Procedural Rights Derivative Substantive Rights?," *Law and Philosophy* 17, no. 1 (1998): 19.

119. See Fuller, *supra* note 114.

120. US v. Wade, Case No. 388 US 218 (1967), 256–58; Carol A. Corrigan, "On Prosecutorial Ethics," *Hastings Constitutional Law Quarterly* 13 (1986): 538.

unfair, it might also have a low reliability and could put a conviction based merely on this piece of evidence in question with regard to its fair outcome. This is an argument similar to those brought forward by the reliability rationale.[121] A conviction that is based on unreliable evidence is not substantially fair. Strictly speaking, substantive fairness has a truth component, a fact that lays bare the conceptual common denominator of the juxtapositions substantive fairness vs. procedural fairness and substantive truth vs. procedural truth.[122] On the international stage, too, substantive fairness has received particular emphasis.[123] At the same time, however, especially at the *ad hoc* Tribunals, procedural fairness could outweigh substantive fairness: "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."[124]

1. Moral Authority of the Verdict and Legitimacy

As remarked earlier, the public would hold a critical attitude toward the fairness of the trial and argue that the courts fail to uphold procedural justice if wrongfully obtained material was admitted in every case and without scrutiny.[125] What this sentence incorporates is a combination of substantive fairness and the communicative effect of a judgment. In the words of Duff *et al.*:

> The communicative process is essential in order that verdicts reflect not only the epistemic standards appropriate to the criminal law, but also the court's moral standing to condemn the defendant for committing a public wrong. Such moral standing, we suggest, is only secure if the defendant is treated as a full citizen who is entitled to participate in a criminal process which he could accept as legitimate.[126]

This combination has turned out to be one of the theoretical bases of international criminal law.[127]

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121. See below, section II.C.2., "Reliability."

122. Heinze and Fyfe, *supra* note 113, at 346 ff. with further references.

123. Pitcher, *supra* note 13, at 281 with further references.

124. ICTY Rules of Procedure and Evidence (RPE), rule 89(D). ICTY RPE, https://www.icty.org/en/documents/rules-procedure-evidence.

125. See Heinze, *supra* note 27, at 654–55.

126. A. Duff et al., *supra* note 12, at 236.

127. The following part is, albeit in modified form, taken from Heinze, *supra* note 109, at 351–428.

On the international level, retribution is clothed in an expressivist[128] and communicative appearance,[129] that is, as the expression of condemnation and outrage of the international community, where the international community in its entirety is considered one of the victims.[130] The stigmatization and punishment for gross human rights violations in service of the confirmation and reinforcement of fundamental human rights norms can justify a right to punish of an international criminal tribunal that lacks the authority of a State. Given this justification of punishment, what the world community is trying to achieve through international criminal trials is a communicative effect: to show the world that there is justice on an international level and that no perpetrator of grave international crimes can escape it.[131] That is why international criminal law seeks to achieve retributive and deterrent effects of punishment through creating a certain perception of international criminal trials; that is why the protection of due process rights is perceived as crucial to restore international peace and strengthen the trust of the international society in legal norms (procedure "as an end in itself"[132]); and that is why Nazi perpetrators were not executed without trial. Instead, US President Harry S. Truman remarked at the start of the trials before the International Military Tribunal at Nuremberg in 1945: "[T]he world should be impressed by the fairness of the trial. These German murderers must be punished, but only upon proof of individual guilt at a trial."[133]

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128. For a definition and in more detail, see Heinze, *supra* note 73, at 417 ff.

129. Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), 173 ff.

130. Kai Ambos, "Review Essay: Liberal Criminal Theory," *Criminal Law Forum* 28 (2017): 589, 601.

131. International criminal law is also "educating society about its past" through the truth-telling function of international criminal trials; see Mina Rauschenbach, "Individuals Accused of International Crimes as Delegitimized Agents of Truth," *International Criminal Justice Review* 28 (2018): 293 with further references.

132. Jonathan Hafetz, *Punishing Atrocities Through a Fair Trial* (Cambridge: Cambridge University Press, 2018), 109.

133. Cited in Francis Biddle, *In Brief Authority* (Westport, CT: Greenwood Press, 1962/1972), 372; Patricia M. Wald, "Running the Trial of the Century," *Cardozo Law Review* 27 (2005–06): 1559, 1574. US Chief prosecutor Jackson famously argued: "Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during war. We must establish incredible events by credible evidence." See Telford Taylor, *The Anatomy of the Nuremberg Trials* (Boston: Back Bay Books, 1992), 54.

It would be detrimental to the expressivist and communicative function of a public trial, if a conviction rendered by an ICT was based on illegally obtained evidence—irrespective of the status of the person who obtained the evidence. Rogall makes a similar general-preventive, or expressivist argument: Trials and judgments respectively have a general-preventive effect. This effect would be circumvented, if evidence that is illegally obtained by private individuals could generally be admitted.[134] Rogall combines this argument with an empirical premise: Private investigations are aimed at the production of evidence. Thus, private individuals in such a context show a reduced willingness to abide by procedural law or due process, due to a case of what Rogall calls "evidentiary emergency."[135] Excluding the evidence has the result of demonstrating the illegality of an individual taking justice in his or her own hands, which is generally assigned to an expressivist theory of punishment. This is especially underlined upon viewing the criminal process as a system: If evidence is used in a trial, based on an infringement of rights and a violation of rules, the public loses confidence in the *system* of rules and their effectiveness, and not so much in a particular rule. It is of secondary importance who in fact broke the rules and violated the rights, whether a public official or a private individual.

The public's trust in the system of rules is different from its expectation to be protected by the State against rights violations. The latter is what has previously been labelled as the sword function of human rights,[136] or *Strafanspruch*.[137] The former touches upon the expressivist and communicative function of a trial and the judgment.[138] More concretely: norms

134. Rogall, *supra* note 105, at n.13.

135. *Ibid*.

136. See above, section II.B.2., Human Rights as Sword and Shield.

137. Henning Radtke, "Beweisverwertungsverbote in Verfahrensstadien vor der Hauptverhandlung und die sog. Widerspruchslösung," in *Festschrift für Reinhold Schlothauer zum 70. Geburtstag*, ed. Stephan Barton et al. (Munich: C.H. Beck, 2018), 461 ff.; Hilde Kaufmann, *Strafanspruch Strafklagerecht* (Göttingen: Otto Schwartz, 1968), 9 ff.; Klaus Günther, "Falscher Friede durch repressives Völkerstrafrecht?," in *Das Dilemma des rechtsstaatlichen Strafrechts*, ed. Werner Beulke et al. (Berlin: Berliner Wissenschafts-Verlag, 2009), 89. In detail, see Kai Ambos, "Strafrecht und Verfassung: Gibt es einen *Anspruch* auf Strafgesetze, Strafverfolgung, Strafverhängung?," in *Recht—Philosophie—Literatur. Festschrift für Reinhard Merkel zum 70. Geburtstag*, ed. Jan Christoph Bublitz et al. (Berlin: Duncker & Humblot, 2020), 565 ff.

138. See text at note 128.

are recognized by the society *as a whole* and determine the contents of social communication[139]—an argument put forward by Jakobs. He draws attention to the "validity" (*Geltung*) of a norm and its affirmation (*Bestätigung*).[140] Dennis combines these elements under the umbrella of legitimacy.[141] Understood this way, legitimacy has both descriptive and normative elements: descriptive in that it "refers to social facts concerning actors' beliefs about the legitimate authority" of an ICT; normative due to the "motivating force" behind an ICT's judgment (as implementation of international criminal justice goals).[142] What becomes visible upon reading these arguments is a close interrelationship between the goals and purposes of substantive criminal law[143] and procedural law—and underlines, again, the synchronization between the two.[144] As argued elsewhere: punishing perpetrators of international crimes will not work without the admission of relevant evidence.[145] Thus, the goal of the admission of relevant evidence for guilt is at the same time the goal of punishing perpetrators of international crimes, which becomes a purpose of international criminal procedure. Moreover, the admission of relevant evidence as a goal of international criminal procedure is also connected to the purpose of punishment "in such a way that it will increase the likelihood that the guilty will be punished and the innocent will go free."[146]

Yet, a similar detrimental effect would be the result if the decision to exclude key evidence were only due to a relatively minor violation of legal

139. Günther Jakobs, "Strafrechtliche Zurechnung und die Bedingungen der Normgeltung," in *Verantwortung in Recht und Moral, ARSP-Beiheft*, ed. Ulfried Neumann and Lorenz Schulz (Stuttgart: Franz Steiner Verlag, 2000), 74:58–59; Günther Jakobs, "Das Strafrecht zwischen Funktionalismus und 'alteuropäischem' Prinzipiendenken," *Zeitschrift für die gesamte Strafrechtswissenschaft* 107 (1995): 843 ff.

140. Günther Jakobs, *Strafrecht—Allgemeiner Teil* (Berlin and New York: Walter de Gruyter, 2nd ed. 1991), 34 ff; see also Andrew P. Simester et al., *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Oxford: Hart Publishing, 2014), 25.

141. Ian H. Dennis, *The Law of Evidence* (London: Sweet & Maxwell, Thomson Reuters, 7th ed. 2020), mn.2-022.

142. The definitions are taken from Andreas Follesdal, "The Legitimacy of International Courts," *Journal of Political Philosophy* 28 (2020): 480.

143. In detail, see Heinze, *supra* note 73, at 929–57.

144. In a similar vein, see Volk, *supra* note 49, at 173.

145. Heinze, *supra* note 73, at 950.

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

procedure. The ICTY-Appeals Chamber in *Karadžić* highlighted this imbalance by recalling

> that the Appellant is charged with genocide, crimes against humanity and war crimes. The public interest in the prosecution of an individual accused of such offences, universally condemned, is unquestionably strong. Against the legitimate interest of the international community in the prosecution of the Appellant for Universally Condemned Offences stands the alleged violation of the Appellant's expectation that he would not be prosecuted by the Tribunal, pursuant to the alleged Agreement.[147]

Here again, the two dimensions of fairness—procedural fairness (the accused go free, since procedural rules have been violated) vs. substantive fairness (the accused are convicted despite the violation of procedural rules, since they have been found guilty beyond reasonable doubt)—affect a judgment like two parents to their child. Within this rationale, integrity becomes a "proxy, synonym or placeholder" for procedural values such as fairness, due process, natural justice or judicial legitimacy.[148]

2. Reliability

Substantive fairness in international criminal law is also the objective behind integrity as reliability, since the use of unreliable evidence "increases the risk of error in fact-finding."[149] The interrelationship—almost an interchangeability—of substantive fairness and substantive truth becomes most visible here, since excluding evidence that has been obtained wrongfully would even *advance* the search for truth. As pointed out earlier, integrity as reliability is informed by the expressivist notion of integrity as the moral authority of the verdict: Rogall expressly refers to a forward-looking evaluation of the illegally obtained evidence and requires the courts

147. Prosecutor v. Karadžić, Case No. IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, ¶ 49 (Oct. 12, 2009), https://www.icty.org/x/cases/karadzic/acdec/en/091012.pdf; ee also Pitcher, *supra* note 13, at 277.

148. Paul Roberts et al., "Introduction: Re-examining Criminal Process Through the Lens of Integrity," in *The Integrity of Criminal Process*, ed. Paul Roberts et al. (Oxford and Portland: Hart, 2016), 5.

149. Hock Lai Ho, "Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis," in *The Oxford Handbook of Criminal Process*, ed. Darryl K. Brown et al. (Oxford: Oxford University Press, 2019), 828.

to take into account the "normative" (read: general-preventive, expressive) effect the admission of the evidence might have.[150] Thus, the question of whether or not to exclude illegally obtained evidence by private individuals is a balancing exercise,[151] where the search for truth and, "indirectly, society's interest in criminal enforcement," is pitted against "the respect for the rights of criminal defendants and, indirectly, of the entire civilian population, which have been declared to be so important to the legal order that they have been enshrined in human rights conventions and national constitutions."[152] Considering this balancing exercise, Haffke sees a prevalence of the search for truth.[153]

Before ICTs a reason not to admit—otherwise admissible—evidence is that the use of illicit methods would negatively affect the reliability of the evidence.[154] Article 69(7) ICC Statute—*lex specialis* to the general admissibility rule of paragraph (4) of the same article—repeats the (new) Rule 95 ICTY/ICTR, stating: "Evidence obtained by means of a violation of this statute or internationally recognized human rights shall not be admissible if: [. . .] The violation casts substantial doubt on the reliability of the evidence." The integrity as reliability rationale becomes even more visible in the ICTY law (and the law of the International Residual Mechanism for Criminal Tribunals [MICT], the institution created to support the ICTR and ICTY in concluding their work,[155] respectively): A Chamber "may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial"[156] or "if obtained by methods which cast substantial doubt on

150. Rogall, *supra* note 105, at mn.14.

151. *Ibid.*, at mn.15.

152. Thaman and Brodowski, *supra* note 35, at 437.

153. Bernhard Haffke, "Schweigepflicht, Verfahrensrevision und Beweisverbot," *Goltdammer's Archiv für Strafrecht* (1973), 83.

154. ICC Statute, art. 69(7)(a); also ICTY RPE and ICTR RPE, rules 95(1) and MICT RPE, rule 117(1). ICTR RPE, https://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf; MICT RPE, https://www.irmct.org/en/documents/rules-procedure-and-evidence.

155. In more detail, see Kai Ambos and Alexander Heinze, "International Criminal Law and International Criminal Justice," *Oxford Research Encyclopedia of Criminology* (Oxford: OUP November 2018), https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-412? rskey=zpJuzD&result=3.

156. ICTY RPE, rule 89(D), and MICT RPE, rule 105(D).

its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[157]

3. Rule of Law

One of main rationales for excluding or not admitting evidence is the rule of law principle.[158] Ideally, the "law" in rule of law incorporates the integrity rationale, that is, the moral authority of the verdict, legitimacy, fair trial, and reliability.[159] The question that remains to be answered is: Is the rule of law principle applicable both to the extra-investigatory context and to the international level?

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

In this extra-investigatory context, where exclusionary rules still apply, the rule of law principle is vital. In fact, it is the benchmark for every conduct within a procedural system. To that end, the rule of law becomes what P. Roberts describes as a "proxy" for integrity and procedural values such as fairness, due process, natural justice, or

157. ICTY RPE and ICTR RPE, rules 95, and MICT RPE, rule 117; also Special Court for Sierra Leone (SCSL) RPE, rule 95 (exclusion if "admission would bring the administration of justice into serious disrepute"). SCSL RPE: http://www.rscsl.org/Documents/RPE.pdf.

158. See Heinze, *supra* note 27, at 657 ff.

159. Dennis, *supra* note 141, at mn.2-022.

judicial legitimacy.[160] In a similar, albeit more restrictive fashion, some scholars in Germany make an exception of the general admissibility of illegally obtained evidence by private individuals when the State intends to make use of the evidence obtained.[161] They argue that this might violate the rule of law, the legal order, or the constitution.[162]

Rogall notes that the rule of law is also applicable in the case of evidence obtained by private individuals.[163] This goes to what Postema famously underlined through his "reflexive dimension" of the rule of law, referring to Bentham: "Those in power as well as those subject to that power must be subject to the law."[164]

b. Criminal Procedure's Subsystems. Every endeavor to apply the systems theory by Luhmann and Teubner eventually passes over to the bifurcated decision of how narrow the systems and subsystems should be. The criminal process with its various stages[165] is especially prone to such an endeavor. Strictly speaking, the investigatory context (subsystem 1) could easily be (and often is) separated from the trial process (subsystem 2).

***Separating Investigatory System and Trial System:* Beweiserhebung vs. Beweisverwertung.** Separating the investigatory and trial contexts has the advantage of separating the effects violations may have within these systems. Let us assume, for a moment, that both are closed systems. They could thus be hermetically sealed to avoid that a violation of the integrity of one system affects the other system. This way, the advantages of sanctioning illegally obtained evidence could be enjoyed without risking the rupture of the entire trial and eventually putting into question the substantive fairness of an acquittal (when it is almost certain, for instance, that the accused is guilty).

What sounds like a viable but almost artificial compromise is reality in German criminal procedure: German courts differentiate between rules

160. Roberts et al., *supra* note 148, at 5.

161. Matula, *supra* note 32, at 101.

162. Rogall, *supra* note 105, at mn.11, with further references in fn.63.

163. *Ibid.*, at mn.13.

164. Gerald J. Postema, "Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law," in *Bentham's Theory of Law and Public Opinion*, ed. Zhai Xiaobo and Michael Quinn (Cambridge: Cambridge University Press, 2014), 56.

165. Heinze, *supra* note 63, at 264 ff.

prohibiting the *obtaining or taking* of evidence (*Beweiserhebungsverbote*), and rules prohibiting the *use* of evidence by the court in its assessment of the defendant's guilt (*Beweisverwertungsverbote*).[166] How radically separated the two stages (put differently: how closed the two subsystems) are, is a matter of controversy, with the strictest separation theory probably brought forward by Jäger's "Separation and Abstraction Principle."[167] Distinguishing between the obtaining of evidence and its actual use at trial is *Janus*-faced and thus works in both ways: not every illegally obtained piece of evidence necessarily leads to its exclusion,[168] and not all legally obtained evidence may later be used as evidence.[169] It goes without saying that the separation of the two stages and the focus on the short- and long-term effects of a procedural violation create a chain reaction of exclusionary rules: those rules may address (a) the "re-use"[170] of the (same) evidence *as evidence* in further proceedings against the same or other defendants; (b) a possible effect of illegally obtained evidence on a fresh investigation; and (c) whether further evidence taken on the basis of excluded evidence must be excluded as well ("fruit of the poisonous tree," *Fernwirkung*).[171]

Separating the two stages in the case of illegally obtained evidence in the extra-investigatory context on the international level, ICTs could, if they found that evidence had been illegally obtained, declare that even though this evidence must be excluded from trial (non-use, *Verwertungsverbot*), it could still be obtained and eventually be *used in the pre-trial stage as lead evidence*. In other words, evidence could be illegally obtained, but only lead

166. In detail, see Thaman and Brodowski, *supra* note 35, at 434–35.

167. Christian Jäger, *Beweisverwertung und Beweisverwertungsverbote im Strafprozess* (Munich: C.H. Beck, 2003), 137–38 (author's translation, original terminology: "Trennungs- und Abstraktionsprinzip").

168. See German Federal Constitutional Court, No. 2 BvR 708/18, Decision, ¶ 40 (Sept. 20, 2018); *id.*, No. 2 BvR 2085/05, Decision (Feb. 16, 2006) = *Neue Zeitschrift für Strafrecht* (2006), 46, 47; *id.*, No. 2 BvR 2225/08, Decision (Jul. 2, 2009) = *NJW* (2009), 3225; BGH, No. 3 StR 332/10, Judgment, ¶ 13 (Jan. 13, 2011); Kai Ambos, *Beweisverwertungsverbote* (Berlin: Duncker & Humblot, 2010), 22; Jäger, *supra* note 167, at 135; Matthias Jahn, *Beweiserhebung und Beweisverwertungsverbote im Spannungsfeld zwischen den Garantien des Rechtsstaates und der effektiven Bekämpfung von Kriminalität und Terrorismus, Gutachten C, 67. Deutscher Juristentag* (Munich: C. H. Beck, 2008), 36.

169. Thaman and Brodowski, *supra* note 35, at 436.

170. Translation by Thaman and Brodowski, *ibid.*, at 458.

171. Generally, see *ibid.*, at 436.

to other evidence and could not be used in court.[172] An exclusionary rule would thus only address the non-use of evidence in court and requires balancing that allows for the obtainment of the evidence (even though it was illegally obtained). To provide an example: Before the Extraordinary Chambers in the Courts of Cambodia (ECCC) in the case against Ieng Thirith, a statement was made under torture. The Defense requested the co-investigating judges not only hold this statement inadmissible, but also decide against its use as "lead evidence." With regard to the latter request, which is of interest in this discussion, the judges decided:

> [T]here is nothing objectionable in using the information contained in confessions as investigative leads to other sources of information, even if the information within the confession is ultimately deemed unreliable. A great deal of "lead evidence" used in investigations is inherently unreliable and as such, would not be relied on in the Closing Order. However, during the course of the investigation, the Co-Investigating Judges need not rule out any hypothesis and it is not necessary for them to believe the assertions in the confessions to be true in order to use them to develop new avenues for searching out the truth, without this affecting the integrity of the proceedings.[173]

Another emanation of the separation hypothesis is the amended Rule 95 ICTY Rules of Procedure and Evidence (RPE). The former rule provided that evidence shall not be admissible "*if obtained by methods* which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[174] As Calvo-Goller analyzed, this rule "had the merit to discourage human rights violations in the gathering of evidence *ab initio*."[175] The rule is reminiscent of the German *Beweismethodenverbote*, prohibiting certain *methods* of obtaining evidence. On the basis of proposals from the governments of the

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172. About lead evidence, see Heinze, *supra* note 63, at 455.

173. Prosecutor v. Ieng Thirith, Case No. C002/19-09-2007-ECCC-OCIJ, Order on Use of Statements Which Were Or May Have Been Obtained by Torture, ¶ 26 (July 28, 2009), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D130_8_EN.pdf; see also Fergal Gaynor et al., "Law of Evidence," in *International Criminal Procedure*, ed. Göran Suilter et al. (Oxford: Oxford University Press, 2013), 1029.

174. Emphasis added.

175. Karin N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court* (Leiden, Boston: Martinus Nijhoff, 2006), 97.

United Kingdom and the United States,[176] the rule was amended in 1995 to add the phrase "which constitute a serious violation of internationally protected human rights" after "methods." The significance of this amendment cannot be overstated: From now on, evidence obtained by an illegal method could still be admitted at trial, unless it "seriously" damaged the integrity of the proceedings.[177] Since Article 69(7) ICC Statute is based on the amended Rule 95 ICTY RPE, the same applies to the former provision ("the evidence is not automatically inadmissible"[178]).

However, the dual test of Article 69(7) ICC Statute has not always been envisaged for the Court's exclusionary rules. In fact, in what arguably became "the most important basis for the Rome negotiations,"[179] the *Zutphen Report*,[180] the exclusionary rule was proposed without the second prong, allowing for the exclusion *ab initio* (the dual test was provided in brackets, though).[181]

In other instances, an ICT might find a violation grave enough to decide that the illegally obtained evidence can neither be admitted in court nor lead to other evidence. Thus, the separation hypothesis provides a tool to disentangle the Gordian knot of procedural vs. substantive fairness. In a way, the Chambers at the ICC also employ the separation hypothesis in the extra-investigatory context when they are asked to impose a stay of the proceedings. In the

176. Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, reprinted in ICTY Yearbook, U.N. Doc. S/1994/728 (Aug. 23, 1995), 287; for the amendment, see Doc. No. IT/32/REV.6 (Oct. 6, 1995).

177. Calvo-Goller, *supra* note 175; Kai Ambos, "The Transnational Use of Torture Evidence," *Israel Law Review* 42 (2009): 370.

178. *Lubanga*, Case No. ICC-01/04-01/06-1981, Decision on the Admission of Material from the "Bar Table," ¶ 41 (fn. omitted) (June 24, 2009); *Bemba et al.*, Case No. ICC-01/05-01/13-2275-Red, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute," ¶ 280 (March 8, 2018). See also Rastan, *supra* note 13, at 161.

179. Kai Ambos, *Treatise on International Criminal Law* (Oxford: Oxford University Press, 2013), 1:24.

180. The *Zutphen Report* or *Zutphen Draft* is a 128-page report, created as a result of a less formal meeting by states and delegations between the 5th and 6th official meetings of the ICC Preparatory Committee, held in the Dutch town of Zutphen on 19–30 January 1998, hence the name. For more detail, see Ambos, *ibid.*

181. Zutphen Draft, art. 62(5), *The Legislative History of the International Criminal Court*, ed. M. Cherif Bassiouni and William A. Schabas (Leiden and Boston: Brill Nijhoff, 2nd ed. 2016), 2:620–21.

example I have given at the outset of this article,[182] both Pre-Trial Chamber I in *L. Gbagbo* and Trial Chamber X in *Al Hassan* decided that a stay of proceedings was "unavailable" where the party that caused a violation of the suspect's fundamental rights during detention had no link with the Court. The Chambers thus not only made a remedy at trial dependent on the person who had caused the violation; they also applied the separation hypothesis to the extent that violations prior to trial are *formally* unable to impact the trial.

The Conceptual Flaw of the Separation Hypothesis. If the separation hypothesis provides a tool to disentangle the Gordian knot of procedural vs. substantive fairness, this tool is indeed a sword (as in the original legend involving Alexander the Great—no pun intended regarding the author's name) rather than sophisticated strategy. The separation hypothesis is arguably a radical conceptual measure that comes at a price. This price is (a) the artificial separation of procedural stages that can easily be viewed as a unified system, and (b) the false premise that these stages are in fact closed.

As opined elsewhere, employing Damaška's models of criminal procedure, the criminal process must be viewed first and foremost holistically, independent of its stages. Just because a procedural stage might appear in a certain setting does not change the characterization of the process as a whole. Quite the contrary: procedural stages are usually "assigned methodological subtasks" that differ from each other: "One stage can be devoted to the gathering and organization of relevant material, another to the initial decision, still another to hierarchical review, and so on, depending on the number of levels in the pyramid of authority."[183] On its face, this argument appears to resemble the familiar argument that different procedural stages may have different "objectives and procedural influences."[184] However, a procedural stage does not present some sort of autonomous, closed, Luhmannesque[185]

182. See above, section I.A. *in fine*.

183. Mirjan Damaška, *The Faces of Justice and State Authority* (New Haven and London: Yale University Press, 1986), 47–48.

184. See, for example, Mark Klamberg, *Evidence in International Criminal Trials* (Leiden and Boston: Martinus Nijhoff, 2013), 499.

185. See Niklas Luhmann, *Soziologische Aufklärung: Aufsätze zur Theorie sozialer Systeme* (Cham: Springer, 8th ed. 2009), 1:226; Gunther Teubner, *Recht als autopoietisches System* (Frankfurt a.M.: Suhrkamp, 1989); Niklas Luhmann, "Introduction to Autopoietic Law," in *Autopoietic Law: A New Approach to Law and Society*, ed. Niklas Luhmann (Berlin: De

system.[186] Damaška, too, doubted the autonomy of procedural stages by acknowledging that (a) in the hierarchical ideal, procedural stages are just part of a multilayered hierarchy[187] (and are therefore, as already mentioned, assigned to "methodological *sub*tasks"[188]), and (b) the existence of procedural stages *per se* and the extent of their integration into the proceedings are already characteristics of a certain procedural model.[189] Thus, to treat procedural stages separately with regard to their objectives and characteristics is already constitutive of a certain procedural model. Think of the perception of the criminal process in civil law *vis-á-vis* common law systems. It is certainly fair to say that all domestic legal systems within the common law or civil law tradition contain concentrated and "continuous" proceedings, but they reach this concentration differently: in proceedings of the civil law tradition, the trial is the cumulation of a continuing criminal process, whereas many common law systems conceive the trial as "a discrete and continuous event" and differentiate more sharply between the trial and pre-trial phases of criminal proceedings.[190]

Beyond that, the ICC provides a reality check to the separation hypothesis, since the investigation phase (read: formal investigations)[191] and the trial phase can hardly be separated. As I have commented on elsewhere,[192] the ICC Appeals Chamber held that "the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is

Gruyter, 1988), 1, 3; Luhmann, *supra* note 67, at 50 ff. (6th ed., 2011, at 111); Brian H. Bix, *Legal Theory* (Oxford: Oxford University Press, 2004), 18; Roger Cotterrell, "Law in Social Theory and Social Theory in the Study of Law," in *The Blackwell Companion to Law and Society*, ed. Austin Sarat (Malden, MA: Blackwell, 2007), 16, 22; Clemens Mattheis, "The System Theory of Niklas Luhmann and the Constitutionalization of the World Society," *Goettingen Journal of International Law* 4, no. 2 (2012): 626 ff.

186. In a similar vein, see Campbell et al., *supra* note 51, at 10.

187. Damaška, *supra* note 183, at 47–48.

188. Emphasis added.

189. See Damaška, *supra* note 183, at 57.

190. Roberts and Zuckerman, *supra* note 76, at 55.

191. Kai Ambos, *Treatise on International Criminal Law: International Criminal Procedure* (Oxford: Oxford University Press, 2016), 3:342 ff. The name "formal investigation" is designed to separate this phase from the preliminary examination phase—a form of a pre-investigation that precedes the actual "formal" investigation of a situation and subsequently a case before the ICC. See in more detail *ibid.*, at 335–36, and Heinze and Fyfe, *supra* note 113, at 2–3.

192. Heinze, *supra* note 63, at 524 ff.

necessary in order to establish the truth."[193] The Appeals Chamber based this decision on Article 54(1)(a) ICC Statute, which lays down that the Prosecutor shall, "[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally."[194]

This does not mean that viewing procedural stages separately to decide about the admission or exclusion of evidence could not be a practical compromise. Yet, again, this compromise comes at the price of dissolving the criminal process as a system. As demonstrated above, it is also questionable whether the separation hypothesis may work at the international level in the face of growing popularity of private investigations. Even the OTP in the *Lubanga* case deliberately violated procedural rules to ensure the success of its investigation. It can only be speculated that the Office was probably rather certain that the ICC could not afford excluding the evidence and eventually acquit Lubanga for reasons of substantive fairness. *Argumentum a maiore ad minus*, a similar motivation might drive private investigators. Duff *et al.* take this argument conceptually even further. They distinguish two types of integrity:

> First, a defendant might claim that it would be inconsistent to continue the prosecution given the State's conduct at the pre-trial stage. Secondly, a defendant might claim that the moral standing of the trial would be undermined by the prosecution through the association between the trial and the wrongful conduct pre-trial.[195]

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193. *Lubanga*, Case No. ICC-01/04-01/06-568, Judgement on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, ¶ 52 (Oct. 13, 2006). This view has been adopted by Trial Chamber IV in the case against Nourain and Jerbo Jamus; see *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09-140, Prosecution's Response to the Defence's Oral Application of Apr. 19, 2011, ¶ 7 (May 4, 2011).

194. *Lubanga*, Case No. ICC-01/04-01/06-772, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19(2)(a) of the Statute of Oct. 3, 2006, ¶ 52 (Dec. 14, 2006).

195. A. Duff et al., *supra* note 12, at 234.

While the former "focuses in particular on conduct of state officials,"[196] the latter addresses "wrongful behaviour without emphasising the need for that conduct to be perpetrated by state officials."[197]

Duff *et al.* call this "integrity as integration": "the defendant must be treated as a citizen not only at trial, but throughout the criminal process, and that the normative validity of the trial rests on the validity of the state's conduct pre-trial."[198] They, too, argue against the separation hypothesis, that is, "that each part of the criminal justice process can be considered independently. According to this thesis, faults at one stage of the process need not infect decisions taken at later stages as long as there are independent remedies for those earlier faults."[199]

Integrity as integration, combined with the presumption that procedural rules are not merely addressed to actors but also to systems and subsystems, allow for the application of exclusionary rules to private conduct. The status of the person collecting the evidence is not relevant for exclusionary rules, but investigatory context is (within which both public officials and private individuals act). More concretely: whether exclusionary rules apply does not depend on the *investigator* but on the existence of an *investigation*.[200] Context is key. In the words of Duff *et al.*: "Integrity as moral coherence involves the moral coherence of treating certain actions, be they of officials or private citizens, as part of the investigation [. . .]."[201] To separate trial and judgment as one subsystem from the investigation as another subsystem is thus not only artificial, it also betrays the communicative, moral, and normative standards of a trial. The umbrella that protects a trial from failing on legitimacy grounds is integrity and eventually the rule of law with its coherence and consistency elements. It applies to both private actions and actions of public officials.[202]

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196. *Ibid.*

197. *Ibid.*

198. *Ibid.*, at 236.

199. *Ibid.*

200. In a similar vein, see A. Duff et al., *supra* note 12, at 239: "What distinguishes the cases of private torture, private entrapment, private phone-tapping and the like from this case is that those cases are investigatory."

201. *Ibid.*

202. *Ibid.* ("[E]ven as far as private citizens are concerned, use of evidence wrongfully obtained involves treating the actions of those private citizens as part of the investigation.

Surely, the holistic view misses the practicability[203] advantage of the separation hypothesis. Yet, it is no less practical in the face of private investigators and possible rights violations on the international level: by simply asking whether or not there is an official investigation, it circumvents the somewhat Sisyphean task of categorizing investigators into private, public, and so forth, which is especially useful in the face of an increasing number of private investigators, security companies, and so on.[204] This investigatory context can be as broad as the mandates of modern fact-finding missions such as the International, Impartial and Independent Mechanism for Syria, established by the UN General Assembly,[205] or the fact-finding bodies established by the UN Human Rights Council (UN HRC).[206] Admissibility issues of material collected by these bodies might soon arise in the South Sudan context: With the approval of

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The argument on this view is that the integrity principle, the principle that the trial cannot be detached from the investigation in normative terms, applies to private actions as well as actions of public officials.").

203. About practicability as an important value in evidence law, see Volk, *supra* note 49, at 3.

204. Heinze, *supra* note 1, at 169 ff.

205. United Nations General Assembly, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, 2016, UN Doc. A/RES/71/248, https://iiim.un.org/mandate/.

206. The UN Human Rights Council established the following bodies to *investigate* (not try!) international crimes: UN Fact-Finding Missions (FFMs: Libya, Venezuela), Commissions of Inquiry (CoIs: Burundi, Syria), Commissions on Human Rights (CoHR: South Sudan), and the Independent Investigative Mechanism for Myanmar. The mandate of the latter is described on its website, https://iimm.un.org/mandate-and-establishment/. See also Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, 17 September 2018, UN Doc. A/HRC/39/CRP.2, para. 4. An instructive overview of investigative bodies established by the UN HRC's can be found here: https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx. In more detail, see Heinze, *supra* note 1, at 171–72; Aksenova, Bergsmo and Stahn, *supra* note 1, at 10 ff. with a list of "International Fact-Finding Mandates 1992–2020" at 32–44. Generally, about fact-finding by the Special Procedures of the Human Rights Council, see Martin Scheinin, "Improving Fact-Finding in Treaty-Based Human Rights Mechanisms and the Special Procedures of the United Nations Human Rights Council," in *Quality Control in Fact-Finding*, ed. Morten Bergsmo and Carsten Stahn (Brussels: TOAEP, 2nd ed. 2020), 75 ff. About the question whether information collected by human rights bodies and "human rights investigators" can generally be admitted as direct evidence at ICTs, see Lyal S. Sunga, "Can International Criminal Investigators and Prosecutors Afford to Ignore Information from United Nations Human Rights Sources?," *ibid.*, 409 ff.

the establishment of a hybrid court in South Sudan,[207] the Commission of Human Rights as a monitoring and/or fact-finding mechanism will have the assigned accountability institution.

CONCLUSION

In this paper, the rationales for exclusionary rules were applied to the extra-investigatory context. After questioning the usefulness of the deterrence theory, both remedy theory and the integrity of the process provide important theoretical bases for the exclusion of illegally obtained evidence in the extra-investigatory context. The argumentative force and even effectiveness of the remedy theory on the international level is underlined by the central role of human rights. The human rights language of Article 21(3) ICC Statute is translated into the admissibility provision of Article 69. Here, integrity from the perspective of the suspect is visibly enshrined in paragraph 7: "Evidence obtained by means of a violation of this Statute *or internationally recognized human rights* shall not be admissible if [. . .] [t]he admission of the evidence would be antithetical to and would seriously damage the *integrity of the proceedings*."

Yet, at the heart of exclusionary rules within the extra-investigatory context lies the integrity of international criminal procedure itself. Illegally obtained evidence by private individuals questions the moral authority of the verdict and its legitimacy. The evidence may be unreliable. Admitting such evidence might violate the rule of law. The basis of the integrity of the process is fairness. Especially the juxtaposition of procedural and substantive fairness is vital for private investigations. A conviction that is based on unreliable evidence is not substantially fair. The two dimensions of fairness—procedural fairness and substantive fairness—affect a judgment like two parents to their child. Within this rationale, integrity becomes a "proxy, synonym or placeholder" for procedural values such as fairness, due process, natural justice, or judicial legitimacy. Moreover, it would be

207. See the report by Nyagoah Tut Pur, *A Glimmer of Hope for South Sudan's Victims*, Human Rights Watch (Jan. 31, 2021), https://www.hrw.org/news/2021/01/31/glimmer-hope-south-sudans-victims. See generally Joseph Geng Akech, "Rethinking Transitional Justice in South Sudan: Critical Perspectives on Justice and Reconciliation," *International Journal of Transitional Justice* 14 (2021): 585 ff.; Kirsten Lavery, "South Sudanese Perceptions of Justice," *Journal of International Criminal Justice* 18 (2020): 278 ff.

detrimental to the expressivist and communicative function of a public trial, if a conviction rendered by an ICT was based on illegally obtained evidence—irrespective of the status of the person who obtained the evidence.

Every endeavor of applying the systems theory by Luhmann and Teubner eventually passes over to the bifurcated decision of how narrow the systems and subsystems should be. The criminal process with its various stages is especially prone to such an endeavor. Strictly speaking, the investigatory context (subsystem 1) could easily be (and often is) separated from the trial process (subsystem 2). This separation hypothesis has practical advantages on the international level: ICTs could, if they found that evidence had been illegally obtained, declare that even though this evidence must be excluded from trial, it could still be obtained and eventually be *used in the pre-trial stage as lead evidence*. An exclusionary rule would thus only address the non-use of evidence in court and require balancing that allows for obtainment of the evidence (even though it was illegally obtained).

Yet, the separation hypothesis must be rejected on the international level. It artificially separates procedural stages that can easily be viewed as unified and is based on the false premise that procedural stages are in fact closed. The rejection of the separation hypothesis and the ensuing holistic view on the process (Duff *et al.*: "integrity as integration") is the continuation of the holistic view to the addressee issue. Integrity as integration, combined with the presumption that procedural rules are not merely addressed to actors but to systems and subsystems, allow for the application of exclusionary rules to private conduct. The status of the person collecting the evidence is not relevant for exclusionary rules, but the investigatory context is (within which both public officials and private individuals act). More concretely: whether exclusionary rules apply does not depend on the *investigator* but on the existence of an *investigation*. Context is key.