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CHAPTER 1.

PLURALISM: A NEW FRAMEWORK FOR INTERNATIONAL CRIMINAL JUSTICE

Editors

Abstract. This opening Chapter of the edited volume 'Pluralism in International Criminal Law' (Oxford University Press, 2014) presents 'pluralism' as an overarching conceptual framework for international criminal justice. The Chapter provides an overview of the previous debates on (global) legal pluralism, fragmentation, and diversification of law as they have been framed in different legal disciplines. It examines the interpretations of these concepts in their disciplinary contexts and makes a vocabulary choice for international criminal justice. It is argued that the category of 'pluralism' is more suitable than 'fragmentation'; it more accurately reflects the nature and origin of international criminal law and procedure and also better captures the diversity and complexity of this field. The discursive transition to 'pluralism' reflects not merely a semantic change but a wholesale paradigm shift; this shift enhances the explanatory force of the proposed framework. The Chapter connects previous debates on pluralism and fragmentation to various forms of legal and normative diversity in international criminal justice and draws an inventory of pluralist perspectives on international criminal law and procedure. It shows that these bodies of law are pluralistic in many different ways and identifies some of the risks and advantages of pluralism. The classic 'legal pluralism' perspective is useful in describing the confluence of legal regulations drawn from sources pertaining to different legal orders in the jurisdictional sphere of international and hybrid tribunals, but it does not capture all of the relevant facets of pluralism in international criminal justice. The Chapter presents the additional 'extrinsic' and 'intrinsic' dimensions of pluralism and outlines several pluralism-based perspectives that fall within those dimensions and are instrumental in explaining the diversified and at times troubled nature of international criminal justice. It concludes by introducing the chapters in the edited volume and by proposing a research agenda.

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Of the ideas of uniformity

There are certain ideas of uniformity, which sometimes strike great geniuses, (for they even affected Charlemagne) but infallibly make an impression on little souls. They discover therein a kind of perfection; because it is impossible for them not to see it; the same weights, the same measures in trade, the same laws in the state, the same religion in all its parts. But is this always right, and without exception? Is the evil of changing constantly less than that of suffering? And does not a greatness of genius consist rather in distinguishing between those cases in which uniformity is requisite, and those in which there is a necessity for differences? ... If the people observe the laws, what signifies it whether these laws are the same?

Charles Montesquieu¹

1. Capturing Complexity and Mapping Diversity

International criminal justice is a dynamic and multifarious enterprise. The more it is studied, the more dimensions of complexity it reveals. This complexity is due to a variety of causes and presents itself in a variety of forms, all of which have to do with the heterogeneity of the project itself and of the environments in which it is set to operate.

The first layer of complexity consists in the fact that the project is centred on the international and hybrid criminal courts, bound together into a decentralized and non-hierarchical ‘community’.² Their relationship and mutual relevance are a corollary of the comparable socio-political mandates and objectives, shared ethos and value system, and legal specialization. The imminent completion of the UN *ad hoc* tribunals’ mandates and transfer of their functions to residual mechanisms cast the prospect of the branched-out network of courts shrinking noticeably in the coming years. The halt in institutional proliferation might signify the end of the heady days of international criminal justice,³ but it is not necessarily a sign of its demise; it might mark the commencement of a new phase of qualitative growth and more informed and experience-based, rather than intuitive, fine-tuning of the system.⁴ The plurality and mutual awareness of the institutions constituting the ‘epistemic community’ has been an essential aspect of international justice in the past two decades. It will not be undone by the closing down of the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL): international criminal law (ICL) is unlikely ever to become a monopoly field. The lasting presence of the ‘phantom limbs’ in the system will be keenly felt as the International Criminal Court (ICC) and other courts continue building upon the more persuasive parts of their predecessors’

¹ *The Spirit of Laws*, Book XXIX (‘On the Manner of Composing Laws’), chapter 18.

² W.W. Burke-White, ‘A Community of Courts: Toward A System of International Criminal Law Enforcement’ (2002–3) 24 *Michigan Journal of International Law* 1, 3 and 75.

³ W.A. Schabas, ‘The Banality of International Justice’ (2013) 11 *Journal of International Criminal Justice* 545, 548.

⁴ Editors, ‘Introduction’ in G. Sluiter *et al.* (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013) 2.

jurisprudence and best practices.

The second layer of complexity relates to the fact that the ‘community’ is as much about the institutions as it is about the legacy of norms applied and progressively developed by the courts. Their profuse case law is a material source of international criminal ‘common law’.⁵ The tribunals have conducted a critical and (mostly) constructive exchange with one another through jurisprudence and less formal dialogue. They have cross-referenced each other’s interpretations of criminal law doctrines and approaches to procedure. Despite (and partly due to) this multilateral conversation, the aggregate body of law and precedents that the courts are leaving behind is far from uniform, consistent, or conclusive, even on key issues. The courts were set apart not only due to the differently configured material jurisdiction, fact-driven specifics of cases, and procedural nuances; this was also a consequence of their being different institutions with distinct identities and placed to deliver justice with unequal resources in unequal contexts. The institution-plurality and sociological factors are as important as the legal parameters. The law’s function as the determinant of institutional style and behaviour should not be overestimated.

For example, the ICC’s operations have been characterized by a tendency to deviate from the *ad hoc* tribunals’ legacy and to forge its own path. This approach was not entirely anticipated; it was presumed that the new institution would draw on the ICTY and ICTR precedents whenever possible. However, this is not self-evident: the ICC’s layout and the codification of the applicable law sources in Article 21 make it a system unto itself.⁶ The distinctive character of the ICC regime has served as a justification for material departures, irrespective of whether those are desirable from a (legal) policy perspective. By referring to Article 21(2) of its Statute, the ICC may justifiably ignore the precedents of other courts; yet the ICC’s institutional culture betrays a propensity to pursue *Alleingang*, as demonstrated by the positions it has taken on a number of issues of substantive and procedural law in its case law. The Court has been resistant to drawing upon principles established in the *ad hoc* tribunals’ jurisprudence even when there is no provision in its legal framework requiring a departure. In the domain of procedure, the oft-quoted example is the prohibition on ‘witness proofing’, i.e. the preparation of witnesses for testimony by the parties.⁷ The example from substantive law is the ‘control theory’ employed by the ICC Pre-Trial and Trial Chambers in interpreting the notion of ‘commission’ in Article 25(3)(a) of the Statute.⁸ The theory draws from a dogmatic German-inspired approach to criminal responsibility and its adoption constitutes a marked departure from the rich body of jurisprudence on Joint Criminal Enterprise (JCE) developed by the ICTY.

⁵ On the tribunals’ ‘common law’, see P.M. Wald, ‘Tribunal Discourse and Intercourse: How the International Courts Speak to One Another’ (2007) 30 *Boston College International & Comparative Law Review* 15, 23-5.

⁶ R. Cryer, ‘Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources’ (2009) 12 *New Criminal Law Review* 390 (this approach to the sources of law is flawed because it contributes to the fragmentation of ICL).

⁷ Decision regarding the Practices used to Prepare and Familiarise Witnesses for Giving testimony at Trial, *Lubanga*, ICC-01/04-01/06-1049, TC I, ICC, 30 November 2007, para. 44; Decision on a number of procedural issues raised by the Registry, *Katanga and Ngudjolo*, ICC-01/04-01/07-1134, TC II, ICC, 14 May 2009, para. 18; Decision on the Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony at trial, *Bemba*, ICC-01/05-01/08-1016, TC III, ICC, 18 November 2010, para. 34.

⁸ Decision on the Confirmation of Charges, *Lubanga*, ICC-01/04-01/06-803-tEN, PTC I, ICC, 29 January 2007, paras 326-67; Decision on the Confirmation of Charges, *Katanga and Ngudjolo*, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008, paras 480-518; Judgment pursuant to Article 74 of the Statute, *Lubanga*, ICC-01/04-01/06, TC I, ICC, 14 March 2012, paras 976-1018 (‘*Lubanga* trial judgment’); Jugement rendu en application de l’article 74 du Statut, *Katanga*, ICC-01/04-01/07-3436, TC II, ICC, 7 March 2014 (‘*Katanga* trial judgment’), paras 1383-1416.

These dissensions between the courts reflect the ebbs and flows in judicial ratiocination. They depend on the variables informing the processes and substance of judicial decision-making: the circumstances of each case, positions adopted by the parties, the time in the life of the court and its accumulated experience, individual opinions of judges, and the composition of a chamber. The judicial positions prevailing at any given time in individual courts are not set in stone. The ICC Trial Chamber in the two *Kenya* cases returned to the *ad hoc* tribunals' approach of allowing witness preparation by the parties. The Chamber balanced the pros and cons and embraced the practice with reference to the security situation in Kenya.⁹ It could be seen as the *Alleingang* by a stray bench against the consolidated position of the ICC as a whole – or as the effective collapse of its institutional position under the burden of experience in the first trials.¹⁰ The same may hold true for its interpretive approach in relation to substantive law. Given several dissenting views regarding the 'control theory' on the record,¹¹ the intrigue is whether the ICC will move to revise its initial approach in the future.

Adding yet another dimension of complexity is that international criminal justice engages with, and impacts on, plural regulatory spheres – the diverse socio-cultural and political contexts of the 'morally pluralistic world'.¹² ICL as a 'social practice' rather than merely a legal project exerts effects on plural domains of regulation (the international law system and domestic legal orders) and social life, including 'glocal' politics and the ethos of accountability. Those effects do not always comport with normative expectations and programmed outcomes. They are to be unpacked and empirically measured.¹³ The combined plurality and diversity of institutions, laws, and operational contexts which constitute international criminal justice, endow it with peerless dynamism. It is increasingly difficult to appreciate the meanings and relevance of legal and political developments in perspective, let alone to predict or manage them. Assessments of issues that (selectively) receive attention abound and are often in opposition; most are retrospective and come too late to 'matter' in the 'real world' of international criminal justice. With outsider analyses lagging, capturing the complexity of the project seems an impossible dream.

Such unparalleled vibrancy renders the ICL project an uneasy object of reflection that is comprehensive and nuanced at the same time. Therefore, it is rare that analyses provided amount to more than mere snapshots of the *status quo* in individual courts or in specialized areas of law and practice. Perspectives on international criminal justice—including its objectives and functions—remain fragmented, and assessments of its performance and prospects discordant and contested. But struggles to tame the disorientation arising from the explosive growth of the field continue. In reflecting on where the project is (or should be) heading, some scholars are agnostic

⁹ E.g. Decision on witness preparation, *Ruto and Sang*, ICC-01/09-01/11-524, TC V, ICC, 2 January 2013, paras 26-51.

¹⁰ This position started showing cracks in *Bemba*: Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, *Bemba*, ICC-01/05-01/08-1039, TC III, ICC, 24 November 2010.

¹¹ Separate Opinion of Judge Adrian Fulford, *Lubanga* trial judgment (n 8); Concurring Opinion of Judge Christine Van den Wyngaert, Judgment pursuant to article 74 of the Statute, *Ngudjolo*, ICC-01/04-02/12-4-tENG, TC II, ICC, 18 December 2012; Minority Opinion of Judge Christine Van den Wyngaert, *Katanga* trial judgment (n 8) paras 279-81.

¹² J.N. Shklar, *Legalism: An Essay on Law, Morals and Political Trials* (Cambridge, MA: Harvard University Press, 1964) 123; B. Roth, 'Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice' (2010) 8 *Santa Clara Journal of International Law* 231, 237.

¹³ On unanticipated effects of complementarity, see S.M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013).

or impressionistic;¹⁴ others seek to foreground their expectations in a legal (moral, political) philosophy, such as liberal legalism.¹⁵ Scholars have also started to engage with the project from the positions of political realism,¹⁶ critical legal studies, or political economy.¹⁷ Endeavours are ongoing to develop an overarching scheme that could capture the divergent understandings and imbues the discipline with a sense of direction. The bottom line is the recognition that international criminal justice has grown out of the linear narrative of progression ‘from Nuremberg to The Hague’ that dominated the debate 20 years ago. Such a presentation is simplistic and no longer satisfactory; it does not bear the weight of challenges and critiques the project is facing at present.¹⁸ Work on an adequate narrative—a meta-theory of international criminal justice—is part of the ‘methodological wave’ of ICL scholarship. This volume pays tribute to this trend and seeks to contribute to a more balanced and inclusive conceptualization of international criminal justice. It proposes a new perspective on international criminal justice – ‘pluralism’: a category that has received some attention in ICL recently.¹⁹

When this book was conceived, the hypothesis was that the notion of ‘pluralism’ could be employed to capture the diversity of ICL and *institutional frameworks* within which it is applied (the ‘extrinsic dimension’ of diversity). It was thought that the legal and institutional diversity within international criminal justice could expose the heterogeneity of legal, political, and socio-cultural environments with which it interacts, including domestic jurisdictions. Eventually, the hypotheses shifted; the concept of ‘pluralism’ turned out to be more capacious than initially thought. It holds substantial explanatory power and is fit to serve as an overarching ‘map of diversity’ of the field. It not only captures the institutional and legal diversity in international criminal justice but also speaks to the inherently complex nature of ICL and international criminal procedure (the ‘intrinsic dimension’). This chapter introduces ‘pluralism’ as a framework for international criminal justice. The following section pays tribute to the previous debates on pluralism and fragmentation of law and makes a ‘vocabulary choice’. The language of ‘pluralism’ does not merely reflect a semantic change but also comes with a paradigm shift. Further, the chapter presents the pluralist perspectives on ICL and international criminal procedure. Besides the classic ‘legal pluralism’ perspective, we identify several perspectives within the ‘extrinsic’ and ‘intrinsic’ dimensions of pluralism that are instrumental in explaining the nature and dilemmas of international criminal justice. The chapter concludes by offering a research agenda for the future.

¹⁴ E.g. Schabas (n 3) (setting out a cyclical narrative of international criminal justice, pointing to the ‘risk of mediocrity’, and calling for the ‘Pinochet moment’).

¹⁵ D. Robinson, ‘A Cosmopolitan Liberal Account of International Criminal Law’ (2013) 26(1) *Leiden Journal of International Law* 127, 132-45 (rekindling a liberal theory based on the principles of culpability and legality and the idea of cosmopolitanism for international criminal justice).

¹⁶ Shklar (n 12) 123 and 134; F. Mégret, ‘Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project’ (2001) 12 *Finnish Yearbook of International Law* 193, 210-5 and 240; S.M.H. Nouwen and W.G. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’ (2010) 21(4) *European Journal of International Law* 941, 943.

¹⁷ E.g. T. Krever, ‘International Criminal Law: An Ideology Critique’ (2013) 26(3) *Leiden Journal of International Law* 701, 704-7 and 715-20.

¹⁸ P. Akhavan, ‘The Rise, and Fall, and Rise, of International Criminal Justice’ (2013) 11 *Journal of International Criminal Justice* 527, 729 (‘beyond the unrealistic fantasy of linear progress, we are able to discern a slow, awkward and meandering development.’).

¹⁹ E.g. A.K.A. Greenawalt, ‘The Pluralism of International Criminal Law’ (2011) 86 *Indiana Law Journal* 1063; E. van Sliedregt, ‘Pluralism in International Criminal Law’ (2012) 25(4) *Leiden Journal of International Law* 847.

2. 'Pluralism' and its Relevance to ICL

2.1 Genealogy of the pluralism debate

The notion of pluralism is advantageously situated at the intersection of several established debates which, although framed in different (legal) disciplines, are settled on the issues raised by the irreducible plurality of legal orders, norms, and institutions. These debates are relatively autonomous, but there is a genealogical kinship and substantive affinity between them. They centre on the consequences of the overlap between multiple normative fields and the pluralism of laws and *in* law. This section identifies the origins of the pluralism concept and traces its migration across several legal disciplines.

A. Legal theory angle: (Global) legal pluralism

One debate centres on 'legal pluralism', understood as 'that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs'.²⁰ In legal sociology and anthropology, this concept was focused on communities rather than institutions²¹ and had an ambitious start.²² It arose from observations of the parallel operation of indigenous (non-state) and western (state) forms of law in colonial territories but eventually moved to the mainstream discourse of legal theory.²³ Any (western) society is also legally pluralist in itself due to the coexistence and interplay of official and unofficial law.²⁴ While this led to a distinction between 'classical' and 'new' legal pluralism,²⁵ the distinction came to be questioned, given that legal pluralism long predated colonialism and could be discerned in the net of overlapping laws in mediaeval Europe.²⁶

Legal pluralists faced criticism for an expansive definition of law, for its equation with non-legal regulation, and for loosening the link between law and state (the state monopoly on law-making).²⁷ This problem was at the heart of the debates on pluralism.²⁸ Criticisms of the

²⁰ J. Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1, 2. See also R. Michaels, 'Global Legal Pluralism' (2009) 5 *Annual Review of Law and Social Sciences* 243, 245 ('a situation in which two or more laws (or legal systems) coexist in (or are obeyed by) one social field (or a population or an individual)'); J. Vanderlinden, 'Le pluralisme juridique - Essai de synthèse' in J. Gilissen (ed.), *Le pluralisme juridique* (Bruxelles: l'Université de Bruxelles, 1971) 19 ('l'existence, au sein d'une société détermine, de mécanismes juridiques différents s'appliquant à des situations identiques').

²¹ Michaels (n 20) 245. E.g. S. Romano, *L'ordre juridique*, 2nd ed. (trans. P. Gothot and L. François) (Paris: Dalloz, 1975). See also G. Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1991-92) 13 *Cardozo Law Review* 1443, 1448 ('The new legal pluralism is nonlegalistic, nonhierarchical, and noninstitutional.').

²² Griffiths (n 20) 4 ('Legal pluralism is the fact.') and 12 ('"Legal pluralism" is the name of a social state of affairs and it is a characteristic which can be predicated of a social group. It is not the name of a doctrine or a theory or an ideology.').

²³ E.g. B. de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law and Society* 279, 293 ('Legal pluralism is the key concept in a post-modern view of law.').

²⁴ S.E. Merry, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* 869, 869 ('virtually every society is legally plural, whether or not it has a colonial past. Legal pluralism is a central theme in the reconceptualization of the law/society relation.'). Teubner (n 21) 1448 ('the dynamic interaction of a multitude of "legal orders" within one social field'); Michaels (n 20) 244.

²⁵ Merry (n 24) 872-3.

²⁶ B. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375, 377-81; Michaels (n 20) 245.

²⁷ S. Roberts, 'Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain' (1998) 42 *Journal of Legal Pluralism* 95; B.Z. Tamanaha, 'The Folly of the "Social Scientific" Concept of Legal Pluralism' (1993) 20 *Journal of Law and Society* 192; *id.* (n 26).

concept were so acute as to make its staunch proponents abandon it.²⁹ Thus, John Griffiths proposed to reinterpret it as ‘normative pluralism’ or ‘pluralism in social control’, dropping ‘law’ and ‘legal’ from the notion.³⁰ However, the ubiquitous concept of ‘pluralism’ could not easily be retracted as it had made advancements into other disciplines, which is ironic given the virulent criticism of it in legal anthropology.³¹

In particular, ‘legal pluralism’ acquired relevance in connection with ‘legal globalization’ as a way to explain the consequences of the globalization of law and the polycentric nature of legal regulation in a global society. ‘Legal pluralism’ was rediscovered as a descriptor of the diversity of laws and regulations originating from sources that belong to different legal orders (local, regional, national, international) and the complex (at times, conflict-ridden) relationship between them.³² Parallels were drawn between the challenges posed for traditional legal thought by the phenomena of legal pluralism and legal globalization, including the irreducible plurality of legal orders, the coexistence of state law with other legal regimes, and non-hierarchical relationships between them.³³ This gave rise to the seminal debate about ‘global legal pluralism’.³⁴

While not uniformly understood, ‘global legal pluralism’ refers to the ‘existence of a plurality of legal orders created both by states and non-state communities’.³⁵ It is a way to make sense of the changes that law undergoes globally and the permeating trends in legal regulation that transcend the boundaries of a single legal system by placing it in the context of a global legal order.³⁶ In that context, the conduct of the same actors is governed simultaneously by multiple norms drawing authority from different sources, and ‘global legal pluralism’ speaks to their combined normative effect.³⁷ The focus is not only on the internal pluralism of a legal system but also on the ‘deep pluralism’ outside of it. This perspective exposes the conversation between overlapping laws, whether state or unofficial, within a single normative space.³⁸ ‘Legal pluralism’ was always ‘global’: the encounter between colonial and indigenous forms of law was

²⁸ E.g. Merry (n 24) 878 (‘calling all forms of ordering that are not state law by the term law confounds the analysis. ... Where do we stop speaking of law and find ourselves simply describing social life?’); F. von Benda-Beckmann, ‘Who’s Afraid of Legal Pluralism?’ (2002) 47 *Journal of Legal Pluralism* 37, 37-8 (questioning the fixation on law-state link and the critique against the ‘legal pluralist’ camp as ‘engaging in some ill-conceived enterprise of irresponsibly broadening the concept of law and equalising normative orders that are fundamentally different.’).

²⁹ Tamanaha (n 26) 392-96.

³⁰ J. Griffiths, ‘The Idea of Sociology of Law and its Relation to Law and to Sociology’ (2005) 8 *Current Legal Issues* 49, 63-4. See also *id.* (n 20) 50 n41 (‘more or less specialized social control’).

³¹ Tamanaha (n 26) 375-6 (‘it is unusual to see a single notion penetrate so many different disciplines.’); Michaels (n 20) 244.

³² Addressing the encounter between ‘conflict of laws’ and global legal pluralism, see P.S. Berman, ‘Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era’ (2004-5) 153 *University of Pennsylvania Law Review* 1819; *id.*, ‘From International Law to Law and Globalization’ (2005) 43 *Columbia Journal of Transnational Law* 485.

³³ Michaels (n 20) 244.

³⁴ P.S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012).

³⁵ R. Michaels, ‘The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism’ (2006) 51 *Wayne Law Review* 1209, 1211 (‘the theory of global pluralism ... posits the existence of a plurality of legal orders created both by states and non-state communities’).

³⁶ Teubner (n 21) 1461 (‘The legal system’s boundaries ... are not defined by the official law of the State.’).

³⁷ Berman (n 34) 4 (referring to ‘the complexities of law in a world where a single act or actor is potentially regulated by multiple legal or quasi-legal regimes.’).

³⁸ Michaels (n 20) 246.

an early manifestation of legal globalization.³⁹ In the globalized environment, legal systems are open to external normative influence and are not closed-up units.

Legal theorist Gunther Teubner provided a different and noteworthy interpretation of ‘global legal pluralism’ as a discourse rather than community-based phenomenon.⁴⁰ Teubner used the concept of ‘autopoiesis’ to describe how law can create itself (rather than be created by a state).⁴¹ He located the state and ‘legislative law’ at the periphery of law-making, while transnational actors and courts are the real centres of law-creation.⁴² This perspective allows the drawing of interesting parallels with international criminal justice. The task of developing ICL and, in particular, international criminal procedure is exercised by judges who are not directly linked to the state. Since the bulk of law-making is effected through jurisprudence and the exercise of quasi-legislative competences by the judges, ICL is a truly ‘autopoietic system’.

B. International law angle: fragmentation and international legal pluralism

The second defining debate related to ‘pluralism’ takes its origin from international law. It concerns the ‘fragmentation’ of that law, as a result of the proliferation of specialized international courts and tribunals. In 2006, Martti Koskenniemi, who was one of the first scholars to address this topic,⁴³ finalized an International Law Commission (ILC) Report that addressed the risks posed by fragmentation and means of coping with it.⁴⁴ The rich debate on ‘fragmentation’ was centred on concern that the unity of international law might be eroding and that forum-shopping was possible.⁴⁵ This issue arose in particular in connection with the collision between the International Court of Justice (ICJ) and the ICTY over the ‘overall control’ test in the *Tadić* case in which the ICTY departed from settled ICJ jurisprudence on the attribution of liability to states (employing a standard of ‘effective control’).⁴⁶ The fact that the ICTY had earlier referred to itself as a ‘self-contained’ system fuelled anxiety about fragmentation.⁴⁷

The incoherence and lack of homogeneity of international law has now been accepted. As Koskenniemi points out,

³⁹ *Ibid.*, 245-6 (‘The encounter between official and unofficial law addressed by classical pluralism is really a consequence of early globalization, which enabled colonization and in turn made possible the encounter between Western and non-Western laws and normative orders.’).

⁴⁰ Teubner (n 21) 1451 (‘Legal pluralism is then defined no longer as a set of conflicting social norms in a given social field but as a multiplicity of diverse communicative processes that observe social action under the binary code of legal/illegal.’) and 1457.

⁴¹ G. Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’ in G. Teubner, *Global Law without a State* (Aldershot: Ashgate, 1997) 3-17.

⁴² Teubner (n 21) 1459 (‘Legislative law is peripheral law! Rather, the center is represented in the hierarchy of courts. Courts generate law in its most autonomous form. They celebrate the central function of law: using the occasion of conflicts to create congruently generalized expectation.’).

⁴³ M. Koskenniemi and P. Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *Leiden Journal of International Law* 553.

⁴⁴ Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law, Report of the Study Group of the International Law Commission, ILC, A/CN.4/L.682, 13 April 2006.

⁴⁵ See among others G. Hafner, ‘Pros and Cons Ensuing from Fragmentation of International Law’ (2004) 25 *Michigan Journal of International Law* 849.

⁴⁶ Judgment, *Tadić*, IT-94-1-A, AC, ICTY, 15 July 1999 (‘*Tadić* appeal judgment’), paras 80 *et seq.*

⁴⁷ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić*, IT-94-1-AR72, AC, ICTY, 2 October 1995, para. 11.

It is evident that fragmentation did not turn out to create the chaos that was feared ... The new regimes have grown up precisely to advance new priorities in contrast to those of old law. The regimes have come to stay and no single normative or institutional hierarchy has emerged. No effort at constitutionalization has succeeded in putting public international lawyers back in control. The international legal world had of course always been pluralistic. Fragmentation merely meant that the traditional units – States – were supplemented and sometimes replaced by new units....⁴⁸

Concerns over ‘fragmentation’ in international law have been exaggerated. The phenomenon has to some extent been rehabilitated and the concept disburdened of the negative connotations it bore at the time when the debate commenced. Some authors who viewed the multi-track enforcement and diversity of international law positively sought to mitigate the effects of prejudicial semantics on the normative perceptions of ‘fragmentation’, and preferred to use different vocabulary. In conveying the advantages of diversity, Burke-White spoke of ‘international legal pluralism’ rather than ‘fragmentation’ in reference to the same phenomenon.⁴⁹ Nollkaemper viewed ‘international legal pluralism’ as the double life of international law in the context of the relationship between international and national orders in which the final authority is contested.⁵⁰ The concept of pluralism gained a ‘vertical’, international/national, dimension (‘external pluralism’); meanwhile its horizontal dimension captures legal collisions that arise and are solved within the own normative space of international law (‘internal pluralism’).

C. Vocabulary choices

In the international law context, the terms ‘fragmentation’ and ‘pluralism’ are often used as equivalent. Both denote the process and consequences of the proliferation of institutional frameworks in which that law is practised, applied, and developed, as well as the ensuing divergences between the specialist legal regimes existing within that pluralist normative field.⁵¹ But a vocabulary choice needs to be made if this terminology is to be taken into the sphere of international criminal justice. In light of their origin in the previous debates framed by different disciplines, ‘fragmentation’ and ‘pluralism’ are not exactly interchangeable but, in a certain sense, are antagonistic concepts, despite both referring to the irreducible plurality and diversity of regulatory regimes that create potential for conflicts. Moreover, this terminology is not neutral but charged with meanings inherited from previous debates. Not only semantic but also normative implications may therefore attach to its use.

Despite the conclusions of the ILC Report, the term ‘fragmentation’ still carries negative connotations of a disintegration and demise of coherent law as a result of increased specialization and proliferation of judicial fora. Anxiety over the decreasing authority of international law is still present in that discourse, which in itself is a tacit call for ‘de-fragmentation’ through uniformization or harmonization. No similar urge seems to be conjured by the term ‘pluralism’,

⁴⁸ M. Koskeniemi, ‘The Case for Comparative International Law’ (2009) 20 *Finnish Yearbook of International Law* 1, 5-6, referring to N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press 2010).

⁴⁹ W.W. Burke-White, ‘International Legal Pluralism’ (2006) 25 *Michigan Journal of International Law* 963.

⁵⁰ A. Nollkaemper, ‘Inside or Out: Two Types of International Legal Pluralism’ in J. Klabbers and T. Piiparinen (eds), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2013) 94-8.

⁵¹ E.g. F. Lattanzi, ‘Introduction’ in L. van den Herik and C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff, 2012) 3.

which is meant as a descriptive prism for the complex legal reality existing within and across socio-political fields. However, theories and ideologies may pass as facts; the question is whether ‘pluralism’ is indeed a neutral descriptive framework or merely poses as such. The endeavour of comprehending and explaining the pluralist legal reality might be premised on the acceptance of the state of affairs it seeks to describe as actual and, possibly, as tolerable or even desirable. (Global) legal pluralism is presented as an objective and insurmountable fact that is to be embraced, even where there are cogent reasons to strive for greater uniformity and where this is feasible.

Hence, if either notion is extended to ICL and international criminal procedure, the possible biases carried by each of them must be taken into account. This helps us to remain aware of the nature (descriptive or normative) of the conceptual framework built on that foundation. The fact that vocabulary choices are never fully neutral is a reason for caution. The utility and prospects of ‘fragmentation’ and ‘pluralism’ paradigms in international criminal justice depend on their validity in that context. This assessment is to be made with consideration of the normative trappings of the language and systemic features of international criminal justice.

2.2 Fragmentation to pluralism: a paradigm shift for ICL

Both ‘fragmentation’ and ‘pluralism’ are notions that appear relevant in international criminal justice. This system consists of multiple—international and hybrid—courts that are primarily tasked with ICL enforcement. In a broad sense, it also includes national courts, which have increasingly engaged with ICL and international jurisprudence when exercising jurisdiction over international crimes and interpreting relevant domestic criminal code provisions. The system—or, rather, a loose judicial network dispersed across legal orders—disposes of substantive and procedural law frameworks that are not only *plural* but also *different*. It is therefore understandable that conceptualizations of international criminal justice as an array of coexisting, competing, diverging, and cross-fertilizing legal regimes have attracted increased use of the categories ‘fragmentation’ and ‘pluralism’.⁵² ICL provides fertile ground for testing their validity and limitations.

Although the institutional and legal diversity of international criminal justice has been the traditional subject of scholarly inquiries, debates aiming to make sense of it are still at an embryonic stage. There has been little discussion on what is to be understood by ‘diversity’, what its causes and implications are, and how we should relate to it. Is ‘diversity’ an intrinsic property or a temporary condition, and is it something to be reconciled with or to be concerned about? No single conceptual apparatus has been developed, and the terms ‘pluralism’ and ‘fragmentation’ are often used as synonymous in ICL. They have acquired a degree of autonomy from the original debates upon their entry into this discipline; however, it is far from certain that they are uniformly understood and that they should have the same meaning. The fledgling debate on the pluralism of ICL would be assisted by an analysis and shared understanding of the key terminology.

⁵² Lattanzi (n 51) 3-4 (‘this normative branch is probably the most fragmented/diversified among all the branches of the international legal system, thus representing a test-case that is particularly challenging.’); C. Stahn and L. van den Herik, ‘Fragmentation, Diversification and ‘3D’ Legal Pluralism: International Criminal Law as the Jack-in-the-Box?’ in L. van den Herik and C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff, 2012) 22.

Ever since the ILC Report, ICL scholars have fallen back on the ‘fragmentation’ discourse in coming to terms with the plurality and diversity of the substantive and procedural law regimes in international criminal tribunals. The parallel between the fragmentation within international law and the diversification of ICL as its specialist branch has been drawn for the following reasons.

First, the diversification of ICL and international criminal procedure is comparable to the analogous process unfolding within international law at large and can be seen as the special case of international law fragmentation.⁵³ Second, both the diversification of international law and that of ICL can be viewed as normative emancipations of specialist legal regimes from the general *corpus iuris*. This may lead to ‘regime collisions’ along the *lex generalis v. lex specialis* divide.⁵⁴ Stahn and van den Herik have employed the metaphor of the ‘jack-in-the-box’ regarding ICL, as ‘a branch of law that departs from the established structures of the old general law’ due to ‘its pluralist structure and its dynamic development’.⁵⁵ The ‘exceptionalism’ of ICL may be questioned because any other specialized branch also exhibits ‘centrifugal’ tendencies vis-à-vis the *lex generalis* of ‘old’ international law (e.g. international humanitarian law and human rights law). Third, the ‘fragmentation’ discourse has been kept alive in ICL by the idea of the tribunals as self-contained ‘sub-regimes’ existing in relative isolation from one another. This idea drew support from a number of landmark instances in which the tribunals adopted legal positions and gave interpretation to international law norms departing from those of other courts, in particular the ICJ and the European Court of Human Rights (ECtHR), with reference to their distinct mandates and legal and operational contexts.

The ‘isolationist’ rhetoric was adopted by the ICTY in its early and turbulent years, presumably as a manifestation of insecurity of a fledgling institution. In *Tadić* the Appeals Chamber ruled that the conflict in Bosnia and Herzegovina after the withdrawal of the Yugoslav Army in May 1992 was of an international character, and that therefore that the grave breaches regime under Geneva Convention IV and Article 2 of the Statute applied. In concluding thus, the Chamber not only departed from but also questioned the persuasiveness of the ICJ’s *Nicaragua* test of ‘effective control’ for attributing the conduct of paramilitary groups in a state territory to another state.⁵⁶ However, arguably, it could have disavowed the test for its own purposes without seeking to undermine its general authority under international law. In turn, the ICJ subsequently rejected the ICTY’s test of ‘overall control’ and reclaimed its authority with respect to general issues of international law with reference to the different specialization of courts.⁵⁷ A classic example from the procedural law domain is the *Tadić* Trial Chamber’s summary rejection of the relevance of the ECtHR’s case law on the right of the accused to confront prosecution witnesses, bolstered by an inapposite comparison of the ICTY to a military

⁵³ S. Vasiliev, ‘General Rules and Principles of International Criminal Procedure: Definition, Legal Nature, and Identification’ in G. Sluiter and S. Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May, 2009) 22.

⁵⁴ Stahn and van den Herik (n 52) 23.

⁵⁵ *Ibid.*, 24.

⁵⁶ See *supra* nn 46-47; *Tadić* appeal judgment (n 46) paras 115-45 (the *Nicaragua* test not ‘consonant with the logic of the law of state responsibility’ and ‘at variance with judicial and state practice’).

⁵⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ, 26 February 2007, ICJ Reports 2007, 170 (para. 403).

tribunal with limited due process rights.⁵⁸ This dismissive attitude toward another judicial authority was not only controversial and misconceived, but also unnecessary to justify the Chamber's legal position.⁵⁹

The 'self-containment' of the tribunals led to concerns about the negative implications of the 'fragmented' ICL for both its internal coherence and its outbound authority vis-à-vis domestic jurisdictions. The application of non-identical substantive and procedural law by multiple international criminal tribunals results in divergent interpretations and decisions on similar matters. This brings the uniformity and predictability of the ICL regime into question and perpetuates insecurity about the existence of 'general' ICL and international criminal procedure. The absence of a single code of substantive law and procedure and the divergent *legi speciali* of the individual tribunals are pushing the *lex generalis* into a twilight existence characterized by the lack of 'identity' and the requisites of a proper 'system of law'.

Going back to the choice of terminology, not everything is 'fragmentation' that looks like it or is presented as such. The Oxford English Dictionary defines 'fragmentation' as 'a breaking or separation into fragments' and, in computing, the term denotes the storage of information in different locations that complicates retrieval and leads to deterioration in performance. This assumes first the existence of a single and coherent whole that is partitioned into 'fragments', and second that both the process and the result are undesirable. If applied to ICL, this description misconstrues the incremental and expansive process of institution-building and law-creation in the past two decades and the fact that it proceeded from scratch within each court, not from a pre-existing whole of a coherent system of law.

The divergence in the reasoning and outcome of decisions rendered by different courts dealing with non-identical questions of fact and law (e.g. attribution of individual responsibility v. state responsibility) cannot properly be considered as 'fragmentation'. It is the result of an exercise by each court of its adjudicative autonomy in accordance with applicable law and after considering the facts of each case. Adjudication in the domains of general international law (the ICJ), human rights law (the ECtHR and IACtHR), and ICL has different dynamics and purposes and is subject to diverging judicial culture and mandates. So long as there exist cogent grounds to distinguish the case *sub judice* from cases previously decided by another chamber or tribunal, even if dealing with similar issues, a legal collision or conflict is fictional and 'fragmentation' a misnomer. The tribunals with different specializations seldom deem it necessary to pronounce themselves on issues within the purview of other courts and to do so in a way which contests their authority. In the absence of direct normative conflicts, instances of 'fragmentation' are rare. 'Fragmentation' depends on the reasoning employed by the court in distinguishing the case before it when departing from the previous legal rationale, as well as on the (more reverent or confrontational) language used for justifying departure. 'Fragmentation' is more a matter of judicial discourse and perception than an objective phenomenon.

Notably, the scholarship on 'fragmentation' of ICL sought to take this concept beyond the inter-institutional dimension of diversity of plural international criminal tribunals. Stahn and van den Herik interpret 'fragmentation' as incorporating 'internal fragmentation' or '3D legal pluralism', i.e. the ICL's being 'a blended branch of law that is founded upon internal inconsistencies or tensions'.⁶⁰ This does not exclude the interchangeable use of the terms

⁵⁸ Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Tadić*, IT-94-1-T, TC, ICTY, 10 August 1995, para. 28.

⁵⁹ S. Vasiliev, *International Criminal Trials: A Normative Theory* (forthcoming 2014), chapter 2.

⁶⁰ Stahn and van den Herik (n 52) 24 and 89.

‘fragmentation’ and ‘pluralism’ in the ICL. For them, the vocabulary choice is ‘a matter of perspective’ that ‘depends largely on the observational viewpoint’.⁶¹ They attribute the preference for the ‘top-down’ vocabulary of ‘fragmentation’ to universalists and international lawyers, who tend to rely on authority and coherence for resolving normative conflicts, whereas the ‘legal pluralism’ language is, in their view, a typical discourse of human rights advocates.⁶²

This provides a starting point for the foundational debate on definitions and approach to be adopted in respect of the institutional and legal diversification present in ICL, which informs the criteria for distinguishing between admissible and objectionable diversity. The premise underlying the notion of ‘internal fragmentation’—a normative tension animating ICL from within—is a valuable insight. ICL is a blend of divergent aspirations, methods, and goals drawn from general international law, human rights law, humanitarian law, and criminal law – an aspect of diversity that requires closer scrutiny as part of a conceptual framework.⁶³ However, the term ‘fragmentation’ is not the most fitting to refer to tensions and conflicts internal to any individual tribunal’s regime insofar as they have little to do with the discourse on tribunals as ‘self-contained’ regimes and their positioning toward general international law. ‘Internal fragmentation’ is a tautology (because fragmentation is always internal). Besides, there are no ‘parts’ or ‘fragments’ into which a coherent unity has been broken that remain to be pieced together. What is meant instead is the ‘3D pluralism’, or ‘intrinsic pluralism’, of values and ideologies, which compete for recognition and priority in ICL and international criminal procedure and attract conflicting methods and philosophies. The distinction between ‘pluralism’ and ‘fragmentation’ is not reducible to observational or professional differences between universalists and pluralists. Human rights or victim lawyers might lament the ‘fragmentation’ of ICL if it undermines the universalism of the ideal of fairness or the effectiveness of remedies of human rights violations, just as international lawyers might see ‘pluralism’ as the natural state of ICL and as a source of opportunity in the pursuit of post-conflict justice.

‘Fragmentation’ and ‘pluralism’ do not have the same meaning and application in the ICL domain, as each of them carries semantic baggage that cannot easily be left behind. The latter is a less sinister (more euphemistic) notion than the former and does not conjure up the idea of the law disintegrating into ‘fragments’ and losing authority. To begin with, ICL has never been, and is not, a consolidated legal regime that lends itself to ‘fragmentation’. Its development in the course of the proliferation of interconnected and mutually aware international criminal tribunals has been a process of expansion of the field, not its compartmentalization. Being compatible with this paradigm, ‘pluralism’ allows for capturing the diversity and nuances of substantive and procedural ICL as applied in different international tribunals.

It is also sufficiently spacious to bring into focus status in national jurisdictions, even though domestic courts interpret and apply national laws that implement treaties criminalizing certain conduct, rather than applying international norms directly. It is not justified to speak of ‘vertical fragmentation’ when referring to differences between the law of international criminal tribunals on the one hand and that of domestic jurisdictions on the other. Their respective legal orders and regimes are not ‘fragmented’ but simply different: they do not belong to the same legal system. The legal diversity along the international–national axis is better captured by the term ‘vertical pluralism’, which does not suggest that this divergence is a result of an improper disunity of the erstwhile uniform regime.

⁶¹ *Ibid.*, 25.

⁶² *Ibid.*

⁶³ See section 3.3.B.

Another advantage of the ‘pluralism’ concept is that it conveys aspects of diversity of the ICL not captured by ‘fragmentation’, namely its ‘internal’ dimension. One perspective is the ‘pluralism of origins’, or legal–cultural pluralism, which exposes the origin of ICL and international criminal procedure as a combination of legal concepts, standards, and practices drawn from domestic law. Another ‘intrinsic’ perspective is the pluralism of normative identities and philosophies that co-exist (not always amicably) within the ICL as a consequence of its disciplinary complexity. By contrast, the ‘fragmentation’ debate focuses on the implications of plurality and diversity of legal regimes, not on the normative diversity *within* such regimes.

Therefore, there are good reasons to prefer the ‘pluralism’ concept to ‘fragmentation’ in ICL, the difference between which is not merely a matter of different perspectives on the same phenomenon. The transition from ‘fragmentation’ to ‘pluralism’ entails a paradigm shift. The following section addresses several layers of complexity of international criminal justice through the prism of ‘pluralism’. This allows for testing the explanatory force of this concept and its ability to capture the different aspects of diversity of the field.

3. Pluralist Perspectives on ICL

3.1 ‘Legal pluralism’ in ICL

ICL has not yet been examined from the perspective of classical ‘legal pluralism’. This perspective, which originates from the sociology of law, exposes the diversity of (legal) regulation within the same socio-political fields.⁶⁴ If an individual tribunal can be regarded as such a social field, this concept may be used to describe the coexistence of several legal regimes originating from different sources and legal orders within the same jurisdiction. The ‘shadow’ regimes may be in different types of relationship with the formal ‘law of the tribunal’ (whose function is analogous to that of state law in a traditional environment of legal pluralism). They may have normative effects when recognized by formal law, or regardless of such recognition—the latter occurs in particular where the tribunal applies ‘informal’ law instead of the formally valid law, which is set aside. The ‘shadow’ regimes may replace formal law with regard to certain matters or supplement it to fill in the gaps in regulation.

Paradigm examples of ‘legal pluralism’ in substantive ICL are provided by hybrid courts whose constituent instruments extend the subject-matter jurisdiction to serious offences proscribed by domestic legislation and contain blanket references thereto for crime definitions. Thus, the SCSL Statute provided for the SCSL’s jurisdiction over certain crimes under Sierra Leonean law.⁶⁵ The Extraordinary Chambers in the Courts of Cambodia (ECCC) have jurisdiction over homicide, torture, and religious persecution under the 1956 Penal Code of Cambodia.⁶⁶ The Special Panels for Serious Crimes in the Dili District Court (SPSC) operated on the basis of the law of East Timor as promulgated by the United Nations Transitional Administration in East Timor (UNTAET) in UNTAET Regulation 1999/1, which allowed the panels, subject to certain conditions, to apply the law in effect prior to the establishment of the transitional authority, i.e. the law of the occupying power, Indonesia.⁶⁷ Pursuant to the UNTAET

⁶⁴ See section 2.1.A.

⁶⁵ Art. 5 SCSL Statute.

⁶⁶ Art. 3 new ECCC Law.

⁶⁷ Section 3.1(a) UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000; Section 3.1 UNTAET Regulation 1999/1 on the Authority of the Transitional Administration in East Timor, UNTAET/REG/1999/1, 27 November 1999.

Regulation 2000/15, the SPSC jurisdiction extended over murder and sexual offences under Indonesian criminal law as ‘the applicable Penal Code in East Timor’.⁶⁸ These instruments conceded room to domestic criminal law with regard to specific offences, but continued to apply otherwise. The domestic penal regimes were complementary to the international one and did not give rise to normative conflicts. This reflects ‘legal pluralism’ in a weak sense that is compatible with legal centralism because the secondary regime (domestic law) is validated by the primary regime (tribunal law).⁶⁹

Nor is legal pluralism in a strong sense unknown to hybrid courts. One example is the infamous *Armando dos Santos* judgment of East Timor’s Court of Appeal, which epitomized the political struggle over applicable law in the fledgling legal order.⁷⁰ In departure from all previous jurisprudence, the Court held that ‘the law applicable prior to 25 October 1999’ in UNTAET Regulation 1999/1 refers not to Indonesian law but the law of Portugal, since Indonesian occupation was illegal under international law.⁷¹ The Court’s attempt to instate a law with no formal status as the primary legal regime was detrimental for legal stability as it meant the invalidation of all previous court decisions. The trial panel refused to follow the decision.⁷² The ensuing legal chaos—with the appellate court applying Portuguese law and trial panels Indonesian law—was resolved by legislation to the effect that the latter law was to be applied, as a result of which the Court of Appeal revised its position.⁷³ However, its reasoning continued to show signs of ‘strong’ legal pluralism.⁷⁴ In East Timor, the ‘shadow’ law contested and even temporarily displaced the formal applicable law.

‘Legal pluralism’ in procedure can be discerned in jurisdictions where the Rules are adopted and amended by judges. Their dual role as quasi-legislators and decision-makers deformed the procedural law. The border between law-interpretation and law-creation becomes elusive given the coincidence of both functions in a single authority. In the ICTY, the *ad hoc* solutions for specific situations improvised through a creative interpretation of existing (insufficient) rules were without much ado upgraded to ‘formal law’ through rule-amendments. ICTY Rule 92ter, authorizing the admission of witness statements regarding acts and conduct of the accused where the witness is available for cross-examination, codified the practice earlier sanctioned by the Appeals Chamber in *Milošević*.⁷⁵ The ‘informal’ judicial procedure governed the situation until its formalization and served as a gap-filler.

Direct reliance on domestic standards has been another form of ‘legal pluralism’ in the *ad hoc* tribunals, which sought to operationalize the open-ended procedural rules in the most practicable manner. Given that the ICTY Rules do not address the proofing of witnesses before

⁶⁸ Sections 8 and 9 UNTAET Regulation 2000/15 (n 67).

⁶⁹ For a distinction between legal pluralism in a weak sense and in a strong sense, see Griffiths (n 30).

⁷⁰ Decision, *Prosecutor v. Armando dos Santos*, Case No. 16/2001, Court of Appeal, East Timor, 15 July 2003 (‘*Armando dos Santos* judgment’), 3-7. See also Decision, *Augustinho da Costa*, Case No. 03/2002, Court of Appeal, East Timor, 18 July 2003.

⁷¹ *Armando dos Santos* judgment (n 70) 3-4.

⁷² Decision on the defense (Domingos Mendonca) motion for the Court to order the Public Prosecutor to amend the indictment, *Prosecutor v. Domingos Mendonça*, Case No. 18a/2001, SPSC, East Timor, 24 July 2004, 10-14.

⁷³ Section 1, Law No. 10/2003 Interpretation of Section 1 of Law No. 2/2002, of 7 August, and Sources of Law, Democratic Republic of Timor-Leste; Judgement (Criminal Appeal No. 2004/29), *Prosecutor v. Paulino de Jesus*, Case No. 6/2002, Court of Appeal, 4 November 2004.

⁷⁴ S. Vasiliev, ‘Commentary’ in A. Klip and G. Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals. Vol. 16: Special Panels for Serious Crimes in East Timor 2003-2006* (Antwerp: Intersentia, 2009) 898-9.

⁷⁵ Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, S. *Milošević*, Case No. IT-02-54-AR73.4, AC, ICTY, 30 September 2003.

they testify by the parties, it was reported that the prosecution staff relied on diverging domestic standards and employed different methods.⁷⁶ Some of them emulated the thorough US-style preparation while others eschewed such practice. Another example is the ICTY's resort to common law standards when interpreting Rules 85(B) and 90(H), which define the manner of examination of witnesses.⁷⁷ As a manifestation of a 'weak' legal pluralism, national standards and practices with no formal status are transposed into the domain of procedural law in order to fill in the lacunae.

The concurrence of regimes governing professional conduct before the tribunals is also a case of 'legal pluralism'. For instance, defence counsel are bound both by the standards of the respective tribunal and by domestic codes of professional ethics. The tribunals' codes uniformly stipulate that their provisions prevail in the case of a conflict with other codes.⁷⁸ Theoretically, there may be situations in which counsel's compliance with the tribunal code would be qualified as misconduct under a national bar code.⁷⁹ The need for counsel to comply with the latter is not easily dismissed because being a member of the bar in good standing is important for both domestic and international practice.⁸⁰ The situation of 'legal pluralism' in a strong sense occurs where, in the case of a conflict between the codes, counsel gives priority to the informal (domestic) deontological regime.

These examples show that, as any social field in which normative regimes co-exist, international and hybrid tribunals are faced with 'legal pluralism'. In various areas, their formal law gives room to the regulatory role of secondary regimes whenever it refers to legal sources pertaining to another legal order or whenever it is interpreted as justifying reliance on those sources. This leads to the incorporation of secondary regimes into the legal sphere for the purpose of gap-filling. Where the subjects of regulation are distributed between the formal and informal law and the latter plays a complementary role, normative conflicts do not arise and legal pluralism in a 'weak' sense is unobjectionable. However, where the 'informal' law enters despite the clear terms of formal law and displaces its authority, this is undesirable and destabilizes a tribunal's legal system. Admittedly, this reflects a usual lawyerly concern about 'strong' legal pluralism.

3.2 Extrinsic dimension: legal diversity across and within courts

Classic 'legal pluralism' does not exhaust pluralist perspectives on ICL. The concept of 'pluralism' can be employed to capture the 'extrinsic' and 'intrinsic' diversity of ICL regimes.

⁷⁶ M. Schrag, 'Lessons Learned from ICTY Experience' (2004) 2 *Journal of International Criminal Justice* 427, 432 n9.

⁷⁷ E.g. Decision on 'Motion to Declare Rule 90(H)(ii) Void to the Extent it is in Violation of Article 21 of the Statute of the International Tribunal' ..., *Brđanin and Talić*, Case No. IT-99-36-T, TC II, ICTY, 22 March 2002, para. 12 (relying on *Browne v. Dunn* (1893) 6 R. 67, House of Lords).

⁷⁸ Art. 4 Code of Professional Conduct for Counsel Appearing before the International Tribunal, ICTY, IT/125 Rev. 3 (as amended on 12 July 2009); Art. 19 ICTR Code of Professional Conduct for Defence Counsel, ICTR, 14 March 2008; Art. 3(B) Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, as amended on 13 May 2006; Art. 4 Code of Professional Conduct for Counsel, Resolution ICC-ASP/4/Res.1, 2 December 2005.

⁷⁹ E.g. Transcript, *Taylor*, SCSL-2003-01-T, TC II, SCSL, 4 June 2007, 251-67 (counsel refusing to continue representing the accused, who terminated representation, as assigned counsel despite the TC's orders and warnings referring to 'contempt of court').

⁸⁰ Art. 14(i), (v), (vii) Directive on the Assignment of Defence Counsel, ICTY (Directive No. 1/94, IT/73/Rev. 11, as amended 29 June 2006).

‘Intrinsic pluralism’ will be turned to shortly; this paragraph addresses ‘extrinsic pluralism’. First, the term means the variance in law and practice across different jurisdictions located along the ‘vertical’ and ‘horizontal’ axes that are tasked with interpreting and applying ICL and international criminal procedure. The ‘extrinsic pluralism’ perspective addresses legal diversity among international/hybrid criminal courts, between such courts and domestic systems, and between domestic systems (to the extent relevant to ICL). ‘Horizontal’ pluralism and ‘vertical’ pluralism raise issues of the ‘own coherence’ of the ICL and the divergence between national and international jurisdictions in interpreting its norms, respectively. Second, ‘extrinsic pluralism’ also includes variation in legal interpretations and practices within the same jurisdiction (e.g. across different chambers) or within the same Chamber over time or depending on the composition.

A. Inter-jurisdictional pluralism: ‘horizontal’ and ‘vertical’ axes

Horizontal pluralism is easy to discern in international criminal justice. It denotes the evident plurality, heterogeneity, and divergence in the law and practice, such as in the foregoing examples of the ICC forging its own path *vis-à-vis* the *ad hoc* tribunals with regard to a variety of issues. International criminal judges encounter the pluralism of ICL on a daily basis when trying to resolve interpretive dilemmas, as long as they see themselves as part of a larger system of international criminal justice and operate in a ‘state of connectedness’.⁸¹ The second form of inter-jurisdictional pluralism, ‘vertical pluralism’, denotes the plural and divergent interpretations of ICL norms across the international/national divide. In line with the ICC’s complementarity principle, the bulk of responsibility for prosecuting and trying persons for war crimes, crimes against humanity, and genocide rests with national courts. This shift of emphasis to national prosecution was conspicuous in the implementation of the *ad hoc* tribunals’ completion strategy; they could no longer afford to adhere to primacy in exercising concurrent jurisdiction and had to refer less serious cases ‘back’ to the national courts under Rule 11*bis*. While international criminal justice in the sense of international prosecution and adjudication is here to stay, the future of (much of) ICL indeed appears domestic.⁸² Pluralism in international criminal justice is reinforced by domestic courts, who act as its enforcers on the basis of territoriality, nationality, or universal jurisdiction, or under the complementarity regime.

Pluralism along the horizontal axis leads to domestic judges being uncertain about which of the inconsistent international norms to use. Pluralism along the vertical axis raises questions of hierarchy of norms and the extent to which domestic courts are to rely on the international legal framework. Domestic courts may look to international jurisprudence for guidance, but they are not obliged to apply the law and its interpretations emanating from international tribunals. Some domestic courts will apply domestic criminal law implementing international law in line with the authoritative interpretations of international norms by the tribunals. However, the national practice is more likely to enhance ‘vertical pluralism’ along the international/national line and pluralism across domestic jurisdictions that exercise jurisdiction over international crimes.

The key question is where the limits to ‘vertical pluralism’ lie. Arguably, faithful application of international norms that determine the scope of international criminalization of individual conduct (e.g. crime definitions and command responsibility) is warranted at the

⁸¹ Van Sliedregt (n 19) 850.

⁸² See A.-M. Slaughter and W. Burke-White, ‘The Future of International Law Is Domestic (or, The European Way of Law)’ (2006) 47(2) *Harvard International Law Journal* 327.

national level.⁸³ Complementarity and universal jurisdiction may prompt national jurisdictions to align with or incorporate the exact definitions of international crimes in ICL, but the general part of criminal law and sentencing is generally regarded as belonging to the domestic sphere.⁸⁴ While it might be argued that the complementarity principle requires states to consistently apply the substantive law of the ICC Statute, including Article 25(3) on modes of liability, no *lacunae* exist in the national systems in this domain and states should be able to rely on domestic law. Yet, when adjudicating international crimes, domestic courts may also be urged to apply international statutes as interpreted in the tribunals' case law, at the expense of time-honoured domestic criminal law.⁸⁵ This would require them to leave aside the general part of their domestic law (regarding 'ordinary crimes') when prosecuting and adjudicating international crimes. It is not self-evident whether the 'internationalist approach' is warranted even when exercising universal jurisdiction on behalf of the international community. In the case of *Van Anraat*, a Dutch court refused to apply ICL norms with regard to the degree of intention required for a conviction for aiding and abetting genocide because it found them unclear.⁸⁶ Indeed, the inconsistent and contrived rulings of the *ad hoc* tribunals on this matter do not offer satisfactory guidance to national courts.⁸⁷ Against that background, the idea of ICL overriding the seasoned domestic doctrines is questionable.⁸⁸

With a prolific body of case law of the *ad hoc* tribunals, the ICC, hybrid jurisdictions, and domestic courts, the heterogeneity of ICL (and its domestic versions) has become an overwhelming reality and conceptual challenge in this field. The cross-jurisdictional pluralism confronts both international and domestic judges whenever they seek guidance and inspiration from the relevant 'international standards' for the purpose of interpreting applicable law. As a way of dealing with this, scholars, in particular comparatists from the civil law tradition, have advocated the need to develop a 'general part' of ICL defining *mens rea*, modes of criminal responsibility, and justifications and excuses.⁸⁹ While the prospects of a 'general part' emerging are unclear, efforts have been undertaken to construct comprehensive reference sources on ICL and jurisprudence aimed at facilitating knowledge transfer to domestic jurisdictions such as the ICC Case Matrix and Legal Tools.⁹⁰ These databases enable access to information on international law and jurisprudence by national courts, but this will not necessarily ensure a

⁸³ P. Gaeta, 'International Criminalization of Prohibited Conduct' in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 70-3.

⁸⁴ H. van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' (2008) 8 *International Criminal Law Review* 229, 254.

⁸⁵ E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012) 10-11 (discussing the *Van Anraat* case). See also van der Wilt (n 83) 254.

⁸⁶ Judgment, *Van Anraat*, Hague Court of Appeals, Case No. LJN: BA4676, ILDC (International Law in Domestic Courts) 753 (NL 2007), 9 May 2007, at 7; Judgment, District Court, The Hague, 23 December 2005, LJN: AU8685 (in Dutch). See H.G. van der Wilt, 'Genocide v. War Crimes in the *Van Anraat* Appeal' (2009) 6 *Journal of International Criminal Justice* 557.

⁸⁷ E. van Sliedregt, 'Complicity to Commit Genocide' in P. Gaeta (ed.) *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 162-93.

⁸⁸ Van der Wilt (n 84) 254.

⁸⁹ K. Ambos, 'Remarks on the General Part of International Criminal Law' (2006) 4 *Journal of International Criminal Justice* 660; F. Matovani, 'The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer' (2003) 1 *Journal of International Criminal Justice* 26.

⁹⁰ See 'Case Matrix Network', available at <<http://www.casematrixnetwork.org/icc-case-matrix/>> (last accessed 24 March 2014).

uniform interpretation and application of domestic criminal law norms in light of international standards.

A question visible throughout the debate on pluralism is that of the *sui generis* nature of international crimes. If we accept that international crimes and their adjudication are fundamentally different from ordinary crimes and domestic criminal justice, we embrace pluralism and a two-track system of adjudication. One may wonder whether liability theories modelled on domestic law capture the reality of mass atrocities and question the reliance on that law for constructing substantive ICL. However, the idea of ICL consolidating around one monocentric approach has its detractors—those who are opposed to the move for uniformity. Notably, Greenawalt has argued that (vertical) pluralism in ICL should be accepted. The search for uniformity along the ‘vertical’ axis is misguided, insofar as the ‘internationalist’ approach ‘necessarily creates fracture and inconsistency at the domestic level’ and generates a two-track system of adjudication.⁹¹ The drive toward unification threatens the integrity of a state’s criminal justice system as it may cause a state to adopt criminal law principles for international crimes that are inconsistent with those otherwise applied.⁹² Indeed, it is difficult to contend with the irreducible (cross-jurisdictional) pluralism of substantive criminal laws at the national level. However, the unqualified endorsement of ‘vertical pluralism’ downplays the need for a ‘general part’, which can be useful to national jurisdictions with a view to the possible importation of general ICL principles into domestic law.

Acceptance of ‘vertical pluralism’ does not necessarily entail a dismissal of the idea of a more unified body of ICL. International criminal jurisdictions themselves may benefit from reaching some degree of uniformity. In particular, there is much to be said in favour of refining and harmonizing the principles governing the attribution of liability at the international level. Developing a general part may contribute to the emergence of a more balanced, effective, and clear substantive ICL regime. As has been argued elsewhere, this can be achieved by looking beyond the specific labels in search of a ‘common grammar’, so that the differences can be reconciled under the umbrella of the international theory of attribution.⁹³ Such an approach may allow limiting pluralism to the extent necessary, i.e. to the extent that international statutory law compels it.

The extrinsic cross-jurisdictional pluralism is at least as evident in the procedural law realm as it is in substantive law. Each of the tribunals is equipped with a separate institutional structure and a separate set of Rules of Procedure and Evidence, which results in the diversity of procedural forms. A ‘master’ procedural model is absent as there is no singular format of investigation, indictment and charging, trial, and appellate procedures that attach to the enforcement of ICL and are mandatory for adoption by all institutions.⁹⁴ There are as many ‘international criminal procedures’ as there are courts, because each of them is endowed with a distinct framework and none of the models in use is by definition more authoritative (legitimate,

⁹¹ Greenawalt (n 19) 1067-8.

⁹² *Ibid.*, 1068-9.

⁹³ Van Sliedregt (n 19) 852.

⁹⁴ R. Vogler, ‘Making International Criminal Procedure Work: From Theory to Practice’ in R. Henham and M. Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (Aldershot: Ashgate, 2011) 105 (‘After two decades of debate and experimentation it is still not clear whether a definitive model of “international” criminal procedure has emerged’); G. Sluiter, ‘Trends in the Development of a Unified Law of International Criminal Procedure’ in C. Stahn and L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (Hague: T.M.C. Asser Press, 2010) 586 (advocating the need for ‘a unified core of the law of international criminal procedure’).

valid, effective). The criteria for ranking are not self-evident.⁹⁵

This does not mean, however, that there is no *lex generalis* or ‘common grammar’ of international criminal procedure, consisting of uniform principles and general rules, over and above any occasional coincidences.⁹⁶ The Rules of other courts were prescribed as sources of reference in some jurisdictions;⁹⁷ regardless, they also served as sources of borrowing of ready-made solutions, which is the most efficient way of constructing a procedural system from scratch. Attention to the experience of other members of the ‘community of courts’ led to a degree of initial uniformity and (partial) convergence over time. Similarities resulted neither from the aspiration to achieve cross-jurisdictional uniformity nor from attempts to adhere to a single mandatory blueprint, which would in any event have been impossible in the absence of such. Instead, the partial overlap and convergence were caused by the expediency of drawing upon the experience of courts with similar mandates and forensic challenges.

This has neither precluded significant divergences between the tribunals nor ruled out occasional exercises in ‘reinventing the wheel’, with some of the courts persisting on forging their own path, if only to find out that it represented a detour. In procedure, cross-jurisdictional divergence is justifiable when warranted by the tangible need to exercise legal autonomy, with a view to guaranteeing a fair and expeditious process in the specific legal, institutional, and operational circumstances. However, it is a matter of concern when the procedural solutions conflict with the core principles of the *lex generalis* of international criminal procedure or when the rejection of established approaches is motivated by unprincipled reasons. An unjustified refusal to consider best practices developed by other courts, as a sole consequence of the desire to be ‘different’, breaks down a constructive inter-curial conversation and hampers cross-fertilization.

Along the vertical axis, there is limited scope to discuss the pluralism of international criminal procedure. That law is reserved to the sphere of the tribunals, because procedural law remains exclusively within the domain of domestic jurisdictions. In formal terms, the effects of international criminal procedure on national criminal process are tenuous and can only be indirect.⁹⁸ Compared to criminalization policies, states are more conservative when it comes to the basic structure and features of their criminal process. Domestic courts are supposed to apply domestic procedure in all cases, irrespective of whether they involve international crimes. Unlike with human rights norms, there is no imperative need for them to consult the standards of international criminal procedure in order to deal with cases of international crimes. However, for jurisdiction-specific reasons, international criminal procedure can affect the modalities of prosecution and adjudication at the domestic level indirectly. Such effects may attach to the Rule 11bis procedure, the complementarity regime of the ICC, as it is understood locally, or other recourse to international procedural standards by domestic courts. In particular, national legislators and/or courts in the ICC situation countries may be willing to emulate the procedures and practices adopted by the ICC.⁹⁹

National jurisdictions have some positive and negative procedural lessons to learn from international criminal tribunals. Mass atrocity cases pose formidable challenges to the

⁹⁵ Editors, ‘Introduction’ (n 4) 6.

⁹⁶ For a study, see Sluiter *et al.* (n 4).

⁹⁷ See e.g. Art. 14 ICTR Statute; Art. 14(1) SCSL Statute.

⁹⁸ G. Sluiter, ‘The Law of International Criminal Procedure and Domestic War Crimes Trials’ (2006) 6 *International Criminal Law Review* 605

⁹⁹ See Nouwen (n 13).

prosecution and adjudication effort. The scale and nature of international crimes, the cultural differences that attend extraterritorial justice, and the volume of evidence needed for such cases may require tailored approaches to case management and additional measures to preserve equality of arms. National legislators and adjudicators may be prompted to modify domestic procedural practices for processing international crimes cases and international criminal procedure may be a rich source of guidance, despite its pluralism. However, the main lesson the states may learn from the tribunals' own effort to ameliorate procedure, is that international procedural models are not failproof blueprints from which ready-made solutions can be drawn. States should adjust their criminal procedure to the challenges posed by international crime cases in accordance with their human rights obligations and procedural culture. The tribunals are *trend-setters* rather than *standard-setters*.¹⁰⁰

B. Intra-jurisdictional pluralism: fragmentation again?

Another form of 'extrinsic' pluralism that has gained prominence in the debates on ICL of late is pluralism *within* the same institution ('intra-jurisdictional pluralism'). As opposed to cross-jurisdictional pluralism, it arises when fundamentally different interpretations of substantive and procedural frameworks are adopted by different chambers of the same court or when the same chamber applies the same norm differently over time, even in the same case. 'In-court pluralism' is distinguishable from the classic 'legal pluralism' addressed above. It does not refer to the confluence and competition for priority between multiple legal regimes within the same jurisdictional sphere; instead, it denotes the perceivable differences in practice within the same institution and under the same legal framework, as if the practice followed in separate tracks of 'self-contained sub-regimes'. These situations may warrant the use of the term 'fragmentation', given that a single legal regime shows signs of disunity.

One example from the substantive law domain is the attempted rejection of the JCE concept by the *Stakić* Trial Chamber. Although JCE was the mainstream doctrine for attributing crimes to leadership since *Tadić*, the *Stakić* Chamber preferred the concept of co-perpetration based on Roxin's control theory. It held that JCE is 'only one of several possible interpretations of the term "commission" under Article 7(1) of the Statute' and that priority must be given to a 'more direct reference to "commission" in its traditional sense' before adopting JCE.¹⁰¹ Commission entails that 'the accused participated, physically or otherwise directly or indirectly, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others'.¹⁰² Co-perpetration occurs when there is an 'explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct'.¹⁰³ In the Chamber's view, this definition was 'closer to what most legal systems understand as "committing"' and helped avoid 'the misleading impression that a new crime not foreseen in the Statute of this Tribunal has been introduced through the backdoor'.¹⁰⁴

By applying the doctrine of co-perpetration, the *Stakić* Trial Chamber fragmented the ICTY approach to interpreting Article 7(1). This situation was not allowed to endure by the Appeals Chamber, which intervened to review the Trial Chamber's treatment of this mode of

¹⁰⁰ Vasiliev (n 59), chapter 12, section 4.4.

¹⁰¹ Judgement, *Stakić*, IT-97-24-T, TC II, ICTY, 31 July 2003, para. 438.

¹⁰² *Ibid.*, para. 439.

¹⁰³ *Ibid.*, para. 440.

¹⁰⁴ *Ibid.*, para. 441.

liability *proprio motu*, as the issue of general importance to the jurisprudence of the Tribunal.¹⁰⁵ The Appeals Chamber found that the Trial Chamber ‘erred in conducting its analysis of the responsibility ... within the framework of “co-perpetratorship”’, as this mode of liability has support neither in customary international law nor in the settled jurisprudence of the ICTY that is binding on the Trial Chambers.¹⁰⁶ Since this mode of liability was not charged in the indictment, was not pleaded at trial, and did not constitute ‘valid law’, the Appeals Chamber set the trial judgment aside in this respect and reviewed the Trial Chamber’s factual findings in light of the correct doctrine, the JCE.¹⁰⁷ The appellate instance exercised its competence to guard the consistency of the jurisprudence and preclude the ‘fragmentation’ of the ICTY’s regime.

By contrast, the rift in the ICTY’s appellate jurisprudence on the controversial requirement that assistance must be specifically directed at the commission of crimes to warrant a conviction for aiding and abetting exemplifies ‘intra-institutional pluralism’ that amounts to ‘fragmentation’ in the proper sense. In its *Perišić* judgment, the Appeals Chamber instated the ‘specific direction’ requirement for cases of remote assistance, and on that basis reversed the conviction by the Trial Chamber.¹⁰⁸ Less than one year thereafter, a differently constituted appellate bench in *Šainović et al.* reviewed the reasoning in *Perišić* in light of jurisprudence and customary law.¹⁰⁹ By majority, the *Šainović et al.* Appeals Chamber rejected the *Perišić* holding that ‘specific direction’ was an element of aiding and abetting liability and found it to be ‘in direct and material conflict with the prevailing jurisprudence ... and with customary international law’.¹¹⁰ The prosecution’s motion for reconsideration of the *Perišić* appeal judgment in light of *Šainović et al.* was denied without much discussion by the *Perišić* Chamber.¹¹¹ The unfortunate consequence of this rupture between the appeal judges is that the ‘law of the Tribunal’ on aiding and abetting currently remains fragmented. As it is unclear which position stands as the authoritative interpretation of the Statute, the ICTY presents a two-track system of adjudication on this issue. This is detrimental for legal certainty and uniformity of jurisprudence and unacceptable in a properly functioning judicial system.¹¹²

‘Intra-institutional pluralism’ has also widely manifested itself in procedural practice. Where the interpretations of procedural rules vary by chamber and where the same chamber moves from one approach to another in the course of ongoing proceedings, difficulties arise for ascertaining which practice reflects the institution-wide approach. The parties may be uncertain about the ‘rules of the game’, which might impair their ability to effectively prepare and present a case. In the *ad hoc* tribunals, the inter-chamber pluralism was related to the fact that judges come from different procedural traditions (which also accounts for what we call ‘pluralism of origins’, discussed later in this chapter).¹¹³ The procedural frameworks of the tribunals are sufficiently open-ended to accommodate diverging approaches within the broadly defined

¹⁰⁵ Judgement, *Stakić*, IT-97-24-A, AC, ICTY, 22 March 2006, para. 59 (‘The introduction of new modes of liability into the jurisprudence of the Tribunal may generate uncertainty, if not confusion, in the determination of the law by parties to cases before the Tribunal as well as in the application of the law by Trial Chambers.’).

¹⁰⁶ *Ibid.*, para. 62.

¹⁰⁷ *Ibid.*, paras 66 *et seq.*

¹⁰⁸ Judgement, *Perišić*, IT-04-81-A, AC, ICTY, 28 February 2013, paras 25-40, 73-74, and 122.

¹⁰⁹ Judgement, *Šainović et al.*, IT-05-87-A, AC, ICTY, 23 January 2014, paras 1618-48.

¹¹⁰ *Ibid.*, para. 1649-50.

¹¹¹ Decision on Motion for Reconsideration, *Perišić*, IT-04-81-A, AC, ICTY, 20 March 2014.

¹¹² See further S. Vasiliev, ‘Consistency of Jurisprudence, Finality of Acquittals, and *Ne Bis in Idem* – Comments on the *Šainović et al.* Appeal Judgment and the OTP Motion for Reconsideration of the *Perišić* Appeal Judgment’, CICJ, 7 February 2014, available at <http://cicj.org/?page_id=1608> (last accessed on 24 March 2014).

¹¹³ See section 3.3.A.

judicial discretion.¹¹⁴ The combined effect of the ambiguity of procedural rules, the absence of a coherent trial culture, and the diversity of judicial backgrounds was uncertainty regarding the exact parameters of the actors' procedural roles. This resulted in a diversity of judicial styles practised across the ICTY and ICTR Trial Chambers and plural ways in which judges exercised their discretion.¹¹⁵

Significant cross-chamber differences have been spotted regarding judges' participation in the presentation of evidence at trial. Judges coming from civil law countries tend to be more active during the testimonial process and are more willing to pose questions to witnesses than their common law colleagues are.¹¹⁶ Similarly, there is variance in the ICTY judges' exercise of their case-management duties in the pre-trial process and degrees of judicial activity in streamlining cases before they go to trial.¹¹⁷ 'Procedural pluralism' is not limited to specific areas but extends virtually to all essential procedural or evidentiary matters, including questioning of witnesses, admission of documents, treatment of hearsay, setting and enforcing time limits for the presentation of cases, and admission of expert evidence proposed by the parties.¹¹⁸ The divergence in approach exhibited by different benches in applying the same Rule of Procedure and Evidence, as a consequence of the judges' background and personal preferences, has been criticized by practitioners both on the prosecution and defence side.¹¹⁹ Over and above 'cross-chamber pluralism', parties have been concerned with inconsistent interpretations of the rules in the same case. Judges could substantially amend their practice on a specific matter as the case went along as a way of fixing what appeared as an excessively permissive (or restrictive) approach.¹²⁰ Such turnabouts, occasionally followed by rule amendments, have been seen as problematic by trial participants, as they create the impression that rules are being made up *ex improviso* for reasons that have little to do with ensuring a fair trial and rather reflect the managerial pressure of the completion strategy.¹²¹

The comment that 'it would be misleading to describe the ICTY as having had a procedural *system* as opposed to procedural *systems*'¹²² brings to the fore the scale of 'intra-institutional pluralism' and procedural fragmentation in that Tribunal. The inconsistent application of procedural rules across different chambers of the same court, as a result of diverging backgrounds and (changing) preferences, is not merely a scholarly concern and poses practical problems. It dilutes procedural certainty which the actors should have in order to be

¹¹⁴ See e.g. Rules 85(B) and 90(F) and (H) ICTY RPE. See also R. Byrne, 'Drawing the Missing Map: What Socio-legal Research Can Offer to International Criminal Trial Practice' (2013) 26(4) *Leiden Journal of International Law* 991, 995.

¹¹⁵ Byrne (n 114) 996.

¹¹⁶ On different judicial styles in the ICTY, see F.J. Pakes, 'Styles of Trial Procedure at the International Criminal Tribunal for the Former Yugoslavia' in P.J. van Koppen and S.D. Penrod (eds), *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (New York: Plenum Press, 2003) 309–19. On 'reactive' and 'proactive' TCs at the ICTR, see R. Byrne, 'The New Public International Lawyer and the Hidden Art of International Criminal Trial Practice' (2010) 25 *Connecticut Journal of International Law* 24.

¹¹⁷ M. Langer and J.W. Doherty, 'Managerial Judging Goes International, But Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms' (2011) 36 *Yale Journal of International Law* 241.

¹¹⁸ A. Whiting, 'The ICTY as a Laboratory of International Criminal Procedure' in B. Swart *et al.* (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011) 91.

¹¹⁹ *Ibid.*; M.G. Karnavas, 'The ICTY Legacy: A Defense Counsel's Perspective' (2011) 3 *Goettingen Journal of International Law* 1053, 1062–3.

¹²⁰ Whiting (n 119) 91.

¹²¹ E.g. Karnavas (n 119) 1056 and 1064.

¹²² Whiting (n 119) 91.

able to effectively exercise their functions and it may impact on the fair and expeditious conduct of the proceedings.¹²³ Trial by improvisation or experimentation is disorientating and frustrating even for repeat players.¹²⁴

While at the *ad hoc* tribunals cross-chamber pluralism is a sociological reality unaccounted for by the Rules (except for the reasonable scope of judicial discretion), at the ICC the variability of trial processes across different chambers and cases is sanctioned by the legal framework. The ICC Statute and the Rules do not provide for a specific format of trial and the order and modes of presentation of evidence, but leave it to the parties to agree on the conduct of the proceedings and authorize the presiding judge of the Trial Chamber to give directions on these issues.¹²⁵ Since the adoption of the rules governing the conduct of trial is left to each trial bench, in consultation with the parties, there is a high chance of *ad hoc* approaches and discrepancies in practice across different chambers.¹²⁶ This creates an ‘unpredictable system’ in which procedural uncertainty challenges the ability of the parties to prepare for trial, given ‘the impossibility of ordering in advance the presentation of witness’ testimony and making the necessary arrangements to ensure the attendance of witnesses at trial’.¹²⁷

The ICC trial practice so far has shown divergence across cases not only with respect to witness proofing, but also in relation to the arrangements for victims to apply for participation and to participate in the proceedings.¹²⁸ However, on a wide range of matters, a consolidated institutional position has emerged. The Chambers have endeavoured to minimize the negative effects of uncertain statutory trial format by consulting the parties and by issuing general and supplementary directions setting forth the order and modes of presenting and examining evidence.¹²⁹ The cross-chamber pluralism in the ICC trial procedure is not antithetical to procedural certainty and not problematic as long as the ‘rules of the game’ are known to the parties and participants in advance in every individual case. Moreover, the possibility of tailoring trial process to the epistemic needs of the court and the parties as well as to the forensic challenges posed by the situation on the ground and the nature of witnesses may prove beneficial. Provided that procedural pluralism is properly managed and procedural uncertainty is minimized by consultations and detailed guidance handed down by the Chamber, it can be enlisted to enhance the truth-finding capacity and fairness of the ICC process in specific contexts.¹³⁰

¹²³ See also G. Mettraux, ‘Of the Need for Procedural Fairness and Certainty’, International Criminal Law Bureau Blog, 29 November 2009, <<http://www.internationallawbureau.com/index.php/of-the-need-for-procedural-fairness-and-cerainty/>> (last accessed on 24 March 2014).

¹²⁴ Karnavas (n 119) 1062-3.

¹²⁵ Art. 64(8)(b) ICC Statute; Rule 140(1) ICC RPE.

¹²⁶ F. Guariglia, ‘The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of Individual Criminal Responsibility’ in A. Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 1132 (observing that this ‘conspires against basic principles of predictability and consistency in criminal proceedings.’).

¹²⁷ *Ibid.*

¹²⁸ S. Vasiliev, ‘Victim Participation Revisited: What the ICC is Learning about Itself’ in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015).

¹²⁹ Vasiliev (n 59), chapter 10, section 3.3.

¹³⁰ In this vein, see N.A. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010) 285, 316, and 318; Vasiliev (n 59), chapter 12, section 4.2.4 and 4.4.

3.3 Intrinsic dimension: coexistence and competition of cultures and values

The ‘intrinsic dimension’ of pluralism turns attention to the building blocks that constitute the normative structure of ICL and international criminal procedure. Because of the way in which these bodies of law have developed, they act as points of encounter between different legal cultures, values, and ideologies. These elements display divergence and generate tensions within the ICL’s substructure. The ‘intrinsic pluralism’ perspective enables one to pierce the ‘extrinsic’ diversity of multiple legal regimes to discern the diverging values and rationales that do not easily lend themselves to a conflict-free combination within a singular legal field.

A. Pluralism of origins: legal-cultural diversity

The ‘deep pluralism’ of ICL is revealed when looking at its standards through the prism of domestic legal cultures or traditions. Neither the substantive nor the procedural limb of ICL emerged as a result of divine creation; instead, they evolved in the process of ‘reinventing’ domestic legal concepts drawn from predominant legal traditions of common law and civil law, with other traditions having played a lesser (arguably insufficient) role. The domestic ingredients were thrown into the receptacle of ICL to undergo legal translation, readjustment, and amalgamation with similar concepts originating from other conversing legal cultures and to form a *sui generis* system of justice. It is unsurprising, therefore, that the discourse of ICL and international criminal procedure was dominated by debates on the similarities and differences between the major legal systems. Both the ICL academic and practice communities have long been preoccupied with the relative advantages and disadvantages of different concepts and approaches ‘on offer’ from national systems.

The major lines of those debates have been presented in considerable detail elsewhere and need not be rehearsed here. The traditions of common law and civil law, which have had a material influence on the formation and evolution of ICL, each come not only with seasoned doctrines of substantive law and procedure but also with specific interpretations of the concepts central to the administration of justice: ‘truth’, ‘fairness’, ‘blameworthiness’, and ‘responsibility’, among others. Those interpretations inform the understanding of the same concepts within and by international criminal tribunals, which are in the luxurious but at the same time unenviable position of being able (and having) to choose among them. The tribunals either adopt the most fitting concept or approach known from a domestic context, or build a concept of their own by means of theorization or hybridization of the options available.

The setting up of the tribunals was attended by the integration of the national profession into the international sphere. ICL practice more than general international law practice is opened up to domestic legal experience. Subject to specific qualification requirements, expertise and experience in criminal justice qualify a professional for tribunal practice, whether as a judge, prosecutor, defence attorney, or victim counsel. This is a good thing because, after all, the core business of the tribunals is the administration of criminal justice, albeit in a different legal, institutional, and operational context than in domestic systems. There is, however, a drawback: it poses an obstacle to the development of a common methodology and culture to constitute a background to adjudication and procedural operation. Opening up to the national profession has led to clashes of legal cultures within the body of international criminal practice. As a result, no common view or uniform understanding exists with regard to fundamental issues and concepts.

To take the concept of ‘truth’ as an example, the ICC Trial Chamber in *Katanga* allowed by majority the recharacterization of facts under Regulation 55 long after the closing statements

in the trial.¹³¹ This reflects the continental interpretation of ‘truth’ as ‘material truth’ and the understanding that it is a court’s objective to establish it in criminal proceedings.¹³² A dissent to that ruling gravitates more toward the Anglo-American view of ‘truth’ as ‘legal truth’, which limits the effort of establishing facts to evidence by the parties. This interpretation does not tolerate fact-finding activism of an adjudicator and, on the contrary, perceives it as a manifestation of bias.

The approach taken to the attribution of liability is another example of the clash of cultures at the ICC. The Trial Chamber’s majority in the *Lubanga* judgment adopted a ‘dogmatic’ concept of liability, which is an approach that expects the substantive law to reflect differences in degrees of blameworthiness and is typical of German/Hispanic legal thought. However, the dissenting Judge Fulford looked at the substantive law from the perspective of the legality principle: legal definitions should capture as comprehensively as possible the potential forms of reprehensible conduct, but differentiating between degrees of responsibility is a sentencing matter. This position rather reflects the French and Anglo-American traditions.

This is not to say that international criminal practice has failed to cut through the common law v. civil law divide. As the example from the *Katanga* case just cited attests, judges coming from a civil law system may lean toward the Anglo-American view of ‘legal truth’ or, for that matter, other concepts. This could be a consequence of previous experience in the *ad hoc* tribunals, where the understanding of ‘truth’ as ‘legal truth’ rather than ‘material truth’ predominated due to the ‘adversarial’ logic of the process. In addition, the distance one manages to retain from one’s own national system may depend on the length of (judicial) career in that system. It is more difficult for a judge who has spent many years on the bench in a domestic court to shrug off the national legal culture quickly upon entry into an international courtroom.

As long as international criminal justice continues to be overshadowed by the conversation and interaction between domestic legal traditions, the intrinsic legal-cultural pluralism will remain a distinctive and irreducible aspect of its substantive and procedural law. The ICL project is yet to construct its own coherent legal culture common to all participants and actors. After 20 years of the *ad hoc* tribunals’ work, it is questionable whether such a culture can be forged in the furnace of international criminal justice at all.¹³³ The tensions between legal traditions in the substructure of ICL are a source of inspiration and stimulus for its growth and evolution, but if such tensions devolve into clashes of legal cultures, they become counter-productive and obscure the vision of the optimal directions for its progressive development. The lesson that must have been learnt by now is that international criminal justice is no forum for rhetorical dominance of one legal culture over the other(s) and that the legal-cultural conversation should not degrade into a quarrel. This undermines the collegiate atmosphere within the institutions and does not promote the objective of refining law and fine-tuning practice. While it can be hoped that the ICL will eventually develop its own coherent culture, it is clear that it will take hold only if it accommodates pluralism and does not settle the cultural differences between constitutive legal traditions by means of comparative ‘hegemony’.

¹³¹ Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, *Katanga and Ngudjolo*, ICC-01/04-01/07-3319-tENG/FRA, TC II, ICC, 21 November 2012.

¹³² T. Weigend, ‘Should We Search for the Truth, and Who Should Do It?’ (2010-11) 36 *North Carolina International Law and Commercial Regulation* 389; Vasiliev (n 59), chapter 4.

¹³³ Vasiliev (n 59), chapter 12.

B. Pluralism of identities: ideological and methodological diversity

Another form of ‘intrinsic pluralism’, independent from cross-jurisdictional diversity, is the plurality of, and contestation between, the normative identities of ICL. This perspective captures the complex relationship between the diverse normative, methodological, and ideological foundations of international criminal justice. It refers to the conflicting premises, ambitions, and aspirations at the heart of ICL and international criminal procedure which inform the tribunals’ treatment of the sources of law, methods of interpretation, and patterns of legal reasoning. ICL has been the ‘arena of battle’ between the different goals and rationales, and values and ideologies, competing for priority in the enterprise of justice. This competition turns it into a ‘conflict of interest’-driven normative field, with clashes surfacing especially in ‘hard cases’.

Archetypal dichotomies include, for example, the following pairs: ‘fair trial’ v. ‘fight against impunity’ (of which the closest parallel in domestic criminal theory is Packer’s ‘due process’ and ‘crime control’ models);¹³⁴ individual guilt and responsibility v. collective or vicarious responsibility; and strict ‘legality’ v. the pull of the ‘progressive development’ of law. These categories do not materialize out of an ideological vacuum but are linked to the overarching philosophies, which are not always compatible or even reconcilable. The intrinsic conflicts within the ICL can be traced back to the ideological pairs of ‘retributive justice’ v. ‘restorative justice’ and ‘liberal justice’ v. utilitarian (‘non-liberal’) justice. Those conceptions of justice place different emphases on legality, individual culpability, and the rights of the accused on the one hand, and the interests of victims in obtaining redress, restoration, and assurances of non-repetition of crimes in the future on the other. It is unavoidable that this will inform ways in which international criminal judges identify, interpret, and apply law. By having recourse to different methodologies depending on the prevailing ethos, the judges give expression to competing values and prioritize among underlying ideologies.

The substantive ICL rests on the ‘paradox’ of trying to reconcile contradictory aspirations, methods, and philosophies that are pulling in opposite directions and that originate from several legal fields serving it as sources of normative content.¹³⁵ The confluence of those fields and the encounter of professional ‘tribes’ representing them endows the ICL with ‘3D pluralism’.¹³⁶ In essence, this is the meeting of ‘world visions’ associated with general international law, criminal law, and human rights law (which in itself has dual ‘sword’ and ‘shield’ functions in criminal justice).¹³⁷ The ICL’s ‘general international law’ pull not only accounts for its ambition of ‘universalism’;¹³⁸ it also reminds the tribunals of the predominantly consensual nature of state obligations under international law, whenever relevant to the adjudication of individual criminal responsibility, and of the need, in principle, to give such obligations a strict interpretation. Other imperative considerations often prod the tribunals toward a ‘progressive’ humanitarian, rather than state-centred agenda. For that, ICL is indebted to

¹³⁴ H.L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).

¹³⁵ See also Stahn and van den Herik (n 52) 23.

¹³⁶ *Ibid.*, 23-4 (distinguishing ‘the “universalist” aspirations of public international law’, ‘the “humanist” dimensions of human rights law’, and ‘the legality and fairness-oriented foundations of criminal law’); A. Clapham, ‘Concluding Remarks. Three Tribes Engage on the Future of International Criminal Law’ (2011) 9 *Journal of International Criminal Justice* 689, 689-90 (identifying the ‘tribes’ of *pénalistes*, *droits de l’homme*, and *internationalistes*).

¹³⁷ C. Van den Wyngaert, ‘Human Rights between Sword and Shield’, Lecture at the Award Ceremony Prize, Human Rights League, Antwerp, December 2006; F. Tulkens, ‘The Paradoxical Relationship between Criminal Law and Human Rights’ (2011) 9 *JICJ* 577, 579.

¹³⁸ Cf. Stahn and van den Herik (n 52) 23-4.

international humanitarian law and the humanitarian (victim-oriented) pull of international human rights law, as part of its ‘sword’ function. But, like the two-faced Janus, human rights law is (or at least should be) no less concerned with protection of the rights of the accused and the need to ensure a fair trial, as mandated by its ‘shield’ function.

It is particularly the tension between the ‘due process’ and ‘fight against impunity’ aspects of human rights law that has endowed the ICL with an ‘identity crisis’, as it has absorbed contradictory methods of reasoning and techniques for the identification of applicable law.¹³⁹ The plurality of normative identities of ICL implies that different interpretive methods co-exist side by side, leading to questionable choices and incoherent outcomes. The primacy of sacrosanct criminal law principles of strict interpretation of crime definitions (e.g. Article 22 of the ICC Statute) and *favor rei* may be contested by international law principles allowing for the interpretation of treaties in light of their ‘object and purpose’. Through purposive and expansive interpretations of criminal law norms, which must be construed restrictively, the humanitarian and victim-centred agenda puts a strain on legality and the accused’s rights. The ambition of the pluralist ICL to appropriate for itself, and to operate under, multiple identities might push the courts to ‘deviant’ decision-making and leave them susceptible to criticism from the liberal justice positions. This condition goes beyond the tribunals’ use of customary international law as a source; it can equally be discerned in every contested aspect of international criminal procedure. The latter is also torn by the values and rationales of rights-protection and fair trial (‘due process’) on the one hand, and those of the ‘fight against impunity’ and victim-centred justice (‘crime control’) on the other. While procedural rules draw priorities among the conflicting interests,¹⁴⁰ the tensions between them persist in practice, and the courts seek to resolve these through balancing exercises.

Can an ‘identity crisis’ be deemed a crisis if it is a congenital and permanent condition of ICL, which by its origin and nature juggles multiple normative identities? The ‘normative pluralism’ perspective on ICL provides one with a better observational position from which sense can be made of its ideological underwater currents, more neutral than the alarming language of crisis used elsewhere. This does not mean that the noted conflict of identities and the incoherence which results should be accepted and tolerated. On the contrary, contemplation of the tensions at work in ICL and international criminal procedure as ‘normative pluralism’ will help produce a coherent methodology for channelling those currents. This should ensure the principled use of different interpretive methods depending on the legal question at hand and prod judges to be more transparent in the reasons given for their decisions, and therefore more accountable. It is not only the plurality of professional cultures, values, and ideologies, but also the conversation, interpenetration, and dialectic tensions between them, that makes the ICL a pluralistic system and a dynamic field of law and practice.

4. Approach and Structure

4.1 Outlook for the future

This provides a basis for (tentative) conclusions concerning the prospect of ‘pluralism’ as a conceptual framework for international criminal justice. It also enables us to identify some of the questions to be answered by those who wish to put that framework to use. It has been argued that

¹³⁹ D. Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21 *Leiden Journal of International Law* 925. On the ICTY’s inconsistent treatment of sources of law, see Vasiliev (n 53) 62 and 72-74.

¹⁴⁰ E.g. Art 20(1) ICTY Statute; Art. 68(3) ICC Statute.

the notion of ‘fragmentation’ is ineffective in capturing the many aspects of legal diversity found in ICL and international criminal procedure. It misinterprets the processes by which those bodies of law have evolved and mischaracterizes the normative dynamics between the international and national layers of enforcement of responsibility for international crimes. In our view, ‘pluralism’ is a more valid concept for these purposes. It presents a better vantage point from which to observe and comprehend the character, causes, and implications of the diversity and complexity of international criminal justice and its evolutionary logic. The ‘pluralism’ concept is not free from the semantics of ‘maternal’ debates, but at least it does not carry indelible assumptions about the primordial unity of the legal regime and normative prejudices against legal diversity as such. Importantly, it captures not only the extrinsic but also the intrinsic diversity of ICL and accommodates a variety of perspectives that are of practical relevance to both substantive and procedural law. The ‘pluralism’ paradigm carries significant promise as a methodological lens and analytical framework through which the origins, nature, and prospects of ICL can better be appraised.

But further work will be needed to expose the different ‘faces’ of pluralism in ICL, to decipher its laws and regularities, and to identify the challenges and risks it poses. The areas in which pluralism poses risks should be delineated with greater precision and any risk assessment must be underlain by solid reasoning; it is clear that far from all forms and degrees of pluralism are problematic. Questions about the need for uniformity—whether it is to be achieved through unification or harmonization—can only be meaningfully answered if one is assured that this exercise is not undertaken in pursuit of the ‘kind of perfection’ referred to in the epigraph to this Chapter. Besides, there remain conceptual uncertainties as to how the different faces of ‘pluralism’ correlate with the ideal states of uniformity and processes by which undesirable pluralism can be harnessed: ‘unification’, ‘convergence’, ‘hybridization’ or ‘amalgamation’, ‘approximation’, and ‘harmonization’. It is unclear whether the differences between them are qualitative or a matter of degree. Is ‘harmonization’ to be equated with convergence and is it averse to ‘pluralism’?

The use of the term ‘harmonization’ in other contexts (e.g. EU law) collides with such an equation. A ‘harmonized’ international justice system—with national systems included—arguably not only permits but also requires leaving courts a margin of appreciation in respect of substantive law doctrines and procedural approaches. Finally, ‘pluralists’ in ICL and international criminal procedure will need to work on the meta-theory that would enable them to hold their framework in check and to be aware of its nature and purport. They will need to attend to the question of whether the ‘pluralism’ framework is meant for describing, understanding, and explaining the complex realities of international criminal justice, or whether it is a normative prism that ultimately pursues an apologetic, critical, or reformist agenda. This is a fertile soil for future thinking and research.

4.2 Roadmap

The chapters featured in this book deal with specific topics of ICL and international criminal procedure from the perspective of ‘pluralism’. Not only do they provide insights into the real or fictitious character of ‘pluralism’ and evaluate its manifestations, but they also enrich the proposed framework and indirectly test its validity. Other valuable perspectives on pluralism surface in the content of individual chapters, depending on the authors’ views. The volume consists of four parts and 15 chapters. The organizing principle in sequencing them is the

(extrinsic) cross-jurisdictional perspective and the need for, or feasibility of, harmonization along the ‘horizontal’ and ‘vertical’ axes.

In the first part, dedicated to *conceptual perspectives* on pluralism in ICL, we are presented with two different views of this phenomenon. In Chapter 2, Steer unveils what we call a ‘pluralism of origins’, as a form of intrinsic pluralism. The very nature of ICL is pluralist because of the way in which it has been created, developed, and applied. In developing a theory of ‘legal patchworking’, Steer draws on comparative law scholarship regarding legal transplants. The author makes clear that pluralism in ICL is a reality and should be embraced. She does, however, draw attention to pluralism’s capacity to undermine the legitimacy of international criminal justice. By contrast, in Chapter 3, Drumbl adopts a broad perspective of pluralism – pluralism of method, of nomenclature, of epistemology, and of accountability (which can be referred to as ‘pluralism beyond ICL’). By discussing the factual context of the case against the ICTR accused Ndahimana, Drumbl elucidates the broad scope of pluralism within and outside of ICL. He describes how different interpretations of collective action and different fact-finding processes produce a pluralism of truth, even within one court. This pluralist picture is even more heterogeneous bearing in mind that ICL is but one mechanism of attaining accountability for international crimes; it forms part of the ‘pluralism of responses’ to atrocity, next to *gacaca* courts. Drumbl accepts pluralism as a force that can be positively harnessed and, if creatively appreciated, can help the discipline move from ‘law’ to ‘justice’.

The second part of the book comprises the chapters that deal with *horizontal pluralism*. In Chapter 4 Ohlin discusses two approaches to organizational liability that have divided the ICTY and the ICC, namely JCE and co-perpetration. As noted, JCE has a common law pedigree and has been widely used at the ICTY. Co-perpetration, on the other hand, represents the civil law approach and has been embraced as an alternative to JCE at the ICC. Ohlin does not choose one approach over the other but proposes a third approach, that of organizational liability. In Chapter 5, Cupido undertakes a painstaking analysis of case law and examines the dichotomy that is said to exist between JCE and joint/co-perpetration. She concludes that both concepts are in fact similar and share the same basis of attribution: the common plan. In a spirit of harmonization, she urges scholars and practitioners to further explore the similarities between JCE and joint perpetration, on the one hand, and domestic forms of collective action on the other.

Continuing the *horizontal pluralism* theme, Chapter 6 by Jackson and Brunger discusses pluralism in international criminal evidence within and across different tribunals. The chapter draws on a pilot study of interviews with prosecutors, defence practitioners, lawyers, and judges in the chambers, who have experience of working in several tribunals. While a plurality of evidentiary practices has emerged to meet the particular challenges posed by mass atrocity cases, the fact that the procedural actors are familiar with international criminal practice and have experience with other tribunals may be a harmonizing factor. The chapter concludes that the experience accumulated by professional actors across different tribunals may be used to develop a set of (relatively uniform) evidentiary practices that is sensitive to the peculiarities of prosecuting and adjudicating mass criminality. In Chapter 7, Holá discusses what many regard as one of the most pluralist themes in ICL: sentencing. Surprisingly, however, her empirical study demonstrates that consistent and predictable patterns have emerged in the calculation of penalties at the tribunals. International sentencing appears to be consistent not only within a single tribunal but also across the tribunals. The main problem of ICTY and ICTR sentencing is not so much the lack of consistency but the lack of transparency and clarity of sentence determinations.

The third part of the book discusses *vertical pluralism* and the dialectics between national and international courts in trying international crimes. Chapter 8, by Kok, discusses the legal framework of international crimes prosecutions in the Netherlands. Her analysis of the *Van Anraat* and *Abdullah F.* cases illustrates how Dutch judges interact (or not) with the international normative framework when interpreting an ICL concept. Chapter 9, by Zahar, turns our attention to international criminal procedure. It explores the implications of the phenomenon of ‘rights-pluralism’ in the leadership trials. Zahar argues that charges in such trials are more indistinct, easier to prove, and harder to refute than those in the trials that do not involve high-ranking accused and, for that matter, those in domestic criminal trials. He concludes that in order to ensure that all those accused in international criminal tribunals are provided with a reasonable opportunity to respond to the incriminating evidence, the international model of adjudication should be steered closer to the national one. In Chapter 10, Fry takes a different approach and examines the *sui generis* nature of international crimes and the distinct goals typically associated with international criminal justice, to see how they affect evidence law and practice. Certain typical features of international crimes set them apart from ordinary crimes. As a result, Fry suggests a perspective on the law of evidence that focuses on the nature of the crime and not on the (international or national) type of the court in which the crime is adjudicated. Since all courts are likely to encounter the same evidentiary challenges if these are inherent to the type of crime, forum-neutral solutions may be the answer. Jordash and Crowe, in Chapter 11, offer a defence perspective on the law in action and illustrate the nature of work in a pluralist legal field where each national or international court is unique and faces specific problems. They conclude that it is not the time to be celebrating a pluralistic future of the ICL; in their view, that law is in urgent need of harmonization and codification of tailored responses to the evidentiary challenges faced by the defence.

The fourth part of the book, entitled *Harmonization, Uniformity, or Hegemony?*, comprises four chapters, three of which propose a theory of liability that captures the typical features of mass criminality. In Chapter 12, Werle and Burghardt argue in favour of the ‘control over the crime’ theory, which they believe is the overarching liability concept underlying Article 25 of the ICC Statute. In their view, this theory best fits the text of the Statute, aptly captures the different ways in which international crimes are committed, and establishes a valuable gradation or ranking of degrees of responsibility. In Chapter 13, Stewart sets out ten arguments that favour a universalist approach to participation. The author argues, among other things, that such a model should be one on which academics agree, which does not reflect the hegemony of specific domestic approaches, and which is an easy-to-use and easy-to-understand tool for establishing individual criminal responsibility for international crimes. In contrast to Greenawalt’s arguments, this model would rule out pluralism at the national level. In Chapter 14, Gadirov suggests a framework that can be used in comparing and evaluating ICL regimes on the concept of criminal responsibility. He proposes a theory of harm premised on the notion of collective intentions. Finally, Chapter 15 brings us back to procedural law. Murphy and Baddour criticize the international criminal tribunals’ non-adoption of the minimum rules for exclusion of evidence similar to those existing in common law jurisdictions; they regard this as an erroneous decision inspired by the approach in continental jurisdictions. This practice leads, in their view, to unduly long and complex trials, characterized by vast quantities of ‘evidential debris’. In essence, they propose the adoption of one particular approach to evidence law—the common law approach—which means that international criminal evidence should change direction and adopt a ‘harmonized’ approach based on one legal culture.

The chapters in this book present a rich palette of interpretations and perceptions of pluralism in ICL. Some chapters confirm that pluralism is the reality of the ICL project and take on the task of exposing its causes, implications, and risks. Others show that there in fact exists more unity and uniformity in the contested areas than at first appears. The debates tend to magnify differences without paying sufficient attention to the emerging ‘common grammar’ of substantive and procedural law. By the same token, certain chapters—especially those written by the practitioners—evinced deep suspicion about pluralism and make a case for a greater consolidation of ICL; however, other contributions, typically written by scholars, show more benevolence toward the phenomenon at issue. This in itself is a revealing finding. Theorists of pluralism ought to be aware of how pluralism is experienced on the ground in refining their normative arguments. There is a need to develop the empirical and socio-legal components of the conceptual research on pluralism in ICL. In turn, practitioners—legislators, policy-makers, and procedural participants—will certainly benefit from knowing more about what is achievable in the field that is torn apart (or kept together) by pluralism and how it can be enlisted to assist them in achieving their operational objectives in specific settings. The diversity and richness of perspectives on pluralism presented in the chapters that follow attest that pluralism is a topic of increasing importance in ICL and that it deserves closer attention. This book lays one of the first bricks in the conceptual foundation of the emerging debate, which will undoubtedly continue.