

# Radbruch Redux: The Need for Revisiting the Conversation between Common and Civil Law at Root Level at the Example of International Criminal Justice

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## Abstract

International criminal justice is based to a large extent on extrapolations from criminal-law research on domestic systems. The difficult exercise of arriving at a common denominator is exacerbated by the systemic dichotomy of the so-called common-law and civil-law models, which, in turn, have now been joined by a third contender: public international law. Each of these has its own methods of approaching the task of solving legal problems. This paper queries the inter-model conversation that is happening so far and asks the question as to whether it is necessary to hold this discussion at a much more fundamental level than it would seem has been the case so far. It does so at the example of the relationship between German and English and Welsh law, but its concerns and conclusions merit consideration for the entire debate between the systems.

## Key words

civil law; common law; international criminal justice; law and linguistics; Radbruch

[The English] have a horror of abstract thought, they feel no need for any philosophy or systematic 'world-view'. Nor is this because they are 'practical', as they are so fond of claiming for themselves. One has only to look at their methods of town planning and water supply, their obstinate clinging to everything that is out of date and a nuisance, a spelling system that defies analysis, and a system of weights and measures that is intelligible only to the compilers of arithmetic books, to see how little they care about mere efficiency. But they have a certain power of acting without taking thought.

*George Orwell, The Lion and the Unicorn (1940)*

Deutsch sein heißt, eine Sache um ihrer selbst willen zu tun.<sup>1</sup>

*Richard Wagner*

Mon expérience est que souvent le droit comparé est utilisé pour confirmer une solution que l'on avait déjà trouvée.<sup>2</sup>

*Antonio Cassese, in Mireille Delmas-Marty and Antonio Cassese (eds.), Crimes Internationaux et Juridictions Internationales (2002), 140*

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1 Translation: Being German means doing a thing for its own sake.

2 Translation: My experience is that comparative law is often used to confirm a solution one had already found.

## I. INTRODUCTION

International criminal justice is, as far as legal phenomena go, a relatively recent addition<sup>3</sup> to the mechanisms of reaction to crime – which is not a thing that can be said for the crimes it deals with. The idea of justice in the criminal context developed differently in different cultures over long periods. What may appear to be a non-negotiable part of one system can be a non-issue in another. Fostering understanding between cultures is first and foremost a question of language in a deeper, richer sense. Unless the linguistic and cultural influence on scientific thought and practice is given the necessary attention as a primary determinant of scientific or academic dialogue, a gap will remain between different legal cultures, despite the best intentions of the partners to any comparative dialogue. Nowhere is this gap of mutual understanding greater than between the so-called common-law and continental (or civil)-law systems, and to differing degrees at that. The author is a German judge-turned-academic teaching English, comparative, and international criminal law at a university in the United Kingdom; this paper is a first step in an investigation and it is based on his experiences with the particular dialogue between the English variety of common law and the German system, but, of course, the topic needs to be studied on a much wider range, including other major common-law jurisdictions such as the United States, for example.

German law is one of the continental jurisdictions least understood by English lawyers, who mostly look to France when comparing continental systems. More often than not, that comparison will focus on procedural issues rather than on substantive law principles. Given that the process of harmonization of laws within the European Union has also taken hold of the criminal law and mutual understanding is becoming ever more important if we are to proceed on the path to *mutual recognition* as the new guiding principle of co-operation after the Treaty of Lisbon, some might say that it is time that the common-law community was provided with adequate tools enabling them to comprehend the continental criminal law beyond mere policy issues and generalist compilations, and, more to the point, to become acquainted with their underlying epistemology. Mirjan Damaska has described the problem famously as follows:

[L]aymen dislike being bound by technical criteria, not only because they do not always understand them, but also because such criteria may dictate results at odds with their ideas about the appropriate solution of the case – ideas likely to be generated by feelings about substantive justice. If external pressures nevertheless impose a degree of legalism on coordinate structures, the kinship of these structures with pragmatic legalism is far closer than their kinship with logical legalism. This is because the legalist of the pragmatic persuasion and the layman attached to substantive justice demand close attention to concrete particulars. To both, *le bon Dieu est dans le détail*. On the other hand, the regulation that appeals to logical legalists is alien to laymen. It displays insensitivity to the singularity of human drama, and its capacity to assure principled

3 See on the general problems that that entails for the operation of the courts from the point of view of establishing an amalgamated procedure recently R. Skilbeck, 'Frankenstein's Monster: Creating a New International Procedure', (2010) 8 JICJ 451.

decision making leaves laymen unimpressed. They are likely to prefer warm confusion to cool consistency.<sup>4</sup>

German criminal procedural law, for example, takes rather different approaches to many of the problems of procedural law from those of the common-law family of countries like the United Kingdom, the United States, Canada, New Zealand, Australia, etc. It also differs markedly from the system that is most often used in anglophone writing as a civil-law comparison: the French law. German criminal law is a code-based and so-called ‘inquisitorial’ – better: ‘judge-led’ – procedural model. The influence of academic writing on its development has been far greater than in the common law, as George Fletcher correctly observed when analysing the task of constructing a terminology in English (or other languages) that adequately describes and represents the generally accepted dominant German model of the tripartite structure<sup>5</sup> of criminal offences: ‘This task has not been easy to do in English, largely because academics lack the kind of authority that they enjoy in many cultures of Western Europe and the Far East.’<sup>6</sup>

To stay with this point – the offence definition and the related level of conceptual difference – the English dualist concept, for example, can be summarized in the notorious equation memorized by every first-year law student: ‘Offence = (*actus reus* + *mens rea*) – defences.’ This naturally entails the question of where one subtracts the defences from and what that means for the offender’s liability, for example, in the context of secondary participation where one party may have a *mens rea* defence but not her accomplice, etc. Is insanity really a question of *mens rea* or does it belong to a different category of a personal, subjective, mental-state-related context that would merit a separate classification? In the ensuing sections, these issues shall first be clarified mainly in the example of one major Continental jurisdiction, that of Germany, followed by a look at the increased complexity of the topic in the arena of international criminal law. This can, by its very nature, only be a mere snapshot of the wide panoply of legal systems on the Continent and elsewhere, but it shall suffice to highlight some salient points in the debate about the common and civil law, which the international criminal justice community in particular may have overlooked for too long and which may be in need of addressing at root level in future research.

It bears mentioning as an aside in this context that is primarily focused on the Anglo-German dialogue that the traditional focus on the dichotomy between common and civil law does not even begin to reach the level of systemic difference that both systems exhibit vis-à-vis Islamic legal thought. Islamic Shari’ah is a separate category that does not fit easily into the division between common and civil law. It is often neglected in comparative law research, which is questionable, to say the least, because it is seen as a divine or divinely inspired source of law, demanding obedience in all spheres of life by more than one and a half billion people on this planet. This is notwithstanding the fact that most Islamic states do not apply

4 M. Damaska, *The Faces of Justice and State Authority* (1986), 28.

5 See M. Bohlander, *Principles of German Criminal Law* (2009), 16.

6 G. Fletcher, *The Grammar of Criminal Law*, Vol. 1 (2007), 145.

pure Shari'ah in the criminal-law field, but rely on codes that may be based to differing degrees on previous colonial principles and indigenous attitudes, which may be an indicator that there is actually no state practice within the meaning of Article 38 of the Statute of the International Court of Justice (on which, more below). The Shari'ah's way of arguing and the sources of reasoning as accepted by legal scholars and the leading (clerical) jurists especially in the criminal law are somewhat reminiscent of scholastic deductions combined with the doctrine of precedent, but lacking what Wael B. Hallaq calls a 'single umbrella category equal in scope and taxonomical groupings to the modern notion of criminal or penal law'.<sup>7</sup> The absence in traditional Shari'ah of any written criminal law apart from the few legally relevant verses contained in the Qur'an and the Prophet's Practice likens it more to the common-law tradition of inductive reasoning. In more recent times,<sup>8</sup> many of the Islamic countries would also at some point or another have been under the influence of colonial powers and modern state-sponsored<sup>9</sup> law often proclaims the Shari'ah as the supreme law of the land, although not necessarily to its full extent in the realm of criminal law.<sup>10</sup> However, traditional Shari'ah will inevitably have an influence on how Islamic governments adapt their criminal justice systems because traditional Islam strictly speaking does not allow a government to neglect the divine command or the practice of the Prophet in any area of public life.<sup>11</sup>

## 2. SOME EXAMPLES

The differences in legal culture and history can be drastic. A few examples may be mentioned to clarify this point. The German system, for example, has gone through a development of serious human-rights abuses from the times of the witch trials to the Nazi era and the political trials during the GDR regime – an experience that has left deep scars on the German communal conscience and has strongly influenced the way most German lawyers think about procedural safeguards for defendants and about civil liberties in general.<sup>12</sup> The United Kingdom, for example, also has had dark periods, but not nearly to a comparably severe degree in this respect. Has this difference had an impact on how the average Englishman today perceives the justice system of England and Wales? Does it show in the way the English, laypersons and professionals alike, talk about their legal institutions? Is the mode of talking an

7 W. B. Hallaq, *Shari'a: Theory, Practice, Transformations* (2009), 308. There are, of course, many attempts now at modernizing the Islamic jurisprudence from within Islamic parameters as opposed to secularizing or even Westernizing it; *ibid.*, 500 ff.

8 On the development of the law in the Middle East, see C. Mallat, *Introduction to Middle Eastern Law* (2009).

9 See on this phenomenon K. S. Vikor, *Between God and the Sultan* (2005), 254 ff. who calls the codification efforts 'Shari'a through Siyasa', i.e. implementing Shari'ah through state-sponsored codification. On the situation in Pakistan, see T. Wasti, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice* (2009).

10 See, e.g., A. Belal, *Principles of Egyptian Criminal Law: The General Part* (2004/05).

11 See on the underlying problems that this situation creates M. Bohlander and M. M. Hedayati-Kakhki, 'Criminal Justice under Shari'ah in the 21st Century: An Inter-Cultural View', (2009) 23 *Arab Law Quarterly* 417, which also deals with the Shi'a perspective and from which part of the above section is excerpted.

12 An attitude in which they are occasionally even outdone by the Spaniards; see M. Bohlander, 'Case Comment on Tribunal Supremo, Sala de lo Penal, Judgments of 15 March 2005 (Case No. 336/2005) and 13 April 2005 (Case No. 463/2005)', (2006) 70 *Journal of Criminal Law* 211.

expression of a deeper cultural affinity for certain problem-solving models within the ambit of criminal justice? Maybe the relative ease with which the UK law uses its ubiquitous CCTV surveillance and legal instruments such as reverse burdens of proof to the detriment of the defendant, and strict-liability offences, as opposed to the general and principled condemnation any such approach would receive in Germany, has to do with that human-rights history. This may appear at first blush to be counterintuitive, because Jeremy Paxman, for example, has used the slogan ‘I know my rights’ as one of the catchphrases most tellingly defining Englishness,<sup>13</sup> yet the emphasis put on different interests may not be shared across Europe: for a German, it is almost inconceivable how one can acquiesce to video cameras in almost every public space<sup>14</sup> but become incensed at the idea of having to carry an ID card – something the Germans have done for many years without the face of Big Brother looming on the horizon. The Germans have traditionally had a reputation as being an efficient, albeit authority-minded, mechanical, methodical, and subservient, people, more interested in a smooth and efficient running of the different little wheels and cogs in the great machine that is the body politic than in ideas of natural justice and individual rights. That this reputation runs afoul of the impressive history of moral and legal philosophy in Germany, tied to names such as Hegel, Kant, or Feuerbach, and its influence on legal systems all over the world is another matter.

A second example is that Germany has not used jurors since 1924. There are lay judges in some courts but no laymen-only courts such as the English magistrates’ courts; however, depending on the case and the numbers required for a majority, lay judges can outvote the professional judges on issues of fact *and* law, unlike in the Crown Court at appellate level in England.<sup>15</sup> The trial procedure is not party-driven, but judge-led, entailing a drastic difference in the roles of prosecution, defence, and judge. The position of the defendant herself in practice is fundamentally different in that she is not merely a quasi-piece of evidence, but a fully equal party: she may address the court, make motions, and question witnesses directly, even if represented by counsel; she does not give evidence when making a statement, is not required to incriminate herself in any way, and thus, consequently, cannot perjure herself (the so-called (in-)famous ‘right to lie’). The prosecution can directly appeal acquittals as well as too-lenient *and* too-harsh sentences. There is no rule against the introduction of hearsay evidence, and so on.

Cases of mistake of fact, as yet another example, are (controversially) called ‘failure-of-proof’ defences in English law: the expression is based on the prosecution’s failure to prove an essential element of an offence. It becomes immediately evident that this is a procedure-driven terminology referring to the trial situation. German doctrine also treats these scenarios as the absence of a necessary element of an offence, but describes them in material, substantive and dogmatic terms: a

13 J. Paxman, *The English: A Portrait of a People* (1999), 133.

14 The usual popular reply to this that ‘I’ve got nothing to hide’ is naive in the extreme because it is always someone else who decides what in a person’s behaviour is worth hiding for them, and therefore worth discovering for someone else.

15 See M. Bohlander, ‘“Take It from Me”: The Role of the Judge and Lay Assessors in Deciding Questions of Law in Appeals to the Crown Court’, (2005) 69 *Journal of Criminal Law* 442.

*Tatbestandsirrtum* is not a defence based on the absence of prosecutorial proof at trial; it is merely the lack of an essential element related to the person and, more specifically, the mental state of the offender as such. I personally had a similar experience at an international symposium when I was explaining an issue related to the lack of an offence element and an English colleague of mine in the discussion said that that would be an issue ‘on which the prosecution would not have to lead any evidence’. The conceptual distinction between an element of an offence and a defence was succinctly captured at the international level by the *Čelebići* Appeals Judgement of 2001, when the judges wrote – clearly employing common-law procedural epistemology – about the question of whether a defence of diminished responsibility existed under the ICTY’s law:

As stated earlier, both Landžo and the Trial Chamber appear to have assumed the existence of such a defence in international law by reason of Rule 67(A)(ii).969. That sub-Rule is in the following terms:

As early as reasonably practicable and in any event prior to the commencement of the trial:

[. . .] the defence shall notify the Prosecutor of its intent to offer:

(a) the defence of alibi; [. . .];

(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

The Rule is not happily phrased.

It is a common misuse of the word to describe an alibi as a ‘defence’. If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a *defence* in its true sense at all. By raising that issue, the defendant does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true.

On the other hand, if the defendant raises the issue of *lack* of mental capacity, he is challenging the presumption of sanity by a plea of insanity. That is a defence in the true sense, in that the defendant bears the onus of establishing it – that, more probably than not, at the time of the offence he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that what he was doing was wrong.<sup>16</sup>

While the result is the same in substance<sup>17</sup> – that is, absence of *mens rea* or another offence element or the presence of a defence – the way of describing the phenomenon is highly significant of the different linguistic and cultural approaches to thinking about and practising law. George Fletcher is right when he states:

The particular attachment of Anglo-American legal culture to the concept of ‘fairness’ derives from the emphasis in the common law on procedural regularity as a value in

16 *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka ‘Pavo’), Hazim Delić and Esad Landžo (aka ‘Zenga’)*, Appeals Chamber Judgement, Case No. IT-96-21-A, 20 February 2001, paras. 580–582 (emphasis in original).

17 Though not as far as the burden of proof is concerned: German law, for example, does not recognize any reverse probative burden to the detriment of the defendant at all. That would be seen as a violation of the presumption of innocence, would run counter to the duty of the court to ascertain the truth under para. 244(2) of the Code of Criminal Procedure, and would ultimately be considered unconstitutional.

itself, a value worth respecting apart from justice in the individual case. Our notions of fairness and fair play draw heavily on the analogies from competitive sports and games, which pervade idiomatic English. . . . Relying on a sporting ethics to design the contours of criminal trials would strike lawyers from other parts of the world as a distortion of justice<sup>[18]</sup>. . . .

This characteristic<sup>[19]</sup> of common law thinking derives in part from the jury system. The basic rule guiding the competence of the jury is that lay people should decide those questions on which reasonable people might differ. If reasonable jurors would not disagree,<sup>[20]</sup> then the judge should direct a verdict. Thus reasonableness becomes the standard for demarcating the realm where the expertise and official power come to an end.<sup>21</sup>

This procedure-based approach relating to the judge-and-jury model in the epistemology of the conversation about criminal justice, and maybe law in general, is also reflected in the terminology of English appellate courts when they have to address errors of law by the trial judge, if the judge sat without a jury or made a decision in which the jury did not play a part. The judge is then often said to have ‘misdirected himself’, as he would otherwise have been held to have ‘misdirected the jury’ in his summing-up, for example.<sup>22</sup> Similar talk based on the judge-and-jury model can be found in the language of the Appeals Chamber of the ICTY in the *Jelisić* case (see below). A civil-law court would merely state that the lower court *misapplied* or *erred* about the law.

### 3. LOST IN TRANSLATION? THE CASE OF GERMAN LAW

The simple fact of the matter is that there is, for example, no one work on German criminal procedure in English available at this time,<sup>23</sup> neither for the substantive analysis of the law nor for the linguistic and methodological background. The standard work in the latter area was and still is a short monograph in German by Gustav Radbruch from 1947,<sup>24</sup> *Der Geist des englischen Rechts*. The more recent and thus up-to-date monographic academic-level literature available in English on the German procedural system at present exists mainly of more or less brief overview sections in three comparative collections<sup>25</sup> and a comparative case study.<sup>26</sup> The German Federal Ministry of Justice has published the fifth edition (2009) of a

18 G. P. Fletcher, *The Grammar of Criminal Law*, Vol. 1 (2007), 136.

19 i.e., the emphasis on reasonableness as a guiding concept.

20 That does, of course, beg the question as to who decides what a reasonable juror would think. Is it the judge, when, for example, he makes a decision on a submission of no case to answer, called a ‘motion for acquittal’ on the international level?

21 Fletcher, *supra* note 18, at 141.

22 See, e.g., only recently, *Attorney General’s Reference (No 120 of 2009) & R v. Wright* [2010] All ER (D) 93 (Mar); *R v. Castillo* [2010] EWCA Crim. 658; *R v. Thomas and others*, [2010] EWCA Crim. 148, para. 50.

23 This author is currently writing a monograph on that topic to complement his 2009 book on the substantive German law, to be published in late 2011.

24 G. Radbruch, *Der Geist des englischen Rechts* (1947), reprinted in H. Scholler (ed.), *Gustav Radbruch, Der Geist des englischen Rechts und die anglo-amerikanische Jurisprudenz* (2006), 44.

25 R. Vogler and B. Huber (eds.), *Criminal Procedures in Europe* (2008), 269; C. Bradley (ed.), *Criminal Procedure: A Worldwide Study* (2007), 243; M. Delmas-Marty and D. Spencer, *European Criminal Procedures* (2006), 292.

26 F. Floyd and J. Herrmann, *One Case, Two Systems: A Comparative View of American and German Criminal Justice Systems* (2005).

67-page statistical overview by Jörg-Martin Jehle on its website.<sup>27</sup> The Canadian law website of Lareau<sup>28</sup> has links to German criminal-law works, which also shows the fragmented and often dated nature of the literature available in foreign languages on the German system. There are a limited number of articles and essays in UK, US, and other international journals that contain comparative aspects related to the German criminal law; as can be easily deduced from their relative paucity and the page numbers and the nature of the above-mentioned works, an in-depth, analytically coherent, and monolithic exposition of the German system is conspicuously missing, both for the legal as well as for the linguistic-cultural part.

What is needed is an analytical, coherent, and systematic presentation of the academic methodology and the judicial and legislative policy approaches to the criminal process in German legal culture, as well as their linguistic and cultural influence on academic thought and practice to familiarize the common lawyers with the academic and judicial methodology and overall policy of German legal thinking in the field of criminal procedural law, as well as with the cultural emphasis on and the shape of procedural general principles and protections, and extract patterns of talking about law as a cultural phenomenon.<sup>29</sup> German criminal law is heavily doctrine-driven, much more so than is the case under the approach taken, for example, by English criminal law, or, for that matter, the criminal law of many common-law systems. While it is true that parliamentary law-making has gained a lot of ground, especially in recent decades, common-law systems have traditionally relied on judge-based development on a case-by-case basis. Because their law had to be tailored for use by laypeople as fact-finders in the criminal process, be they jurors or lay magistrates, a high emphasis was put on remaining as close as possible to what judges like to call ‘common sense’, making the approach akin to that described by Damaska as that of a pragmatic legalist or layman. The following quote from a well-known English case on the effects of voluntary intoxication on the *mens rea* of the accused in so-called basic intent offences, *DPP v. Majewski*, is a good example of this attitude:

A number of distinguished academic writers support this contention on the ground of logic. As I understand it, the argument runs like this. Intention, whether special or basic (or whatever fancy name you choose to give it), is still intention. If voluntary intoxication by drink or drugs can, as it admittedly can, negative the special or specific intention necessary for the commission of crimes such as murder and theft, how can you justify in strict logic the view that it cannot negative a basic intention, e.g. the intention to commit offences such as assault and unlawful wounding? *The answer is that in strict logic this view cannot be justified. But this is the view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic.* There is no case in the 19th century when the courts were relaxing the harshness of the law in relation to the effect of drunkenness on criminal liability in which the courts ever went so far as to suggest that drunkenness, short of drunkenness producing

27 Available at [http://forum.bmj.de/files/-/960/Criminal%20Justice%20in%20Germany\\_Auflage%205\\_englisch.pdf](http://forum.bmj.de/files/-/960/Criminal%20Justice%20in%20Germany_Auflage%205_englisch.pdf).

28 Available at [www.lareau-law.ca/codification-Germany.html](http://www.lareau-law.ca/codification-Germany.html).

29 Parts of the following section are modified excerpts from my *Principles of German Criminal Law* (2009).



insanity, could ever exculpate a man from any offence other than one which required some special or specific intent to be proved.<sup>30</sup>

A similar argument with a view to the importance of procedural rules was made at the international level by the Australian judge David Hunt, who had previously been the Chief Judge at Common Law at the Supreme Court of New South Wales, at the International Criminal Tribunal for the Former Yugoslavia in the case against *Milan Milutinović*<sup>31</sup> and others, when he said in relation to the prosecution's contention that he no longer had jurisdiction to decide on the request of the accused: 'The Rules of Procedure and Evidence were intended to be the servants and not the masters of the Tribunal's procedures.'<sup>32</sup>

In contrast, although German law has widely subscribed to the use of historical and teleological interpretation, which includes the application of public-policy arguments like the one used by the court in the *Majewski* case, such a barefaced rejection of the appeal of logic would be an alien thought to any German judge, let alone academic. Despite the fact that the development of German criminal law, too, has increasingly come under the influence of judicial reasoning about legal principles, there is still a discernible impact of and reliance on academic writing, mainly based on the pervasive German legal commentary culture. German academics and practitioners have over the centuries produced large and intricate commentaries on the different codified laws and handbooks on practice and procedure. Only the latter can be equated with common-law publications such as Archbold or Stone's *Justice Manual* in England. Commentaries, some of them with several volumes, on specific codes written by respected academics, seasoned judges, and practitioners through many editions do not only digest the development of literature and jurisprudence, but they also analyse them and criticize the arguments put forward by the writers and judges and, if they happen to disagree with them, set out their own view of how things should be done – something hardly ever found, for example, in the leading English manual on criminal procedure, *Archbold*. It is no rarity, either, to find a court changing its long-standing jurisprudence on a certain topic because the logic

30 *DPP v. Majewski*, (1977) AC 443, repeated in *R v. Powell and another*; *R v. English*, (1999) AC 1 (emphasis added).

31 *Prosecutor v. Milan Milutinović et al.*, Decision on Application by Dragoljub Ojdanić for Disclosure of Ex Parte Submissions, Case No. IT-99-37-I, 8 November 2002, para. 14. He had previously made the same argument in the case of *Prosecutor v. Dario Kordić & Mario Čerkez*, Decision Authorising Appellant's Briefs to Exceed the Limit Imposed by the Practice Direction on the Length of Briefs and Motions, Case No. IT-95-14/2, 8 August 2001, para. 6, and in *Prosecutor v. Zoran Kupreškić et al.*, Separate Opinion of Judge David Hunt on Appeal by Dragan Papić against Ruling to Proceed by Deposition, Case No. IT-95-16-A, 15 July 1999, para. 18. He was right to the extent that the Rules of Procedure and Evidence at the ICTY were judge-made in the first instance and ranked below the Statute in the hierarchy of norms. However, in systems in which the rules are not made by judges, this statement is questionable.

32 Citing as authority in the decisions mentioned above, merely two English civil-law cases from 1897 and 1907: *Kendall v. Hamilton*, (1879) 4 App. Cas. 504, at 525, 530–1; *In the Matter of an Arbitration between Coles and Ravenshear*, [1907] 1 KB 1. In the latter, Sir Richard Henn Collins, the Master of the Rolls, said in the Court of Appeal (at 4): 'Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.' Whether that translates into a statement as general as Hunt J. may have understood it is open to question.

behind the arguments of renowned academic writers made in such commentaries or in journal articles convinces the judges that their previous views were wrong.

The fact that German law is to a large extent based on the more or less strict application of logic and well-developed methods of interpretation is also a function of the German academics' (and actually also the judges') attitude to the judicial process: they do not see academia as the mere handmaiden of the judges, but as their guiding light. To their minds, judicial practice should, in principle, follow abstract reasoning rather than adhere to a casuistic approach that favours justice in the individual case over systemic coherence to the major and overarching legal principles across the board.<sup>33</sup> The German approach, to use a simplistic description, is thus deductive in nature, as opposed to the more inductive one of the common law,<sup>34</sup> and it runs counter to the inclination of laymen, who may be 'likely to prefer warm confusion to cool consistency'.<sup>35</sup> The function and view of the trial and its effect on legal reasoning in the sphere of substantive law are markedly different. This begins with the nature and structure of the German criminal process. German criminal proceedings are, by their nature, not a contest between parties, but an objective, judge-led inquiry into the material truth of the facts underlying a criminal charge. Equality of arms is not a principle that would apply to a similar extent and in the same nature as it does in adversarial systems. From the German point of view, the prosecution, on the one hand, has no individual rights of fair trial; it has powers and duties, with the consequence that the prosecution cannot argue a violation of the right to equality of arms because the system is not adversarial, but the court *itself* is under a duty to find the truth.<sup>36</sup> The defence, on the other hand, has no duties, only rights, yet it may suffer if it does not exercise them properly, as is the case under the well-known common-law 'save-it-or-waive-it' principle relating to grounds of appeal, which, however, in an intriguing converse development of transplantation of individual legal cultural facets, appears to find more and more favour with German courts, too, especially in connection with section 238 II StPO.<sup>37</sup> The defence is seen as being, by definition, inferior in power and facilities to the prosecution, so, from a German point of view, equality of arms is a principle that protects the defence, but not the prosecution. Any idea of changing the law, for example, by introducing probative burdens of proof on the defence or reading down the requirements the prosecution has to prove (see, e.g., the recent Sexual Offences Act 2003 with regard to requiring proof of absence of *reasonable* belief in consent as opposed to the *honest* belief standard (probably) still applicable to all other offences

33 This is another typical area of divergence between common and civil-law systems, as has been shown by Mirjan Damaska in his seminal work, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986).

34 See also G. Radbruch, *Der Geist des englischen Rechts und die anglo-amerikanische Jurisprudenz: Aufsätze herausgegeben und eingeführt von Heinrich Scholler* (2006).

35 Of course, in some areas of German law, notably labour and employment law, large sections are almost wholly judge-made because the government has for some reason or other not taken up the burden of providing for proper codification. Very often, Parliament will, in its acts, codify a long-standing and proven judicial tradition and, to that extent, there is, of course, a judicial influence on codified law-making, too.

36 StPO = Strafprozessordnung = Code of Criminal Procedure, section 244(2) StPO.

37 See L. Meyer-Goßner, *Strafprozessordnung* (2010), para. 238, marginal number 22, with references to the case law.

under *DPP v. Morgan*<sup>38</sup>) in order to make it easier for the prosecution to bring its case, would have no equivalent in German doctrine, and indeed would be seen as constitutionally questionable. Difficulties of the prosecution to prove its case cannot lead to an abridgment of the defence's position by interpreting down the threshold of existing offence requirements, as they can in England.

These examples show that some of the fundamental cultural parameters defining the criminal process as a whole differ drastically between the German and the English systems, the latter being, after all, the parent system of all common-law countries. As already mentioned above, these cultural differences express themselves in the way laypeople and professionals talk about the law, and the language in turn influences the theoretical approaches to academic thinking about and practising law – something that was picked up early in the twentieth century by Gustav Radbruch.

#### 4. RADBRUCH RESURRECTED

Gustav Radbruch (1878–1949),<sup>39</sup> the eminent German jurist and legal philosopher, had the following to say in 1947 about the English approach to law and its underlying methodology in *Der Geist des englischen Rechts*:<sup>40</sup>

It is not in the nature of the English mind to violate the facts by reason, it seeks reason in things, to it reason is in the 'rerum natura'. This English fact-mindedness does not cherish founding decisions on the expectation of things to come, it allows them to materialise first in order to decide once they have arrived. It trusts neither the imagination nor the calculation of future events, the real situation is always different anyway; it rather waits until the situation brings the decision, forces it. It feels no obligation towards the elegance of the clear contour in order to avoid an unsightly zigzag course ... its strength is being able to correct and adapt itself to the new situation.<sup>41</sup>

Maitland, the great English legal historian, speaks in the same sense of 'stumbling forward in our empirical fashion, blundering into wisdom.'<sup>42</sup>

In the same fashion, Macaulay says of the English mode of legislation 'neglect of the symmetrical and adept order; never abolition of an anomaly merely because of its having been an anomaly; no innovation unless a grievance was immediately felt, and then innovation only insofar as necessary for the removal of that grievance.'<sup>43</sup>

38 [1976] AC 182.

39 See for a portrait the online edition of the German paper *Die Zeit* of 10 November 2009 available at [www.zeit.de/2009/46/A-Radbruch](http://www.zeit.de/2009/46/A-Radbruch).

40 Translation: 'The Spirit of English Law'.

41 Radbruch, *supra* note 24, at 47–8: 'Englischem Denken liegt es nicht, die Tatsachen mittels der Vernunft zu vergewaltigen, es sucht die Vernunft in den Dingen, Vernunft ist ih[m] Natur der Sache. Dieser englische Tatsachensinn liebt es auch nicht, Entschlüsse zu gründen auf die Erwartung künftiger Tatsachen, er lässt die Tatsachen an sich herankommen, um sich erst dann zu entscheiden, wenn sie da sind. Er traut weder der Phantasie noch der Berechnung künftiger Situationen, die wirkliche Situation ist ja immer ganz anders; er wartet vielmehr, bis die Situation selbst die Entscheidung bringt, zur Entscheidung zwingt. Er fühlt sich ... nicht verpflichtet zur Eleganz der klaren Linie, zur Vermeidung eines unschönen Zickzackkurses ... , seine Stärke ist, sich jeweils nach der neuen Lage berichtigen und umstellen zu können'.

42 *Ibid.*, at 48: 'Maitland, der große englische Rechtshistoriker, spricht in gleichem Sinne einmal von stumbling forward in our empirical fashion, blundering into wisdom'.

43 *Ibid.*, at 48: 'Ganz entsprechend sagt Macaulay von der englischen Gesetzgebung Vernachlässigung der symmetrischen und geschickten Anordnung; niemals Beseitigung einer Anomalie bloß um deswillen, weil

This is why most English lawyers are against codifications, against the consolidation of entire areas of law in comprehensive codes, and for a method of finding law that creates new law only based on an individual case and then only for that case and similar ones.<sup>44</sup>

Radbruch also points out that even where such codifications happen, they quickly become overgrown with a layer of case law like ‘a thatched roof by moss’ that quickly pushes the direct applicability of the letter of the law aside.<sup>45</sup> As far as the linguistic approach of English law was concerned, Radbruch observed:

Even the English terminology with respect to the law is original and singular. While in the main continental languages the word for ‘Law’ comes from that which is straight and on the right side, from the right and the just (Recht, droit, diritto), in English it is deduced from the [positive legal order]: ‘the law’.<sup>46</sup>

Radbruch’s writing about the spirit of English law provides a starting point but is, of course, obsolete in some of the observational details because some of the areas referred to have undergone reform since 1947. However, his main thesis seems to have lost nothing of its potency. André Klip has opined:

English would be the obvious choice for a European legal language. This is problematic insofar as the continental (and thus non-English) criminal law holds a wider sway in Europe as a whole and has more commonalities than the anglophone legal systems . . . Yet the experiences with English legal terminology in international criminal courts have shown that given balanced substantive rules, a new and *sui generis* system can emerge and find its own balance. Therefore it should be feasible for English as a common European legal language to shed its national provenance.<sup>47</sup>

The precondition of ‘balanced substantive rules’ is the real sticking point, as what is balanced is often determined not by the letter of a law, but by its interpretation and thus by the methodology applied by the legal scientists, which, in turn, uses linguistic and epistemological tools. What Radbruch said all those years ago is thus likely to remain a pertinent comment.

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sie eine Anomalie gewesen; keine Neuerung, wenn nicht eine Beschwerne unmittelbar empfunden wurde, und dann Neuerung nur insoweit, als gerade zur Beseitigung eben dieser Beschwerne notwendig war’.

44 Ibid., at 49: ‘Deshalb sind die meisten englischen Juristen gegen Kodifikationen, gegen die Zusammenfassung ganzer Rechtsgebiete in umfassenden Gesetzbüchern, und für eine Rechtsfindung, die aus Anlass des einzelnen Falles und nur für diesen Fall und seinesgleichen neues Recht schafft’.

45 Ibid., at 49.

46 ‘Originell und insular ist schon der englische Sprachgebrauch in bezug auf das Recht. Während in den kontinentalen Hauptsprachen das Wort “für Recht” vom Graden und Rechtsseitigen, vom Richtigen und Rechten hergenommen ist (Recht, droit, diritto), ist es im Englischen vom Gesetze abgeleitet: “the law” (59).

47 ‘Strafrecht in der Europäischen Union’, (2005) 117 ZStW 889, at 908: ‘Es liegt auf der Hand, dass die Wahl für eine europäische Rechtssprache auf das Englische fallen dürfte. Das ist zwar insofern problematisch, als das kontinentale (und damit nichtenglische) Strafrecht in Europa insgesamt stärker verbreitet ist und mehr Gemeinsamkeiten hat als die englischsprachigen Strafrechtsordnungen . . . Aber die Erfahrungen mit der englischen Rechtssprache in internationalen Strafgerichtshöfen zeigen, dass bei ausgewogenen Sachregelungen durchaus ein neues und eigenständiges System entstehen und seine Balance finden wird. Deswegen sollte es möglich sein, dass sich Englisch als gemeinsame europäische Rechtssprache aus seinem nationalen Kontext löst.’

## 5. A FEW HERETICAL IDEAS

As was indicated above, this contribution is a mere introduction to the research that may have to be undertaken to get to the root of the misunderstandings that often plague the joint practice of civil and common lawyers. The well-known dichotomies ‘adversarial–inquisitorial/judge-led’, ‘inductive–deductive’ may thus be in need of being broken down further. The following, perhaps provocative, hypotheses, related specifically to the German/English approach in the criminal-law context but to differing degrees applicable to many Continental and common-law jurisdictions, are awaiting verification or falsification:

- The systematic presentation of a foreign legal system in the technical terminology of the target language of another country invariably involves a linguistic and cultural-comparative challenge.
- From a German point of view, English legal culture still has a long way to go before a genuine stage of general coherent codification is reached, if that is desired at all,<sup>48</sup> despite the trend of the last 20–30 years of increasing the legislation density in many areas. An attempt in the 1980s to codify the entire criminal law failed because of the prevalent traditional attitude of many of the most influential English lawyers and government officials. The Law Commission has recently been revivifying the attempt at codification, but merely in individual bills and not as an overall Code. The same can be said for the procedural law.
- Legal methodology as understood in Germany is identical in the work of the judges and of academics, as judges are more thoroughly academically trained in academic legal science than most of their English counterparts. There is thus no dichotomy between the two in Germany and the amount and depth of academic treatment of a case by the courts, especially the highest courts, is thus not substantially different from that applied by academics.
- Thus, German academic and judicial methods are not in any meaningful way distinct; there is no friction in communication between academia and practice in Germany. Conversely, ‘legal science’ – the clumsy translation of *Rechtswissenschaft* – is frowned upon and belittled in modern English legal academia as a mechanical and practice-oriented, applied-research variety of legal discourse, presently at odds with the socio-legal and policy-oriented research focus of the majority of English legal academia, as well as contrary to the piecemeal approach favoured by the judiciary.
- A change in attitude may be required in England as one of the paragons of the common-law world, and it can only come about by a reassessment of the value of academic methodology and its desired influence on proactive rather than reactive law-making. Comparative research in the international justice context requires knowledge and understanding primarily of the law as applied by the practitioners, and only secondarily of the policies and socio-legal context behind it. In the Anglo-German dialogue, for example, this translates into an increased dedication

48 See on the codification efforts and the reluctant response J. Lavery, ‘Codification of the Criminal Law: An Attainable Ideal?’, (2010) 74 *Journal of Criminal Law* 557.

of resources by English academics and lawyers to understanding the German system, not the other way around because that direction on the road of mutual understanding has been travelled by many German academics for many years, as exemplified by such institutions as the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg – something that has no equivalent in England. There are voices in England that call for a more co-ordinated approach, and the German model may be a useful catalyst for that process.

## 6. THE ADDED PROBLEM OF SOURCES OF INTERNATIONAL LAW

So far, we have been moving mainly in the area of bilateral comparative research. The problem of mere comparative differences becomes more complex in the multilateral comparison field underlying international criminal justice. This has a lot to do with Article 38 of the Statute of the International Court of Justice (ICJ) that deals with what are the sources of international law impacting on that court. That article reads in its relevant parts:

- i. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

It is understood that these principles apply to the various ad hoc tribunals as well, and in a restricted manner to the ICC, namely if a matter is not regulated by the Statute, the Rules of Procedure and Evidence (RPE), or Regulations. And, much as with the ad hocs, the lacunae exist in vital areas of the general principles of substantive and procedural law. As I have tried to point out in previous research,<sup>49</sup> the linguistic and epistemological cultural debate between common and civil law is now joined by a third discussant – one that is their progeny to some extent under Article 38(1)(c) but which by now has become an independent adult offspring: public international law. Public international law, with its extensive reliance, in the sphere of criminal law, on customary law as the result of state practice accompanied by *opinio juris*, takes a wealth of other factors into account that tend to clash with the fair-trial and minimum-criminalization-driven approaches of both domestic systems: state

49 See M. Bohlander and M. Findlay, 'The Use of Domestic Sources as a Basis for International Criminal Law Principles', in *The Global Community Yearbook of International Law and Jurisprudence 2002*, Vol. I (2003), 3 (from which some of this section is a modified excerpt); M. Bohlander, 'The Influence of Academic Research on the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia: A First Overview', in *The Global Community: Yearbook of International Law and Jurisprudence 2003* (2004), 195; M. Bohlander, 'The General Part: Judicial Developments', in C. Bassiouni (ed.), *International Criminal Law III* (2008), 517.

practice and international comity. Those two are in an innate tension with the former, not least because the influence of politics in their remit is, on average, much more direct than in the more legalistically guided conflict between common and civil law.

Closely linked to this field is that of the personnel who are in charge of applying the law: the judges. It is common knowledge that there are still pockets of serious translation errors in the dialogue of the systems within the tribunals and courts, which leads Rupert Skilbeck to note that ‘Lawyers and judges can learn a great deal from each others’ systems if they do so with an understanding that it may take more than a moment to fully understand the intricacies that make it function’.<sup>50</sup>

Research<sup>51</sup> has also shown that it would appear that not all of those who make it to the bench are actually properly qualified to undertake the task of engaging in the interpretative endeavour of marrying the different approaches into a coherent whole.<sup>52</sup> This has mainly to do with their previous professional activities, which do not always encompass in-depth familiarity with criminal trials, but also with other issues, such as their command of languages. These systemic problems are overlaid by practical and pragmatic influences, such as, for example, the methodologically problematic result-driven use of comparative methodology alluded to by Antonio Cassese in the quote above or the more logistical obstacles addressed by the German former ICTY judge, Wolfgang Schomburg:

Before continuing, I would like to apologize for restricting my following comments to German law and jurisprudence. *Unfortunately, the workload does not allow for in-depth comparative research.* However, the quoted regulations and case law may serve as an example for many similar systems. Moreover, up until today nobody has successfully claimed that this approach violates the fundamental rights to be informed and to be heard.<sup>53</sup>

As I have tried to explain elsewhere in connection with Judge Schomburg’s candid admission:

[r]esearch related to the ICTY and a further study for the Sierra Leone Special Court tend to show that there are serious problems regarding the foundations for the establishment of international criminal law principles. The courts appear to take a rather nonchalant

50 R. Skilbeck, ‘Frankenstein’s Monster: Creating a New International Procedure’, (2010) 8 *Journal of International Criminal Justice* 462.

51 See the previous footnote and M. Bohlander, ‘No Country for Old Men? Age Limits for Judges at International Criminal Tribunals’, (2010) 1 *Indian Yearbook of International Law and Policy* 327; M. Bohlander, ‘Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and Other International Criminal Courts’, (2009) *New Criminal Law Review* 529; M. Bohlander, ‘The International Criminal Judiciary: Problems of Judicial Selection, Independence and Ethics’, in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (2007), 325.

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

53 *Mikaeli Muhimana v. The Prosecutor*, Appeals Chamber Judgement, Case No. ICTR-95-1B-A, 21 May 2007, para. 9 of the Dissenting Opinion (emphasis added).

approach at building a general part of international criminal law. This may to some extent be caused by the selection, abilities and attitude of the judges. The judicial methodology often does not stand up to close scrutiny and one may wonder whether sometimes the judges do not operate in the knowledge that the law is after all what they say it is. The approach does not always comply with the principles which have been developing since the *LOTUS* case. It may violate the principle of legality, even with the rather broad ambit this principle has traditionally found on the international level. That the legal systems of countries in the Islamic world and Asia rarely figure in the Tribunals' research adds to the concern. If one takes the fact seriously that international customary law is the product of state practice or general principles of law, then one cannot merely rely on linguistically easily accessible sources. If the time pressure born of the completion strategy and staff reductions is an additional exacerbating inhibitor to the judges doing a proper job, then it is to be deplored, even bearing in mind the fact that both Tribunals take up about 15% of the related UN budget.<sup>54</sup>

A good example of what rushed comparative research can do is provided by the *Jelisić* case. Jelisić had pleaded guilty to a number of counts of crimes against humanity, but not to genocide. The Trial Chamber found him not guilty of genocide upon his motion for an acquittal under Rule 98 *bis* and decided that matter on the full standard of proof beyond reasonable doubt. On the appeal of the Prosecutor, the Appeals Chamber reversed this decision. The common-law attitude to Rule 98 *bis*, despite protestations to the contrary in the judgement, impacted on the majority's evaluation on the issue of whether a court with judges as the only fact-finders should apply a reasonable-jury test. The majority view clearly bears the imprint of the common-law judge-and-jury model, where it is not the conviction of the judge that counts, but that of the jurors, with the consequence that a judge can therefore only take a case away from a jury if no reasonable jury could convict on the basis of the evidence. This division does not apply in a judge-only scenario<sup>55</sup> and the accused is entitled to be acquitted and released from custody immediately once the judges have come to the conclusion that the evidence of the prosecution, after hearing all the prosecution has to offer, is insufficient to convince them of his guilt. One might legitimately ask the question as to whether the majority would have applied the same reasoning if, in the absence of a partial guilty plea as the one entered by Jelisić, it had been a question of lack of proof that he was present at all at the scene of the crimes. The argument put forward in the partial dissenting opinion by Judge Shahabuddeen<sup>56</sup> that a full reasonable-doubt standard under Rule 98 *bis* would mean that a chamber could appear to be biased if it decided that the prosecution case was

54 M. Bohlander, 'Comment on ICTR, Judgement and Sentence, Prosecutor v. Mikaeli Muhimana, of 28 April 2005', in A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals*, Vol. XXII (2009), 516, at 519 (footnotes omitted).

55 See more recently in a similar vein A. T. Cayley and A. Orenstein, 'Motion for Judgement of Acquittal in the Ad Hoc and Hybrid Tribunals: What Purpose If Any Does It Serve?', (2010) JICJ 575.

56 See the dissent, available at [www.icty.org/x/cases/jelisić/acjug/en/jel-aj010705.pdf](http://www.icty.org/x/cases/jelisić/acjug/en/jel-aj010705.pdf), at 49, where he said at para. 14: 'In particular, it seems to me that (excepting clear cases of insufficiency of evidence, in which the decision goes in favour of the defence) the danger of deciding a no case issue by attempting to adjudicate on guilt at the mid-trial stage is that, if the no case decision went against the accused, he would understandably feel that the Trial Chamber had made a definitive finding of guilt, so that, in his mind, subsequent defence evidence and submissions would be addressed to a court which had already come to a conclusion as to the result of the case. It could not be correct to engender such lack of confidence in the judicial process.'



sufficient fails to understand the difference between the two scenarios. Especially in an adversarial context such as the one applying at the ICTY, the court will typically only have heard or seen the prosecution's evidence, because the defence, apart from the discovery provisions, is under no general obligation to show its hand before the end of the prosecution case. The decision to reject a motion and to continue the trial is thus not based on a contradictory evaluation of all the evidence, but merely on the one-sided presentation by the prosecution, fully taking into account that the court may, of course, change its mind after hearing the defence evidence. The reverse does, however, simply not follow. The only judge who understood this was Judge Pocar in his dissenting opinion, which merits verbatim reproduction:

It should be noted that the conclusion reached by the majority of the Appeals Chamber is certainly suited to a system in which cases are eventually sent to a jury or to a trier of fact other than the judge who evaluates the evidence at that stage. In such a system, if a judge finds that, while he himself cannot be satisfied of the guilt of the accused, a different trier of fact could come to a conclusion of guilt, he cannot stop the proceedings. Should he apply a higher standard of evaluation of the evidence, he would try the facts himself, instead of leaving the task of doing so to the jury.

In this International Tribunal however, there is no jury; the judges are the final arbiters of the evidence. There is no point in leaving open the possibility that another trier of fact could come to a different conclusion if the Trial Chamber itself is convinced of its own assessment of the case. Therefore, if at the close of the prosecution case, the judges themselves are convinced that the evidence is insufficient, then the Chamber must acquit. Such an approach is not only consistent with the text of Rule 98bis(B), which obliges the Chamber to acquit if it finds that the evidence is insufficient to sustain a conviction. It also preserves the fundamental rights of the accused, who is entitled not only to be presumed innocent during the trial, but also not to undergo a trial when his innocence has already been established. Further, the principle of judicial economy is also preserved, in that proceedings are not unnecessarily prolonged: for what is the point in continuing the proceedings if the same judges have already reached the conclusion that they will ultimately adopt at a later stage?<sup>57</sup>

Judge Pocar was able to see behind the tempting simple solution that commended itself on the clearly common-law-based phenotype of the motion for acquittal and proceeded instead to compare the genotypes of the common-law and Continental understandings of the role of the trier of fact and its impact on the position of the defendant. The majority of the Appeals Chamber was either not able or unwilling to do so, despite its protestations to the contrary and despite Judge Shahabuddeen's attempt to use the English case-law references about 'reasonable trier of fact' – language used by appellate courts vis-à-vis magistrates sitting without a jury<sup>58</sup> – to justify the majority approach; it needs stressing that he did not use one single reference to civil-law sources, but only used common-law references from a very limited range of jurisdictions. Compare this to the vastly superior research exercise undergone by the Trial Chamber in *Kunarac* with regard to the definition of rape.<sup>59</sup>

57 See his dissent, available at [www.icty.org/x/cases/jelusic/acjug/en/jel-ajo10705.pdf](http://www.icty.org/x/cases/jelusic/acjug/en/jel-ajo10705.pdf), at 71, paras. 5–6.

58 See his dissent, available at [www.icty.org/x/cases/jelusic/acjug/en/jel-ajo10705.pdf](http://www.icty.org/x/cases/jelusic/acjug/en/jel-ajo10705.pdf), at 49, paras. 2–14.

59 *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment of 22 February 2001, paras. 437 ff. available at [www.icty.org/x/cases/kunarac/tjug/en/kun-tjo10222e.pdf](http://www.icty.org/x/cases/kunarac/tjug/en/kun-tjo10222e.pdf); and see M. Bohlander, 'Mistaken

## 7. CONCLUSION: IS THERE MORE THAN WHINGING?

First things first, but not necessarily in that order.

*Doctor Who*

Common – and maybe hardened public international – lawyers will be likely to smirk condescendingly or pityingly at best at what they may see as the whining and complaining engaged in above; some will maybe see it as more than a civil lawyer's pitiful attempt at self-catharsis by publication and feel offended, professionally or personally. Be that as it may, as my former colleague at Durham, Paul Wragg, has pithily put it, 'free speech is not valued if only valued speech is free'.<sup>60</sup> What must be avoided at the international level is the impression that everyone is *already* talking to everybody in a fully equal and sophisticated comparative conversation. They may not be doing so. What this paper has tried to do is to impress on the players in the system, academics and practitioners alike, that we may actually have to start talking at a much more basic level to each other than we have thought necessary so far and move beyond the eternal mantras about and the lip-service to the necessity of mutual understanding of different legal concepts to actually comparing their genotypes, and not merely the phenotypes. Only in this manner will we be able to arrive at a successful amalgam of principles and rules that will recognize the special needs of complex affairs such as international trials and move beyond the constant bickering between proponents of different legal systems about the superior qualities of their own. As things stand, one is too often minded to view the operation as being conducted under the legal maxim 'if it walks like a duck and quacks like a duck . . .'.<sup>61</sup>

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Consent to Sex, Political Correctness and Correct Policy', (2007) *Journal of Criminal Law* 412, at 420 ff. for a summary overview of the arguments.

60 P. Wragg, 'Free Speech Is Not Valued If Only Valued Speech Is Free': Connolly, Consistency and Some Article 10 Concerns', (2009) 15 *European Public Law* 111.

61 See in a similar vein A. D'Amato, 'It's a Bird, It's a Plane, It's *Jus Cogens!*', (1991) 6 Conn. JIL 1.