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The Wrong Type of Blood – How the Recent Disclosure Regime at the International Criminal Court is Doomed to Violate Human Rights

Since the first trial before the International Criminal Court (ICC) started, one issue has been causing problems to all parties involved: the disclosure of evidence. By now, a lot has been written about this problem. Summarised and slightly simplified, authors are taking up the following four positions: First, disclosure of evidence is complicated. Thus, second, disclosure has been a problem in every legal system in the world since people are tried for crimes they (may have) committed. Ergo, third, it has to be accepted that there is no such thing as a perfect disclosure regime in the criminal process of the ICC, which is a system *sui generis.* Consequently, fourth, we must apply a **case--by--case approach** to solve disclosure problems.

Of those positions, two are actually correct: disclosure of evidence is complicated indeed and it is obvious that it gives rise to great discussions in almost every legal system. However, it is false and dangerous to conclude that it may be the lesser evil to create an environment where the decision about a certain disclosure problem is dependent on the legal background of the decision maker. On top of that, it is even worse to justify this by noting the procedural system before the ICC is a system *sui generis.*

To create a disclosure regime where the parties will be able to actually **foresee** the consequences of their conduct (i.e. non--disclosure), it is necessary to understand disclosure. However, that is rather difficult given the huge amount not only of rules and guidelines that are applied but foremost of practical obstacles that are broad forward to bedim a clear view on disclosure. Instead of battling one's way through the jungle without any idea of the right path, it is more helpful to simply get a map.

The most important information this map should provide is the nature of the procedural system before the ICC. To characterise this system, for various reasons I will not apply the conventional adversary--inquisitorial dichotomy. Instead, I will take *Damaska's* approach as a basis, analysing the types of authority (hierarchical or coordinate officialdom?) and justice (policy--implementing or conflict--solving?) before the ICC. Characterising the system of the ICC, most authors speak of a system *sui generis* because it blends different legal traditions. Using this labelling, one must consequently verify that almost every state has a procedural system *sui generis* because a pure procedural model is almost obsolete. Thus, calling the ICC system "sui generis" does not get us out of the jungle, to stay in the picture. Using *Damaska's* distinction, I will show that the ICC and its organs are mainly hierarchical structured and the form of procedure seems to be mainly policy-- implementing. However, I will also show that the procedure before the ICC contains many adversary elements usually found in a system of coordinate authority with a conflict--solving form of justice. As long as those elements do not contradict the general structure of the ICC and its procedure, they are acceptable and in some cases even complement policy--implementation (i.e. to achieve the goals of international criminal justice). This is the way many and especially continental systems work. However, the disclosure regime as it is recently interpreted draws a different picture. The way especially the Office of the Prosecutor (OTP) but also some chambers apply it, requires a model of coordinate authority and scrutinises policy--implementation. In other words: the current disclosure regime has the wrong type of blood. Most interestingly – or better: shockingly inconsequently – in case non--disclosure leads to an abuse of procedural principles, judges tend to apply a model of sanctions which is designed not to endanger policy--implementation (instead of sanctioning one party for the sake of fair conflict, irrespective of whether the policy is implemented or not).

So far, this tension has not been solved. The case--by--case--approach leads to legal uncertainty, encouraging the parties to file as many motions as they can – who knows which approach will be favoured by the judge this time? Is he going to lean back and let the parties try to solve their conflict? Or will he actively involve himself to ensure that the goals of international criminal justice are not scrutinised? In the end, a speedy trial is literally not more than a paper promise.

My solution for this takes up the structural and procedural facts at the ICC. In a hierarchical structured system with a policy--implementing model that contains many adversary elements, the parties have to get their information by **disclosure and communication. Disclosure** has to be conducted by way of **open--file--disclosure,** i.e. the prosecution has to disclose almost all of their material (as long as it does not violate legitimate disclosure restrictions). This approach is increasingly considered in the USA and even implemented by some state prosecutors. **Communication** means that every piece of information that is disclosed between the parties has to be communicated to the Chamber and saved in the record of proceedings. This will safeguard open--file disclosure and takes advantage of procedural areas that have been lain idle so far in this respect. The record serves as a *double--dossier* as it is known in Italy since the reform of 1989: one dossier for the pre--trial stage and one for the trial stage. I will show that the structure of the process before the ICC allows for this double--dossier, which encourages the judge to actively involve himself in the proceedings. All in all, this solution will help the process before the ICC getting a disclosure regime with a matching blood type.

I am aware that such an approach might be criticised as being too theoretical and obsolete since the criminal process has been governed by practical and tactical considerations. Nevertheless, a theoretical approach or, in *Damaska's* words, **logical legalism** (i.e. a concrete life situation is evaluated on a network of principles and rules) is in--built in a hierarchical model with policy-- implementing justice, while judges of coordinate officialdom and conflict--solving justice apply a **pragmatic realism** (i.e. a concrete life situation is evaluated on the basis of examples). This impressively demonstrates that even the mode of thought can contradict an existing procedural structure, e.g. when at the ICC the presiding judge is used to coordinate officialdom and a conflict-- solving model. However, in case even this justification of my approach is regarded as too theoretical: When pragmatic solutions do not exist, logical approaches appear on the scene. If they are not taken into account by then, it is miscarriages of justice that appear instead.