General Principles of Law as Gap-Fillers

Neha Jain*

Abstract

General principles of law are a primary mechanism for gap filling in international criminal law. However, their interpretation by tribunals has been fitful, contradictory, and often misguided. Given that general principles have been used to settle crucial legal issues that impact the rights of the accused, the confusion concerning their application threatens the authority and legitimacy of the enterprise of international criminal justice. This article makes sense of the chaotic jurisprudence on general principles by critiquing the various conceptions of general principles developed by scholars and tribunals based on the criteria of formal and material validity. It exposes the problems with these different notions of general principles in light of comparative law and criminal law theory. The article challenges international criminal tribunals' reliance on surveys of municipals legal rules as the primary tool for the derivation of general principles and recommends a more limited role for a conception of general principles focused on the criterion of material validity in the development of international criminal law.

I. INTRODUCTION

Imagine that an accused before an international criminal tribunal has been charged with the crime against humanity of murder and admits his commission

* Associate Professor of Law, University of Minnesota Law School. Special thanks to Antony Duff, Greg Shaffer, Benedict Kingsbury, José Alvarez, Gráinne de Búrca, Tom Ginsburg, Harlan Cohen, Darryl Robinson, Margaret deGuzman, Luis Chiesa, Jens Ohlin, Vera Bergelson, David Sklansky, Jessica Clarke, Susanna Blumenthal, and participants in the NYU International Law Colloquium, the American Society of International Law Mid-Year Meeting and Research Forum, the Johns Hopkins and Tulane University Catania conference on Mixed Jurisdictions, and the SUNY Buffalo Law School BCLC Colloquium Series.

of the offence. He argues that he has a defense because he acted under duress. The text of the Statute establishing the tribunal is silent and says nothing about the possibility of the defense of duress.[1] How should the matter be resolved?

The judges of international criminal courts have responded thus: when no clear answer is forthcoming in the legal text, judges can resort to other sources of law to address this lacuna.[2] One of the most flexible, but deeply controversial, sources in their arsenal is the "general principles of law".[3] This article shows how reliance on the "general principles of law" as a source of international law, and as the primary gap-filling mechanism in the arsenal of international criminal courts is deeply problematic. Far from yielding a consistent, clear rule, the interpretation and application of general principles has been fitful, contradictory, and often misguided.[4] The article makes sense of the chaotic jurisprudence on general principles in international criminal law by critiquing the various notions of general principles developed by scholars and endorsed by courts based on the criteria of formal and material validity. It argues that reliance on comparative surveys of municipal legal rules to derive general principles, which has been acclaimed widely in international criminal law scholarship and jurisprudence, is incoherent and does not satisfy the criteria of formal or material validity. Alternative notions of general principles, on the other hand, potentially fail to comply with the principle of legality in criminal law, especially the requirements of fairness and notice to the accused.

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[1] This scenario is based on the case of *Erdemovic* decided by the International Criminal Tribunal for Yugoslavia: Prosecutor v. Erdemovic, Case No. IT-96-22-A, Judgment, (Int'l. Crim. Trib. Former Yugoslavia Oct. 7, 1997).

[2] On creative use of international law sources by judges, *see e.g.*, JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS (Shane Darcy and Joseph Powderly eds., 2010); Antonio Cassese, *Black Letter Lawyering v. Constructive Interpretation*, 2 J. INT'L. CRIM. JUST. 265 (2004); William Schabas, *Interpreting the Statutes of the* ad hoc *Tribunals*, *in* MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 847 (L Chand Vohrah et al. eds., 2003).

[3] International criminal tribunals have also had recourse to customary international law to elucidate new principles, but since much has been written on this issue, I leave this aside for the moment. For detailed analyses of customary international law as applied by international criminal courts, *see, e.g.,* Mia Swart, *Judicial Lawmaking at the* ad hoc *Tribunals: The Creative Use of the Sources of International Law and "Adventurous Interpretation*", 70 ZEITSCHRIFT FÜR AÜSLANDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 459, 463-48 (2010) (Ger.); GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 13-15 (2005); André Nollkaepmer, *The Legitimacy of International Law in the Case Law of the International Tribunal for the Former Yugoslavia*, *in* AMBIGUITY IN THE RULE OF LAW: THE INTERFACE BETWEEN NATIONAL AND INTERNATIONAL LEGAL SYSTEMS 13, 17 (T.A.J.A. Vadamme & J. Reestman eds., 2001).

[4] See Ilias Bantekas, *Reflections on Some Sources and Methods of International Criminal and Humanitarian Law*, 6 INT'L. CRIM. L. REV. 121, 126-129 (2006).

A coherent account of the general principles of law is vital, as they are expected to play an increasing role in fleshing out the rudimentary rules of international criminal law. The mysterious and perplexing nature of general principles as a source of law that greatly impacts the rights of the accused thus has far-reaching implications for the legitimacy of the enterprise of international criminal justice. International criminal trials' claims to ending impunity and prevention of atrocities ring hollow if they are not carried out with scrupulous respect for fairness and justice to the accused.

The structure of the Article is as follows. Part II briefly describes the use of general principles as the traditional gap-filling mechanism in international law. It critiques the different notions of general principles extant in legal scholarship and judicial opinions by applying the criteria of formal and material validity. Part III analyzes the various conceptions of general principles at play in the Rome Statute of the ICC and in the practice of the ICTY. It demonstrates the profound confusion in the jurisprudence, with different judges and courts slipping and sliding between the different notions of general principles and with little clarity on the hierarchy of their application. At times, general principles that are more closely associated with traditional natural law take precedence, while at other times, they operate as a last resort when no consensus can be reached on the basis of general principles derived from the domestic laws of the world's legal systems. Parts IV and V demonstrate how these varying approaches to general principles are problematic in the context of international criminal law. Comparative law theory brings into question the formal and material validity of general principles derived from canvassing isolated legal rules in a limited number of municipal legal systems. Alternative conceptions of general principles, which may potentially satisfy the criterion of material validity, are rarely explicated in any detail by courts. This leaves them open to the criticism that they are mere placeholders for judicial views on the norm that is substantively desirable or objectively just. Natural law- associated versions of general principles are moreover in constant tension with the legality principle in international criminal law.

The article concludes by recognizing that limited resort to general principles is necessary at this stage of international criminal justice if international tribunals are to fulfil their goals of adjudicating international crimes with a view to ending impunity. It emphasizes the need for international criminal tribunals to make more serious efforts to explain the material and formal validity of general principles in their jurisprudence and recommends extreme caution in relying on surface comparisons of municipal laws in this exercise. The article also urges courts and scholars to pay greater attention to clarifying the basis for material validity: what are the specific features of international criminal law which reveal an underlying general principle, and/or why may a certain principle be categorized as intrinsic to the nature of man or to the idea of justice.

II. THE PROBLEM OF GAPS IN INTERNATIONAL CRIMINAL LAW

1 Gaps in International Law

"Legal gaps" are areas where the law is insufficient, obscure, or imperfect. These are not the typical cases of a mere discord between the abstract rule and the specific facts of the case, which can be resolved through interpretation. Nor are they manifestations of an unsatisfactory legal solution, which are the province of law reform efforts. The law is instead silent, absent, simply unavailable as a means to resolution.[5]

In international law, the issue of a legal gap assumes important dimensions on two fronts. The existence of a systemic *non liquet* (a gap in the very system of the law) is sharply contested with scholars such as Hans Kelsen who consider systemic *non liquet* a logical impossibility, since every issue is either settled by a specific legal rule, and failing that, by a 'residual negative principle' which states that anything that is not specifically prohibited is lawful.[6] Scholars also debate the possibility of a decision-making *non liquet*, where the adjudicator is limited in his ability to resolve that gap.[7] For international lawyers such as Hersch Lauterpacht, the "general principles of law" are one of the tools that the international judge is not only permitted, but obligated, to use to fill in gaps in the fabric of the law as a matter of the law's completeness.[8] This view of the judicial function, as a creative exercise whereby the judge is compelled to avoid a *non liquet*,[9] is vigorously disputed by scholars such as Julius Stone, who are deeply suspicious of this wide-ranging power granted to judges. Rather than entrusting

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[5] For literature on what constitutes a gap in international law, *see generally* HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN INTERNATIONAL COMMUNITY 70-72 (1966); Stephen C. Neff, *In Search of Clarity: Non Liquet and International Law*, *in*, INTERNATIONAL LAW AND POWER: PERSPECTIVES ON JUSTICE 63, (K.H. Kaikobad and M. Bohlander eds., 2009).

[6] HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 306 (1952); Neff, *supra* note 5, at 64. For a critical view of this interpretation and of the correct reading of Kelsen's theory, *see* Jörg Kammerhofer, *Gaps, The* Nuclear Weapons *Advisory Opinion and the Structure of International Legal Argument Between Theory and Practice*, 80 BRIT. Y.B. INT'L. L. 333, 340-44 (2009).

[7] Neff, *supra* note 5, at 64; *see also* Daniel Bodansky, Non Liquet *and the Incompleteness of International Law*, *in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, AND NUCLEAR WEAPONS 153, 154-55 (Laurence Boisson de Chazournes and Philippe Sands eds., 1999).

[8] Hersch Lauterpacht, The Development of International Law 166 (1958); Hersch Lauterpacht, *Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law*, *in* Symbolae Verzijl. Présentées au Professeur J.H.W. Verzijl à l'occasion de son LXX-ième anni- versaire 196, 205 (1958).

[9] *See* LAUTERPACHT, *supra* note 5, at 102; Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 8 EUR. J. INT'L. L. 215, 227-28 (1997).

judges with creating law and risking the imposition of artificial or arbitrary solutions, Stone considers it preferable to let the gap be filled gradually by evolving state practice and treaty law.[10] He is also critical of Lauterpacht's suggestion of using "general principles of law" which Lauterpacht takes to be based on natural law, as providing any clear guidance to the judges on what rule is applicable. [11]

2 International Criminal Law, Gaps, and the Principle of Legality

The issue of legal gaps takes on an added complexity in the context of international criminal law, where the public international law features of the field are inextricably intertwined with its criminal law elements.[12] Since international criminal law is generally thought of as a branch of public international law, it is easy to lose sight of the fact that an international criminal trial ultimately has vital consequences for the accused, which immediately implicates the principle of *nullum crimen sine lege* (the principle of legality).[13]

The principle of legality has various aspects, which apply to a greater or lesser degree, depending on the legal system: the prohibition against *ex post facto* criminal law; the rule favoring strict construction of penal statutes; the prohibition or limitation of analogy as a tool for judicial construction; and the requirement of specificity and clarity in penal legislation.[14] The principle is widely regarded as performing three main functions: preventing arbitrary exercise of the government's punitive power; upholding popular sovereignty by the preserving the legislature's prerogative to define punishable conduct and determine

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[10] Julius Stone, Non Liquet *and the Function of Law in the International Community*, 35 BRIT. Y.B. INT'L. L. 124, 131, 149-53, 159 (1959); Neff, *supra* note 5, at 74-75

[11] Stone, *supra* note 10, at 133-35.

[12] On the hybrid identity of international criminal law, *see* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 18-19 (2003); Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT'L. L. 543, 550-51 (2010).

[13] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 22.

[14] Aly Mokhtar, *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, 26 STATUTE L. REV. 41, 51 (2005); Roelof Haveman, *The Principle of Legality*, *in*, SUPRANATIONAL CRIMINAL LAW: A SYSTEM *SUI GENERIS* 39, 40 (Roelof Haveman et al. eds., 2003); *see also* M. Cherif Bassiouni, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 182-95 (2003); Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937).

sanctions; and providing the accused with fair notice of the range of permissible conduct.[15]

The relatively nascent character of international criminal law results in significant gaps in the regime which are unlikely to be resolved by recourse to international treaties and customary international law.[16] The general principles are thus expected to play an important role, even more so than in other areas of public international law, in the development of international criminal legal rules. However, the use of general principles to avoid a *non liquet* or for the purposes of interpretation has the potential to cause conflicts with the demands of legality, especially the elements of notice and strict construction of statutes.[17]

The force of this challenge to the use of general principles for gap-filling purposes depends to a large extent on their putative character and content: are general principles sufficiently clear and determinate as a source of law to satisfy the requirements of the legality principle?

3 Conceptions of General Principles

International legal scholarship on the nature of the general principles presents an extremely chaotic picture: they are interpreted variously as principles that are common to all or most domestic legal systems; as general tenets that can be found underlying international legal rules; as principles that are inherent principles of natural law; and as principles that are deduced from legal logic.[18]

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[15] John Calvin Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L.REV. 189, 201 (1985); see also David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 569, 581 (Samantha Besson and John Tasioulas eds., 2010); Beth van Schaack, Crimen Sine Lege: *Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 (2008).

[16] See Fabian Raimondo, *General Principles of Law, Judicial Creativity, and the Development of International Criminal Law*, *in* JUDICIAL CREATIVITY, supra note 2, at 45, 46; Mary Fan, Custom, General Principles, and the Great Architect Cassese, 10 J. INT'L. CRIM. JUST. 1063, 1064 (2012); Thomas Weigend, *The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR, and the ICC: An Overview*, *in*, INTERNATIONAL CRIMINAL LAW: QUO VADIS? 319, 320 (2004).

[17] *See* Vladimir Djuro-Degan, *On the Sources of International Criminal Law*, 4 CHINESE J. INT'L. L. 45, 50-51 (1989); Ellis, *supra* note 27, at 951; Fan, *supra* note 16, at 1065

[18] *See, e.g.*, Hermann Mosler, *General Principles of Law*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 511, 512-17(1995); Johan G. Lammers, *General Principles of Law Recognized by Civilized Nations*, *in* ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER 54 (Frits Kalshoven et al. eds., 1980) and references therein; M. Cherif Bassiouni, *A Functional*

Article 38(1)(c) of the Statute of the International Court of Justice,[19] which is deemed authoritative of the sources of international law, simply states:

Article 38(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. …

b. …

c. the general principles of law recognized by civilized nations

One of the more comprehensive accounts of the various possible meanings of general principles has been developed by Schachter, who identifies five different ways in which they have been invoked in international law:[20]

1) Principles of *domestic law* that are recognized by civilized nations.

2) Principles that are derived from the unique character of the international community, such as the principles of territorial integrity and sovereign equality of states.[21]

3) Principles that are "intrinsic to the idea of law and basic to all legal systems", which are implicit in or generally accepted by all legal systems and are necessary based on the logic of the law.[22]

4) Universalist principles that are "valid through all kinds of human societies" and which echo the idea of natural law, such as the principles of human rights.[23]

5) Principles of justice that are premised on the rational and social nature of human beings, and which include principles of natural justice outlined in human rights instruments and the concept of equity.[24]

Approach to "General Principles of International Law", 11 MICH. J. INT'L. L. 768, 770-73 (1990); J.I. Charney, *Sources of International Law*, 271 RECUEIL DES COURS 189, 189-91 (1998); Frances T. Freeman Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations – A Study*, 10 UCLA L. REV. 1041, 1044-78 (1963); H. Waldock, *The Common Law of the International Community – General Principles of Law*, 106 RECUEIL DES COURS 54, 55-57 (1962).

[19] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

[20] OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 50 (1991).

[21] Schachter, *supra* note 20, at 53.

[22] Schachter, *supra* note 20, at 53-54.

[23] Schachter, *supra* note 20, at 54-55.

[24] Schachter, *supra* note 20, at 54-55.

As Schachter notes, the basis for the authority and validity of these various conceptions of general principles differs. Indeed, Schachter's primarily descriptive conceptions of general principles may meaningfully be described in terms of different responses to two of the most fundamental questions that "sources of law" seek to address: where does the legal precept originate from and where might it be located (formal validity); and what lends this precept legitimacy and authoritativeness (material validity)?[25]

4 The Validity and Authoritativeness of General Principles

The debate on the true nature and authority of the general principles becomes clearer once viewed through the lens of formal and material validity. On one end of the spectrum is the first category of general principles described by Schachter: general principles are tenets that can be found in the majority of municipal legal systems (formal validity).[26] Furthermore, the fact that most, if not all, legal systems adhere to them constitutes a ground for their application in the international sphere. For if international law is based on the consent of States, then the rationale for accepting general principles as a source of law is that their presence in most municipal legal systems serves as a proxy for State consent (material validity).[27]

This first conception of general principles either does not address, or does so only in vague terms, the question of whether the simple fact that a principle can be found in most of the world's legal systems says something about its content. In other words, is the commonality across national systems taken as a testament to the value or moral worth of the principle? There is some suggestion that the reason for deducing general principles from a comparative study of legal systems is more pragmatic: the desire to find some agreement on the legal

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[25] I borrow this framing of the sources question from Thirlway, who uses the concepts of material and formal validity somewhat differently. *See* HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 3-5 (2014).

[26] *See* Lammers, *supra* note 18, at 56-57 (citing Oppenheim, Lauterpacht, Berber, Favre, Cavaré, Guggenheim, Ripert, Sørensen, Schwarzenberger, Ch. de Visscher, Waldock and Bin Cheng as scholars who adhere to the view that general principles are norms underlying national legal systems).

[27] *See* Jaye Ellis, *General Principles and Comparative Law*, 22 EUR. J. INT'L. L. 949, 953, 955 (2011); *see also* Marjan Ajevski, *Judicial Law-making in International Criminal Law: The Legitimacy Conundrum*, *in* SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 127, 137(2012).

principles applicable to the case,[28] or even to avoid the suggestion of bias or arbitrariness on the part of an international tribunal.[29] Scholars also caution against a mechanical importation of domestic principles to relations governing States and advocate that before considering any such transfer, one must take into account the unique features of the international legal system.[30]

This first conception of general principles can be distinguished from Schachter's third category of principles that are implicit in domestic legal systems by virtue of being necessary to the logic of the law. Thus, while the source of formal validity still appears to be municipal laws, the material validity of the principles depends on the very nature of the law as an institution.

Municipal laws, as a potential though not exclusive source of formal validity, also play a role in the fourth and fifth accounts of general principles. In these cases, however, the main emphasis is on the material source of validity: that is, the reason why the principles have value and are authoritative lies in the nature of man as a rational being and as a social animal. It is for this reason that they may be found in all societies (the source of formal validity is unclear) and in human rights instruments (which acknowledges that the sources of formal validity are not confined to domestic laws). Indeed, some of the legal scholarship refers to principles of natural law or of objective justice[31] which are normative principles "grounded in the universality of the human condition".[32] Such postulates have inherent validity and must form part of any legal system.[33] This assumes a different relationship between the existence of general principles in domestic legal systems and their relevance to international law. It is not the presence in a sufficiently large number of national systems *per se* that elevates them to a source of authority; rather, the very nature of man and of human societies dictates that these principles would naturally form part of all legal systems. Moreover, since they are foundational and necessary to the functioning

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[28] Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L. L. 279, 284 (1963).

[29] Michael Akehurst, *Equity and General Principles of Law*, 25 INT'L. & COMP. L. Q. 801, 814 (1976); H. C. Gutteridge, *Comparative Law and the Law of Nations*, 21 BRIT. Y.B. INT'L. L. 1, 9 (1944).

[30] Hugh Thirlway, *The Law and Procedure of the International Court of Justice*, 61 BRIT. Y.B. INT'L. L. 1, 113, 129 (1990); Mosler, *supra* note 18, at 519; Akehurst, *supra* note 29, at 816.

[31] *See* Ellis, *supra* note 27, at 953-55; Charney, *supra* note 18, at 191.

[32] *See* Martii Koskenniemi, *General Principles: Reflexions on Constructivist Thinking in International Law*, *in* SOURCES OF INTERNATIONAL LAW 122, 125 (Martii Koskenniemi ed., 2000) (referring to the opinions of scholars such as Verdross and Favre).

[33] Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, *in* SOURCES OF INTERNATIONAL LAW 57, 58 (Martti Koskenniemi ed., 2000) (stating that some general principles involve principles of natural law); Jalet, *supra* note 18, at 1044.

of all systems, theoretically, they can be discovered through an inductive process based on the rules of even one legal system, though this method may not always prove the most sound.[34] On this interpretation, "general principles extend the concept of the sources of international law beyond the limits of legal positivism, according to which the States are bound only by their own will."[35]

The drafting history of Article 38(1)(c) shows some oscillation between these various conceptions of general principles. The dominant view in legal scholarship is that the language in which the provision was first cast – that of principles of objective justice - could have suggested a view of general principles that was akin to natural law. However, the text was expressly amended to clarify that it referred to principles recognized and applied in *foro domestico*.[36] This interpretation, while plausible, only demonstrates that municipal law was explicitly recognized as the source of formal validity. In contrast, different members of the Advisory Committee of Jurists which drafted Article 38(1)(c) held differing opinions of the source of material validity. For instance, Baron Descamps, the President, referred to this area as the realm of objective justice and denied that such principles that are concerned with the fundamental law of justice can differ from nation to nation. They must form part of the "legal conscience of civilized nations". This conception is closer to Schachter's fourth and fifth categories of general principles. Dr. Loder of the Netherlands referred to them as "rules universally recognized and respected by the whole world" which are "not yet of the nature of positive law",[37] which calls into question the exact place of municipals law as a source of formal validity.

Finally, the material validity of Schachter's second category of general principles stems from the specific characteristics of the international community, while the formal source of validity is unspecified, but unlikely to consist of municipal laws that are geared towards specific domestic issues.

The judgments of the PCIJ and the ICJ are not particularly instructive on how the concept of general principles should be understood or where they may

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[34] Jalet, *supra* note 18, at 1075, 1078.

[35] South West Africa Cases, Tanaka J., *supra* note 39, at 298; Christina Voigt, *The Role of General Principles in International Law and their Relationship to Treaty Law*, 31 RETFÆRD ÅRGANG 2/121, 3, 6 (2008).

[36] Waldock, supra note 18, at 56-57; *see also* Antonio Cassese, *The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations*, *in* INTERNATIONAL LAW IN THE POST-COLD WAR WORLD: ESSAYS IN MEMORY OF LI HAOPEI 43, 44-45 (Sienho Yee & Wang Tieya eds., 2001).

[37] Jalet, *supra* note 18, at 1047-56 citing Dr. Loder of the Netherlands, *Proceedings of the Advisory Committee of Jurists, June 16th-July 24th, 1920, with Annexes,* in PROCÈS-VERBAUX 294 (1920).

be found. These courts have resorted to general principles infrequently and general principles have not been used exclusively as a basis for any decision.[38] While they have acknowledged that for a norm to be accorded the status of a general principle, it must exist in a sufficiently large number of States,[39] this pronouncement has not been accompanied by any actual survey of national legal systems to determine its existence.[40] The formal and material validity of the general principles as a source of law thus remains unclear.

III. GENERAL PRINCIPLES IN INTERNATIONAL CRIMINAL LAW

Despite the uncertain character and content of the general principles in public international law, interest in their use and application has been revived in the context of the international criminal law regime, where treaty law and customary international law are relatively underdeveloped. The Statutes of the ad hoc international tribunals, including the ICTY,[41] the International Criminal Tribunal for Rwanda (ICTR),[42] Special Court for Sierra Leone (SCSL),[43] Extraordinary Chambers in the Courts of Cambodia (ECCC),[44] and the Special Tribunal for Lebanon (STL)[45] do not contain any specific provision dealing with

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[38] *See* Ellis, *supra* note 27, at 950; Cassese, *Contribution of the ICTY*, *supra* note 36, at 45-46; Waldock, *supra* note 18, at 62.

[39] *See* South West Africa Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 4, 299 (July 18) (Tanaka, J.,dissenting); North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 101, 229 (Feb. 20) (Lachs, J., dissenting); Bassiouni, *supra* note 18, at 788-89.

[40] Cassese, *Contribution of the ICTY*, *supra* note 36, at 45; Charney, *supra* note 18, at 190-91.

[41] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res. 827, U.N. SCOR, 48th sess., 3217 mtg., U.N. Doc. S/RES/827 (May 25, 1993).

[42] *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th sess., 3453 mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994).

[43] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. SCOR, 55th sess., U.N. Doc. S/2000/915 (2000).

[44] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, G.A. Res. 10135, U.N. Doc. A/RES/57/228B/Annex (May 13, 2003); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006 (Oct. 24, 2004).

[45] *Statute of the Special Tribunal for Lebanon*, appended to S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

the application of the sources of international law or their hierarchy.[46] Nonetheless, general principles of law have emerged as an important source of law in the jurisprudence of the ad hoc tribunals, which have relied heavily on them in a number of cases dealing with procedural and substantive legal questions. While a comprehensive analysis of the ad hoc tribunals' reference to general principles would distract from the focus of this paper,[47] three cases decided by the ICTY are especially useful for illustrating the ambiguities in the tribunal's jurisprudence.[48]

1 General Principles and the ICTY

Prosecutor v Erdemović[49]

In this case, the Appeals Chamber decided, by three votes to two, that duress does not afford a complete defense to a charge of crimes against humanity or war crimes that involves the killing of innocent people.[50] The Separate Opinions appended by the judges illustrate vividly the various ways in which general principles are conceived and applied in international criminal law.

For Judges McDonald and Vohrah, neither conventional law nor customary international law provided any rule on whether duress could be a complete defense to a charge of killing innocent human beings.[51] They turned next to the "general principles of law recognized by civilized nations" noting that this did not require a comprehensive survey of the specific legal rules in all domestic systems, but an analysis of those jurisdictions that were practically accessible to the court with a view to deducing general tenets underlying the concrete rules of those jurisdictions.[52] The judges thus undertook a "limited survey of… the world's legal systems": civil law systems (France, Belgium, Spain,

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[46] Gilbert Bitti, *Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 285, 286-87(Carsten Stahn & Göran Sluiter eds., 2009).

[47] *See* FABIAN O. RAIMONDO, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS (2008) (for a comprehensive analysis of the jurisprudence of the international criminal tribunals).

[48] *See* Cassese, *Contribution of the ICTY*, *supra* note 36, at 47-49; André Nollkaepmer, *Decisions of National Courts as Sources of International Law*, *in*, INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY 277, 286-89 (Gideon Boas & William Schabas eds., 2003); Ellis, *supra* note 27, at 968-70; Raimondo, *supra* note 47, at 105-08, 117-20, 124-29.

[49] Erdemovic, *supra* note 1.

[50] Erdemovic, *supra* note 1, ¶ 19

[51] Erdemovic, *supra* note 1, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 41-55.

[52] Erdemovic, *supra* note 1, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 57-58.

Netherlands, Italy, Germany, Norway, Sweden, Finland, Venezuela, Nicaragua, Chile, Panama, Mexico, Former Yugoslavia; common law systems (England, United States, Australia, Canada, South Africa, India, Malaysia, Nigeria); and the criminal law of "other states" (Japan, China, Morocco, Somalia, Ethiopia). This survey revealed no consistent rule and the variances in the legal systems could neither be reconciled, nor explained as differences between the common law and civil law systems.[53]

The judges then approached the issue in light of policy considerations specific to international humanitarian law and the normative mandate of international criminal law.[54] In analyzing these policy arguments, the judges drew liberally on the reasoning of domestic courts, in particular those of England and Italy.[55] In view of the overriding goal of international criminal law to protect the lives of innocent people, and the importance of placing legal limits on the conduct of commanders and soldiers, the judges rejected duress as a complete defense.[56]

In his Separate and Dissenting Opinion, Judge Stephen also relied on the "general principles of law".[57] He referred to the survey of municipal systems carried out by Judges McDonald and Vohrah, stating that the majority of these systems did recognize duress as a defense to murder in one way or another, and it was the common law systems that were the exception.[58] Were it not for the common law's exceptional position, duress could certainly be recognized as a defense for all offenses as a general principle of law, not only because of its endorsement in civil law, but also as a matter of "simple justice".[59] Judge Stephen went on to examine comprehensively English jurisprudence, concluding that it did not disclose any reasoned basis for excluding duress as a defense for serious crimes, including murder. Further, the common law had only excluded

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[53] Erdemovic, *supra* note 1, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 59-72.

[54] Erdemovic, *supra* note 1, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 72.

[55] Erdemovic, *supra* note 1, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 73-74, 79-82, 85-87. In his Separate Opinion, Judge Cassese disagreed vehemently with the policy-oriented approach of Judges McDonald and Vohrah, not only because it was contrary to the legality principle, but also because it was based on policy considerations governing the defense of duress in common law systems alone. Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Cassese, ¶ 11.

[56] Erdemovic, *supra* note 1, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 75-89.

[57] Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Stephen, ¶ 25.

[58] Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Stephen, ¶ 25.

[59] Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Stephen, ¶ 26.

duress as a defense when the accused had a choice between saving his life and that of another, and not where both persons would be killed in any case.[60]

According to Judge Stephen, a general principle of law rested on an enquiry into the rationale behind the existence of the actual rules of the legal systems in question. The common law's exception in the case of murder was based on an understanding that the law may never endorse the accused's choosing his life over the taking of an innocent one. It would thus do no violence to the common law to accept duress as a defense in situations where this choice was wholly absent.[61]

Erdemovic has been the subject of heated debate amongst commentators. Critics have questioned the normative analyses undertaken by the Judges, their failure to appreciate the distinctions between justifications and excuses, and the different methodologies used to define the scope of the defense of duress.[62] Less attention has been paid to the differences in how the Judges conceptualize general principles as a source of law and the impact this has on their decisions.

Judges McDonald and Vohrah appear to endorse Schachter's first category of general principles as principles that are found in municipal laws of the world's legal systems (formal validity). However, they conduct only a limited survey of the surface legal rules of a number of domestic systems and are unable to discern any consensus in terms of the extent to which duress is permitted as a defense to murder. They also do not explicitly state the material basis for the application of these municipal principles at the international level. Instead, they call upon policy and normative considerations, which are closer to Schachter's categorization of general principles that are derived from the specific nature of the legal regime – international criminal law – to resolve the issue of duress. In this exercise, they are bolstered by the material basis for the denial of the defense of duress in two domestic legal systems, but these are not characterized as general principles of law.

Judge Stephen also undertakes a comparative survey of domestic criminal law systems to support his reasoning (formal validity), but is more concerned with discovering a general principle that embodies the reasons for the creation of a legal rule and its application (material validity).[63] For this reason, he probes

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[60] Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Stephen, ¶¶ 29-58.

[61] Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Stephen, ¶¶ 64, 66.

[62] See, e.g., Alexander K.A. Greenwalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063 (2011); Benjamin Perrin, *Searching for Law While Seeking Justice: The Difficulties of Enforcing Humanitarian Law in International Criminal Trials*, 39 OTTAWA L. REV. 367 (2008); Luis E. Chiesa, *Duress, Demanding Heroism, and Proportionality*, 41 VAND. J. TRANSNAT'L L. 741 (2008); Thomas Weigend, *Kill or be Killed: Another Look at Erdemovic*, 10 J. INT'L CRIM. JUST. 1219 (2012).

[63] See Raimondo, *supra* note 47, at 107-108.

deeper into the rationale behind the common law's exceptional position in the case of duress as a defense to murder and examines why this rationale may or may not apply to Erdemovic.[64] Municipal legal systems thus form a source of both formal and material validity in his reasoning. Further, it is unclear from his Opinion whether, even if he had discovered that the reason for excluding duress in the common law would not apply to Erdemovic, he would nonetheless have allowed the defense as a matter of 'simple justice'.[65] Judge Stephen's Opinion thus slides between the first, fourth and fifth categories of Schachter's five-fold scheme of general principles, where the importance of municipal laws as sources of formal and material validity could potentially be jettisoned in favor of a pure natural justice oriented approach.

Prosecutor v Furundzija[66]

In *Furundzija*, the ICTY Trial Chamber was concerned with the definition of the crime of rape, in particular, whether forced oral penetration would satisfy the *actus reus* for the offence. The Chamber noted that conventional and customary law did not contain a specific definition of rape, and that resort to general principles of international criminal law or general principles of international law was also unhelpful. Thus, the Chamber turned to principles of criminal law common to the majority of the world's legal systems to define rape.[67]

The Chamber's survey of national legislation (it cited the penal laws of Chile, China, Germany, Japan, SFRY, Zambia, Austria, France, Italy, Argentina, Pakistan, India, South Africa, Uganda, New South Wales, Netherlands, England, and Bosnia and Herzegovina for different aspects of the offence) revealed that forced sexual penetration of the human body by the penis or forced insertion of any other object into the vagina or the anus was considered rape by most systems.[68] No similar consensus could be discerned on whether forced oral penetration would be classified as rape or as sexual assault. The Chamber then somewhat contradictorily (having earlier found them unhelpful) thought it appropriate to look to general principles of international criminal law, and failing that, general principles of international law, for a solution.[69]

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[64] See Ellis, *supra* note 27, at 969-70 (approving this methodology).

[65] See Raimondo, *supra* note 47, at 107.

[66] Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Int'l Crim. Trib. Former Yugoslavia Dec. 10 1998).

[67] Furundzija, *supra* note 66, ¶¶ 175-177.

[68] Furundzija, *supra* note 66, ¶¶ 179-181.

[69] Furundzija, *supra* note 66, ¶ 182.

The Chamber found an applicable general principle in the concept of human dignity, which was fundamental to international humanitarian law and human right laws, and which permeated the corpus of international law as a whole. Forcible oral penetration was a severe and degrading attack on human dignity, and it was consonant with the principle to classify it as rape.[70] Defining forcible oral penetration in this manner as rape rather than sexual assault did not violate the principle of legality since the act would have been criminalized in any case.[71] Moreover, as long as the accused was sentenced on the factual basis of coercive oral sex, he would not be adversely affected by this categorization except that conviction for rape may have greater stigma attached to it.[72]

While one can sympathize with the Chamber's ultimate conclusions, the methodology it uses in arriving at them is more suspect. Commentators have noted how the Chamber's comparative analysis is insensitive to considerations of culture and lacks a proper understanding of the definition of rape in national jurisdictions.[73] The Chamber has also been criticized for going beyond its survey of domestic laws on the question of forced oral penetration and extending the definition of rape based on a very broad general principle of law,[74] rather than applying the principle of in *dubio pro reo*.[75]

Furundzija also appears to introduce new sources of international criminal law which find support in the writings of Antonio Cassese, namely "general principles of international criminal law" and "general principles of international law". In Cassese's terminology, "general principles of international criminal law" are principles that are specific to the criminal law, such as the principle of legality, which have been gradually transposed from domestic legal orders to the international level. "General principles of international law" are principles inherent in the international legal system that can be deduced from the features of the international legal system.[76] In this sense, these principles are distinct from the "general principles of criminal law recognized by the community of nations"

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[70] Furundzija, *supra* note 66, ¶¶ 183.

[71] Furundzija, *supra* note 66, ¶ 184.

[72] Furundzija, *supra* note 66, ¶ 184.

[73] *See* Ellis, *supra* note 27, at 968.

[74] It bears noting that even if the principle of human dignity could be considered foundational in the sense of constituting a general principle of international law, this did not necessarily support classifying forced oral penetration as rape rather than sexual assault: Bantekas, *supra* note 4, at 126-27.

[75] *See* Bantekas, *supra* note 4, at 126; Swart, *supra* note 3, at 468; Raimondo, *supra* note 47, at 119.

[76] Cassese, *supra* note 12, at 31; Cassese, *Contribution of the ICTY*, *supra* note 36, at 52-53.

which Cassese labels as a subsidiary source and which are discovered through a comparative survey of domestic legal systems.[77]

Furundzija and Cassese thus seem to recognize various notions of general principles that are similar to Schachter's classification. The surface comparison of domestic legal systems (formal validity) yields general principles which are a "subsidiary source" that only come into play once the other versions of general principles prove unhelpful. This conception is akin to Shachter's first category, where the basis for material validity is not obvious, but seems to consist in the endorsement of the legal precept by the community of states. It is perhaps for this reason that the *Furundzija* does not expend any effort in analyzing the actual rationale behind the municipal rules, and merely notes their presence in the various municipal systems. The "general principles of international criminal law" present a more complicated picture: they are domestic legal principles that have been gradually transposed to the international realm. Thus, the formal validity is presumably sought in domestic and international legal instruments, but the basis for the material validity remains opaque. The nature of the "general principles of international law" is even less clear. *Furundzija* does not cite any positive law source to claim that the principle of human dignity pervades the international legal regime, suggesting an implicit adoption of Schachter's fourth and fifth categories of material validity characteristic of the natural law tradition of general principles. Cassese, on the other hand, considers them inherent to the international legal order, which mirrors Schachter's second conception of general principles that are derived from the specific features of the international legal system.

Prosecutor v. Kupreskic[78]

In the *Kupreskic* case, the Trial Chamber announced its approach to interpretation in the following terms: if the Statute does not regulate a specific issue, the Chamber will address any lacuna in the law by having recourse to

(i) rules of customary international law; (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles; (iv) general principles of law consonant with the basic requirements of international justice.[79]

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[77] Cassese, *supra* note 12, at 32.

[78] Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment (Int'l Crim. Trib. Former Yugoslavia Jan. 14 2000). For a useful summary of the Chamber's use of general principles, see Raimondo, *supra* note 47, at 124-29.

[79] Kupreskic, *supra* note 78, ¶ 591.

The Chamber subsequently relied on general principles of criminal law common to the world's major legal systems charges, to distinguish four legal principles that applied to cumulation of charges: the reciprocal speciality test (Blockburger); the principle of speciality; the principle of consumption; and the principle of protected values.[80]

The Chamber cited two cases decided by US courts and referred, without further elaboration, to "civil law courts" for recognition of the reciprocal speciality rule, where if an act violates two distinct legal provisions, it constitutes two different offenses only when each provision requires proof of an extra element that the other does not.[81] If the reciprocal speciality rule is not satisfied and one offense falls entirely within the scope of another, then according to the rule of speciality (citing the penal codes of the Netherlands and Italy) the special provision governing the act takes precedence over the general provision.[82] The principle of consumption in the civil law, which can be likened to the doctrine of "lesser included offence" in the common law, holds that if all the elements of a less serious offence are present in the commission of a more serious one, then the criminality is fully encompassed by a conviction for the latter. The Chamber relied on the jurisprudence of the Inter-American Court on Human Rights, the European Commission and Court of Human Rights, Austrian and German courts, and English law scholarship for the acceptance of and rationale behind the principle.[83] Finally, the Chamber cited Canadian, French, Austrian and Italian court decisions for the principle of protected values: that if an act infringes upon two legal provisions that protect distinct values, it may be in breach of both provisions and give rise to a double conviction.[84]

It is interesting to note that the Chamber purported to apply general principles in Schachter's first sense of principles that are common to the world's major systems, but provided only scant authority for the acceptance of the four principles it articulated.[85] It also addressed the reasoning or the logic behind each of the four principles, though not in any depth, thus leaving the material basis for the validity unclear.

The search for a commonality across systems had to be abandoned when it came to the issue of how a double conviction for the same act should be

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[80] Kupreskic, *supra* note 78, ¶¶ 677-695.

[81] Kupreskic, *supra* note 78, ¶¶ 680-682, 685.

[82] Kupreskic, *supra* note 78, ¶¶ 683-684.

[83] Kupreskic, *supra* note 78, ¶¶ 686-692.

[84] Kupreskic, *supra* note 78, ¶¶ 693-695.

[85] *See* Raimondo, *supra* note 47, at 128; Nollkapemer, *supra* note 48, at 289.

reflected in sentencing.[86] Article 24(1) of the ICTY Statute provides that the Chamber should have recourse to the general practice on sentencing in the former Yugoslavia for determining the term of imprisonment. The Chamber opined that the practice of courts in the former Yugoslavia was not exhaustive of the sources that the ICTY could rely on.[87] It noted that differences between the provisions of the SFRY, Croatian, and Italian Criminal Code on the one hand,[88] and "other legal systems such as Germany" on the other, on this issue. In light of this divergence between national systems, the Chamber opted for a fair solution based on the object and purpose of the ICTY Statute, and the "general principles of justice applied by jurists and practised by military courts" referred to by the Nuremberg Military Tribunal.[89] Using these criteria, the Chamber held that in the case of two distinct offenses, the sentences for each may be served concurrently with the possibility of an aggravated sentence for the more serious offense if the less serious offense committed by the same act added to its heinous character.[90]

Similarly, the Chamber was unable to find any consistency in the approach various municipal systems took to the question of the consequences of the Prosecutor's erroneous legal classification of facts (surveying England, the US, Zambia, Nigeria, former Yugoslavia, Croatia, Germany, Spain, France, Italy and Austria).[91] Thus, it was compelled to search for a "general principle of law consonant with the fundamental features and the basic requirements of international criminal justice".[92] It this endeavor, it would be guided by two potentially conflicting considerations: the full protection of the accused's rights on the one hand, and the ability of the tribunal to exercise all powers necessary to accomplish its purpose efficiently and in the interests of justice on the other.[93] Through a careful balancing of these principles and taking into account the nascent state of international criminal law, the Chamber devised a detailed set of rules that would guide its decision on the matter.[94]

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[86] Kupreskic, *supra* note 78, ¶ 713.

[87] Kupreskic, *supra* note 78, ¶¶ 716.

[88] Kupreskic, *supra* note 78, ¶¶ 713-715.

[89] Kupreskic, *supra* note 78, ¶¶ 716-717

[90] Kupreskic, *supra* note 78, ¶ 718.

[91] Kupreskic, *supra* note 78, ¶¶ 693-695.

[92] Kupreskic, *supra* note 78, ¶¶ 728-738.

[93] Kupreskic, *supra* note 78, ¶¶ 724-726, 739.

[94] Kupreskic, *supra* note 78, ¶¶ 740-748. For the observation that this is not an application of general principles, but an instance of law-making by the Judges, see Raimondo, *supra* note 47, at 129.

Kupreskic seems to have introduced yet another hierarchy in the sources of international criminal law and the order in which they are to be applied: "general principles of international criminal law", which it fails to define; general principles of criminal law derived from a cursory comparative survey of national systems; and "general legal principles consonant with the requirements of international justice" which mirror Schachter's fourth and fifth categories. The formal validity of this last category is derived from the ICTY Statute and the judgment of the Nuremberg Military Tribunal, but the material validity in addition stems from what is required for justice in the international realm. In contrast with Cassese's formulation though, the general legal principles consonant with the requirements of international justice are applicable only once the principles of municipal law (which are subsidiary for Cassese) do not yield any result.

The above analysis of *Erdemovic*, *Furundzija*, and *Kupreskic* reveals a profound confusion surrounding the nature and application of general principles. The ICTY has liberally used general principles to fill in gaps in the ICTY Statute, and in customary international law, to decide difficult and controversial issues that have come up before the tribunal. However, it is far from clear which conception of general principles has predominated; indeed, judges slip and slide between the different conceptions in the same judgment seemingly unaware of the difference. There is also uncertainty about the hierarchy of their application; at times, general principles that are more closely associated with traditional natural law take precedence, while at other times, they operate as a last resort when no consensus can be reached on the basis of general principles derived from the domestic laws of the world's legal systems. Further complexity is introduced by the seemingly vague and undefined categories of "general principles of international law" and "general principles of international criminal law, where both the material and the formal basis for validity are not addressed explicitly. There are also few efforts to explain the reasoning behind or the basis for the adoption of one conception of general principles over another, and little consciousness that the results may differ depending on which notion is given preference.

2 General Principles and the ICC

While the ad hoc tribunals had the formidable task of working on almost a clean slate – there had been no significant developments in international criminal law post the Nuremberg trials – the ICC has the benefit of the rapid strides in the evolution of the law in the past decade or so. Indeed, the Rome Statute of the ICC, in contrast to the Statutes of tribunals such as the ICTR and the ICTY, is a testimony to the level of sophistication that international criminal law has achieved in a relatively short span of time. The ICC Statute is considerably more

detailed than its predecessors and the court may also have recourse to the rules of international law laid down by the ad hoc tribunals. At first glance, this suggests a more limited place for the utility of general principles as a gap filling mechanism.[95] Nevertheless, several parts of the ICC Statute are still relatively unrefined – the provisions on modes of responsibility (Article 25), command responsibility (Article 28), and defenses such as necessity (Article 31) are instances of where considerable uncertainty or gaps still remain. The ICC is likely to resort to general principles of law as one of the means of filling these lacunae.[96] The ICC Statute and jurisprudence to date does not, however, provide any more guidance on what conception of general principles may be applicable.

The Rome Statute certainly authorizes the ICC to apply general principles: Article 21(1) of the Statute on "Applicable Law" establishes the following hierarchy of sources: a) first, the Statute, Elements of Crimes, and Rules of Procedure and Evidence; 1b) second, treaties and principles and rules of international law; and b) failing that, general principles of law derived from laws of domestic legal systems, including those of the State that would normally have jurisdiction, as long as they are consistent with the Statute and with international law.[97]

Article 21's listing of the sources is, in some respects, quite different from that contained in Article 38 of the ICJ Statute. In contrast to the latter, Article 21 clearly contains a hierarchy as to their application – the ICC must first look to its own "internal" or "proper" sources (the Statute, Elements, and Rules, and its own case law), then to other treaties and public international law rules, and to the general principles of law only if those still do not yield an answer.[98] Also, the provision for general principles of law specifically mentions that these are to be derived from national legal systems, including the laws of the State that would ordinarily exercise jurisdiction over the case.[99]

The Article's formulation can be interpreted to include at least two different notions of general principles. For instance, it is not clear what Article 21(1)(b)'s reference to "principles and rules of international law" encompasses. On one interpretation, it may include the jurisprudence of the ad hoc tribunals

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[95] *See* Raimondo, *supra* note 47, at 57.

[96] Claus Kress, *International Criminal Law*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 40 (2013); *see also, e.g.,* Kai Ambos, *General Principles of Criminal Law in the s*, 10 CRIM. L. FORUM 1, 32 (2009).

[97] Rome Statute, *supra* note 13, art. 21.

[98] Bitti, *supra* note 46, at 287-88; *see also* Allain Pellet, *Applicable Law*, *in* II THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1051, 1053-54 (Antonio Cassese et al. eds., 2002).

[99] Pellet, *supra* note 98, at 1073.

as part of "international criminal practice".[100] Another possibility is that the phrase is simply a reference to customary international law rules and principles.[101] However, nothing in Article 21(1)(b) excludes an interpretation that, in Cassese's terminology, refers to principles inherent in international law that can be deduced from the features of the international legal system.[102] Thus, the material source of validity stems from the nature of the international (criminal) law regime, but the formal basis for validity may arguably go beyond positive international legal sources.

The drafting history of the Rome Statute does not assist greatly in the resolution of this issue. The International Law Commission's (ILC) Draft Statute for an International Criminal Court,[103] which preceded the Rome Statute and greatly influenced it,[104] contained a similar provision on Applicable Law in Article 33. The ILC's Commentary to the Draft Article 33 provides that "principles and rules" of general international law includes the "general principles of law" such that the court may refer to the "whole corpus of criminal law" in national as well as international practice.[105] The formal validity thus consists of municipal and international laws and practice, but the basis for material validity is not stated.

Article 21(1)(c), which comes into play only once Article 21(1)(b) fails to supply an answer, refers more explicitly to Schachter's first category of general principles; it clearly mentions that they are derived from municipal legal systems,

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100 Bitti, *supra* note 46, at 296-98. The ICC has explicitly stated that the jurisprudence of the ad hoc tribunals can have relevance before the ICC only if it falls within the sources recognized in Article 21: *Prosecutor v. Kony et al.*, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification ¶ 19 (ICC Pre-Trial Chamber II, Oct. 28, 2005); *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial ¶¶ 43-44 (ICC Trial Chamber I, Nov. 30, 2007) [hereinafter *Lubanga*, Decision on Witness Proofing].

101 Pellet, *supra* note 98, at 1070-72; Dapo Akande, *Sources of International Criminal Law*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 41, 50 (Antonio Cassese ed., 2009).

102 *See* Margaret McAullife deGuzman, *Article 21: Applicable Law*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 701, 707-08 (Otto Triffterer ed., 2008) (distinguishing, however, between "rules" and "principles" of international law to argue that "rules" refer to customary international law).

103 Report of the International Law Commission on the Work of Its Forty-Sixth Session, UN GAOR, 49th Sess., Supp. No. 10, at 44, UN Doc. A/49/10 (1994)

104 See generally, Kai Ambos, *Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint*, 7 EUR. J. INT'L. L. 519 (1996).

105 II Yearbook of the International Law Commission 51 (1994).

including, when appropriate, the law of the State that would exercise jurisdiction. This is a curious formulation – the "legal systems of the world" would presumably have included the State with jurisdiction over the case. Conversely, if the emphasis is on the world's major legal systems and the State which would normally exercise jurisdiction is not considered one of them, it is not clear why its laws should be relevant except as a concession to the defendant's ostensible familiarity with the system.[106]

The drafting history clarifies, to some extent, why it was considered necessary to mention this specifically. Delegates were divided on the issue of the extent of discretion to be granted to judges to decide on the applicable law. While the majority of States favored judicial discretion in determining and applying general principles of international criminal law, a minority were of the view that any ambiguity must be resolved by applying directly the relevant domestic law (in order of preference, the law of the State where the crime was committed, that of the accused's State of nationality, and that of the custodial State).[107] Article 21(1)(c) reflects a compromise between the two positions, authorizing the application of general principles derived from municipal legal systems, including the State that would normally exercise jurisdiction.[108] This recognizes that the formal validity of the general principles is derived from municipal laws, and that the material validity is in part premised on the accused's familiarity with the laws (of the State that would otherwise have jurisdiction over the case).

Thus far, the ICC has not dealt with the problem of hierarchy and application of sources in any significant way. The ICC Appeals Chamber has recognized that general principles may be applied to fill gaps in the Statute.[109] It has also considered the use of general principles in a few cases, but omitted to define what they may consist of and why. For instance, in a decision concerning

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[106] Pellet, *supra* note 98, at 1075.

[107] DeGuzman, *supra* note 102, at 702-03; Pellet, *supra* note 98, at 1074-75; Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS 189, 214-15 (Roy S. Lee ed., 1999).

[108] DeGuzman, *supra* note 102, at 702-03; Pellet, *supra* note 98, at 1075; Saland, *supra* note 107, at 215. It is not clear however which States would be counted as normally exercising jurisdiction, for instance, whether this would include universal jurisdiction: J. Verhoeven, *Article 21 of the Rome Statute and the Ambiguities of Applicable Law*, 33 NETHERLANDS Y.B. INT'L. L. 3, 10 (2002).

[109] *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment on the Appeal of Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006 ¶ 34 (ICC Appeals Chamber, Dec. 14, 2006).

the *Situation in the Democratic Republic of Congo*,[110] the Appeals Chamber denied the Prosecutor's claim that there was a general principle of law that provided for the review of decisions of subordinate courts by higher courts, including decisions disallowing an appeal. The Prosecutor had cited the laws of fourteen civil law countries, five common law countries, and three Islamic law countries in support of this contention, which were dismissed by the Chamber as yielding no uniform or universally adopted general principle of law.[111]

Similarly, in *Lubanga*, Trial Chamber I rejected the practice of witness proofing as a general principle of law.[112] The Prosecutor had referred to the jurisprudence of the ad hoc tribunals and the laws of a few common law countries (Australia, Canada, England and Wales, and the United States) to assert that witness proofing is well established.[113] The Chamber considered this insufficient to establish a general principle permitting witness proofing, on the basis that the national systems cited by the Prosecution differed on the exact details of the practice and that the Prosecution had moreover not cited any civil law systems.[114]

These decisions tend towards Schachter's first category of general principles that are derived form municipal laws, but in the absence of any comprehensive analysis of the source, and also failing any discussion of "general principles" of international law stemming from Article 21(1)(b), it is difficult to make any claims as to how exactly the ICC conceives of their formal and material validity.

IV. THE CHALLENGES OF THE MUNICIPAL LAW APPROACH TO GENERAL PRINCIPLES

While different conceptions of general principles have surfaced in the jurisprudence of the international criminal tribunals, one of the recurring features cutting across various decisions and opinions has been the recourse to municipal laws as a source of formal validity, though the material validity for this reliance has not been explicitly acknowledged. Various justifications can be adduced for the ostensible material basis for the validity of general principles

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[110] *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (ICC Appeals Chamber, July 13, 2006).

[111] *Id.* at ¶¶ 26-32.

[112] *Lubanga*, Decision on Witness Proofing, *supra* note 100, at ¶ 41.

[113] *Id.* at ¶¶ 7-10, 37.

[114] *Id.* at ¶¶ 39-42.

derived from domestic legal systems. Some of these, which have been alluded to earlier, assume that the borrowing from municipal rules acts as a proxy for state consent for their application at the international level. Others emphasize the element of notice and fairness to the accused who is expected to be conversant with the rules governing his conduct at the domestic level. Additional reasons for looking to municipal laws for general principles could consist of the value of adopting laws the import of which has already been tested at the domestic level. In this sense, judges in international criminal courts are not merely seeking refuge in familiar legal rules that form part of their own legal systems. Instead, the domestic legal system serves as a laboratory where the legal principle is tested and applied, thus reducing the possibility that it is incoherent or incapable of application by international criminal tribunals. However, if one considers the manner in which municipal laws have been surveyed and adopted by international tribunals, the formal and material validity of general principles derived from this exercise is seriously called into question.

1 The Problem with "Legal Families"

According to the standard interpretation of Schachter's first category of general principles, the tribunals should conduct an extensive survey of domestic criminal law systems and strive to find commonality across these jurisdictions. The obvious objection to this methodology is its impracticality: given the time, resource, language, and knowledge constraints of the courts, this would be an impossible exercise. The courts may then adopt the majority's stance in *Erdemovic* and deduce general principles from systems that are "practically accessible" to the judges. As the experience of the ad hoc tribunals bears out, this poses the very real danger that the domestic systems referred to would be heavily biased towards a few "civil law" and "common law" countries.[115] The way out of this insularity, which has received almost unanimous acclaim in the scholarly community, is to consciously include representatives from other "legal families" notably those that follow Islamic law, and countries from Asia and Africa, in the analysis.[116]

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[115] *See* Bantekas, *supra* note 4, at 129; Michael Bohlander & Mark Findlay, *The Use of Domestic Sources as a Basis for International Criminal Law Principles*, 1 GLOBAL COMMUNITY Y.B. INT'L L. & JURISPRUDENCE 3 (2002); *see also* Mirielle Delmas-Marty, *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, 1 J. INT'L. CRIM. JUST. 13, 18 (2003); *see also* Hermann Mosler, *To What Extent Does the Variety of Legal Systems of the World Influence the Application of the General Principles of Law Within the Meaning of Article 38(1)(c) of the Statute of the International Court of Justice*, *in* INTERNATIONAL LAW AND THE GROTIAN HERITAGE 173, 182 (1985) (for a similar suggestion in the context of traditional public international law).

[116] *See, e.g.*, Cassese, *supra* note 12, at 32-33; Bantekas, *supra* note 4, at 129; Degan, *supra* note 17, at 81.

The difficulties with this assumption of representative legal systems become apparent when one pays attention to the long-standing attempts of comparativists to group the world's legal systems into families.[117] International criminal courts and scholars appear to take for granted the validity of what have undoubtedly proved the two most influential groupings of legal families.[118] The first was proposed by René David David who distinguished four legal families based on the criteria of ideology and legal technique: Romano-Germanic laws, common law, socialist law, and a residual category comprising philosophical or religious systems which included Muslim law, Hindu law, the law of Far Eastern countries, and the law of Africa and Madagascar.[119] The second is Zweigert and Kötz's classificatory scheme based on legal or juristic style of the legal system comprising its history, mode of thought, institutions, sources, and ideology: Romanistic, Germanic, Nordic, Common Law, Socialist, Far East systems, Islamic systems, and Hindu Law.[120] However, as comparativists have shown recently, these dominant classificatory schemes were preceded by several other attempts at categorization, in which the seminal distinctions between the common law and the civil law systems that were championed by David[121] and by Zweigert and Kötz, were conspicuously absent.[122] Indeed, the legal scholarship on this distinction seems to now have come full circle, with several prominent academics questioning whether the civil law—common law distinction is coherent or whether it is best abandoned.[123]

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117 *See, e.g.,* René David & Jauffret Spinosi, Les Grandes Systemes de Droit Contemporains (1992); Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law (1987); Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, *in* Mixed Jurisdictions Worldwide: The Third Legal Family (Vernon Valentine Palmer ed., 2001); Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 Am. J. Comp. L. 5 (1997); Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 Am. J. Comp. L. 1043 (2012).

118 See Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 676 (2002); John Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 547(1995).

119 DAVID & SPINOSI, *supra* note 117; Mattei, *supra* note 117, at 8; Jaakko Husa, *Legal Families*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 491, 496 (Jan M. Smits ed., 2012).

120 ZWEIGERT & KÖTZ, *supra* note 117; PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 34, 36 (1999); Pargendler, *supra* note 117, at 1060.

121 Indeed, as Pargendler notes, in his earlier 1950 treatise, *Traité éléméntaire de droit civil compare*, David's classification did not include a civil law-common law distinction. Instead, the main families identified were Western Law, Socialist Law, Islamic Law, Hindu Law, and Chinese Law: Pargendler, *supra* note 117, at 1053.

122 Pargendler, *supra* note 117, at 1047-1053; *see also* Husa, *supra* note 119, at 490-96.

123 See James Gordley, *Common Law und Civil Law: eine überholte Unterscheidung*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 498 (1993); *see also* the discussion in Hein Kötz, *Abschied von der Rechtskreislehre*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 493, 497-504 (1998).

An analysis of the trajectory of the different families proposed demonstrates the extent to which the classifications are contingent,[124] not only on the criteria used for categorization, but also on the area of the law under study. The most influential classifications are Euro-centric in nature, an imbalance that is reflected in the uncertain knowledge about legal systems in other parts of the world that are hastily grouped together as "Far Eastern" and "Islamic" families.[125] As Harding remarks in the context of South East Asia, the legal families tradition persists in labeling these legal systems as "confucian" or "authoritarian",[126] while the truth is that the very idea of legal families with its orientation towards the general style of the legal system is completely ill-equipped to deal with the "nomic din" of South East Asia, where "every kind of legal sensibility is represented except perhaps for African law and Eskimo law".[127] Similarly, in her critique of the treatment of Islamic law in comparative legal scholarship, Abu-Odeh exposes the unhappy consequences of conflating "Muslim law" with the "law in Muslim countries". Rejecting this synonymy, she argues persuasively that Islamic law is at best a partial source of law in Muslim countries which have been deeply influenced by and adopted European models of civil law.[128]

This inability of the legal families approach to account for a significant section of the world's legal systems should be sufficient to make international criminal tribunals wary of its appropriateness for choosing representatives to derive general principles of international criminal law. Its unsuitability is only compounded by the fact that the existing classifications are based primarily on private law and are not necessarily applicable to other areas such as constitutional law, administrative law, and the criminal law.[129] Moreover, the

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[124] For a detailed account, see TP van Reenen, *Major Theoretical Problems of Modern Comparative Legal Methodology (3): The Criteria Employed for the Classification of Legal Systems*, 29 COMP. & INT'L. L.J. S. AFR. 71 (1996).

[125] See Mattei, *supra* note 117, at 10-11; Husa, *supra* note 119, at 499. It is worth noting that, in keeping with the changed geo-political map of the world, at least the independent significance of the "socialist" legal family has largely been eroded: Jaakko Husa, *Classification of Legal Families Today: Is It Time for a Memorial Hymn?*, REVUE INTERNATIONALE DE DROIT COMPARÉ 11, 15-16 (2004).

[126] Andrew Harding, *Global Doctrine and Local Knowledge: Law in South East Asia*, 51 INT'L. & COMP. L. Q. 35, 48 (2002).

[127] Harding, *supra* note 126, at 42, 49 relying on CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FACTS AND LAW IN COMPARATIVE PERSPECTIVE 226 (1980).

[128] Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 813-23 (2004).

[129] *See* Kötz, *supra* note 123, at 494; Husa, *supra* note 119, at 500; Esin Örücü, *What is a Mixed Legal System? Exclusion or Expansion*, 12 ELECTRONIC J. COMP. L. 1, 3 (2008); Åke Malmström, *The*

legal families typology seems better geared towards "macro-comparisons", that is, the comparison of entire legal systems, rather than "micro-comparison" which involves specific legal issues and institutions.[130] Thus, legal systems that are traditionally grouped into one family based on overarching common characteristics may have very different answers to specific criminal law problems. For instance, if one wants to derive general principles on the distinction between perpetration and accessorial liability in domestic legal systems, the German legal system strictly distinguishes between principal and secondary responsibility,[131] in contrast to 'formal unitary systems' such as Italy which do not recognize this distinction, whereas 'functional unitary systems' like Austria formally distinguish between the two but do not consider secondary responsibility to be derivative.[132] Thus, depending on which of these systems is considered "representative" of the civil law family, the answer to the question of how parties to a crime may be distinguished would be very different.

Neither would it be helpful to look to more recent attempts to revise the traditional legal families typology. For instance, Palmer has mooted the category of "mixed jurisdictions"[133] as systems that are based primarily on a fusion of (private) Romano-Germanic law and (public) Anglo-American law and where these dual elements are recognized by both the outside observer and legal actors in the systems.[134] This description has, however, been criticized as too narrow, as it simplifies the differences between these legal systems and the different relationships between the various legal elements within each of these systems, as well as the influence of indigenous law in some of these systems.[135]

Another novel approach to categorization has been developed by Mattei, who divides legal systems according to the source of social behavior that plays a

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System of Legal Systems: Notes on a Problem of Classification in Comparative Law, 13 SCANDINAVIAN STUD. L. 127, 139-40 (1969).

130 *See* Husa, *supra* note 119, at 491. The difference between macro-comparison and macro-comparison is now generally recognized in the literature on comparative law methodology: De Cruz, *supra* note 120, at 227

131 *See* JOHANNES WESSELS WERNER BEULKE, STRAFRECHT, ALLGEMEINER TEIL: DIE STRAFTAT UND IHR AUFBAU (SCHWERPUNKTE) 179 (2008); MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 153 (2009).

132 HÉCTOR OLÁSOLO, THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES 18-19 (2010).

133 Palmer, *supra* note 117, at 4.

134 Palmer, *supra* note 117, at 7-10.

135 Örücü, *supra* note 129, at 11-15; *see also* Esin Örücü, *Mixed and Mixing Systems: A Conceptual Search*, *in* STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING 344 (Örücü et al. eds., 1996).

dominant role in the legal system.[136] Systems may be classified as belonging to the rule of professional law, the rule of political law, or the rule of traditional law, depending on the dominant pattern of social incentives and constraints.[137] The rule of professional law is characterized by a separation between law on the one hand and religion/philosophy and politics on the other.[138] In the rule of political law, political considerations and relationships determine the outcome of the legal process.[139] In the rule of traditional law, there is no secularization of the law, and the dominant legal pattern is a religion or philosophy.[140]

While Palmer's taxonomy does not directly challenge or question the traditional legal families approach, Mattei's scheme is a more daring re-configuration of conceptualizing the world's legal systems.[141] Neither of these would be of much help though in searching for representatives to derive general principles for international criminal law. In particular, Mattei's approach says fairly little about the content of any particular legal rule in a legal system; it is entirely plausible that criminal law principles and rules could differ within the same legal family, and at the same time be common to different legal families. Given the impracticability of surveying all domestic legal systems, and the difficulty in devising any coherent way to group systems into families which can yield representative systems, it is unlikely that the first conception of general principles which depends precisely on such a comparison can be applied legitimately.

2 Legal Formants, Traditions and Cultures

Even if one were able to identify representative legal systems, the formal and material validity of general principles derived from municipal legal precepts would still depend on an accurate understanding of the domestic legal principle in any particular system. If one looks to the nature of the surveys done by

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136 Mattei, *supra* note 117, at 13-14.

137 Mattei, *supra* note 117, at 16.

138 Mattei, *supra* note 117, at 23. This family includes the common law and civil law systems, Scandinavian systems and some mixed systems like Louisiana, Scotland, South Africa, and Quebec: Mattei, *supra* note 117, at 26.

139 Mattei, *supra* note 117, at 28. Mattei would include in this family, the majority of the ex-Socialist legal family and under developed nations in Latin America and Africa: Mattei, *supra* note 117, at 30.

140 Mattei, *supra* note 117, at 35-36. This encompasses nations that follow Islamic law, Indian law and Hindu law, and Asian and Confucian conceptions of law: Mattei, *supra* note 117, at 36.

141 Mattei's classification of "Islamic law" and South East Asian legal systems has invited criticism: Harding, *supra* note 126, at 49; Abu-Odeh, *supra* note 128, at 821-22.

international criminal courts for deducing general principles, it is rare to find citations to anything apart from a single statutory rule or an isolated case from the domestic legal system. However, as Sacco's influential theory of "legal formants" demonstrates, the "living law" is comprised of different formative elements, including statutes, judicial decisions, scholarly opinion, conclusions and reasons in judicial opinions, declamatory statements which may relate to the law, philosophy, religion, or ideology, which must all be consulted together to arrive at a working rule. Indeed, a legal system may have a multiplicity of conflicting legal formants, some that constitute rules of conduct, and others that provide abstract justifications or formulations of the rules.[142]

Thus, if a judge at an international criminal tribunal relies on a statutory provision or a rule in a Code, it may well be contradicted or qualified by any of the other legal formants of the system, leading to a different result. If the kind of comparative analysis done by the courts thus far is any guide, then such a comprehensive analysis of the principle underlying the legal rule in any given domestic legal system is unlikely, especially given the pressures under which the tribunals operate. The consensus on general principles derived from merely considering isolated legal provisions in these systems could thus turn out to be illusory.

Even if a detailed comparison is theoretically possible, legal formants alone are scarcely decisive of the matter. The challenge to this view comes from two different sources: the idea of a plurality of legal orders, and the emphasis on legal culture. The plural legal orders approach rejects the exclusive emphasis on top-down State-centric law and posits the existence of a multiplicity of State and non-State legal orders, which operate alongside each other; "official law" and "non-state" law can even occupy equal status within the same political unit.[143]

While there are different formulations of the idea of legal culture[144] or tradition[145] what they share in common is an antipathy to the conception of law as a mere set of legal rules in the books. Knowledge of law cannot consist in simply looking at legal doctrine, but must take into account its historical, socio-

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[142] Radolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. (1991) 1, 21-34; *see also* Esin Örücü, *Developing Comparative Law*, *in* COMPARATIVE LAW: A HANDBOOK 43, 61 (David Nelken and Esin Örücü eds., 2007).

[143] Örücü, *Developing Comparative Law*, *supra* note 142, at 61 citing BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE 89 (2002).

[144] *See* Ralf Michaels, *Legal Culture*, *in* 2 THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW 1059 (Jürgen Basedow et al. eds., 2012).

[145] *See, e.g.*, Glenn's influential account of legal traditions as ongoing normative information: H. Patrick Glenn, *A Concept of Legal Tradition*, 34 QUEENS L.J. 427 (2008).

economic and ideological context.[146] This is expressed in the idea of a legal tradition, which is a set of 'historically conditioned attitudes' about the nature of law, its role in society, and its formulation, operation and application.[147] Going still further, the 'legal culture' approach argues that a proper understanding of the law requires an 'understanding of the social practice of its legal community', which in turn presupposes knowledge of its broader culture.[148] Comparison of legal systems is not possible without situating these systems in the legal cultures, and the wider societal cultures which gives rise to the legal cultures.[149]

A similar analysis is conducted by Legrand, who refers to a 'legal mentalité, or the epistemological foundations of the cognitive structure of a legal culture. Legal rules, on this view, are merely 'thin descriptions' or 'surface manifestations' of a structure of attitudes and references; they are thus a reflection of a legal culture. The comparativist cannot focus simply on legal rules and concepts, but must take into account the historical, social, and cultural context in which the rules are embedded and gain an appreciation of the cognitive structure of the legal culture.[150]

The challenges posed by these difference conceptions - legal formants, legal tradition, legal culture, legal mentalité - of the law that is an appropriate object of comparison point to the same direction: if international criminal tribunals rely on isolated legal rules in various domestic legal systems to identify a consensus which yields a general principle of law, there is a grave danger that this will lead to a misleading or even incorrect solution. The legal rule contained in a single statutory provision or case may look very different when analyzed against the background of the legal and institutional practices of the system, its ideology, and its legal and non-legal culture. Seemingly similar rules may thus mask vast differences in the operation and application of the rules, making the quest for a consensus ever more elusive, and rendering suspect the general principle derived therefrom.

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[146] Mark van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law,* 47 INT'L. & COMP. L.Q. 495, 496 (1998).

[147] Örücü, *Developing Comparative Law*, *supra* note 142, at 59 citing John Henry Merryman, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 2 (1985*); see also* Reenen, *supra* note 124, at 73.

[148] Örücü, *Developing Comparative Law*, *supra* note 142, at 59 citing John S. Bell, *English Law and French Law – Not So Different?*, 48 CURRENT LEGAL PROBLEMS 63, 70 (1995) and van Hoecke & Warrington, *supra* note 146, at 498.

[149] Van Hoecke & Warrington, *supra* note 146, at 498.

[150] Pierre Legrand, *European Legal Systems are Not Converging*, 45 INT'L. & COMP. L.Q. 52, 56-61 (1996).

3 Transposition and Legal Transplants

The final challenge to the reliance on municipal law to generate general principles comes from the task of transposition. International criminal tribunals have been careful to note that domestic criminal law principles cannot be transplanted helter-skelter to the international plane; one must first establish their appropriateness to the international criminal law sphere.[151] It is doubtful though whether more than lip service has been paid to this admonition. Again, comparative legal theory points to a more nuanced consideration of the transposition debate.

The (ideal) transposition process in public international law, and by extension international criminal law, involves the following steps: identification of the legal rule in the domestic system, abstraction of the legal principle on which the rule is based, and then transposition to the international plane taking into account the specificities of the international legal order.[152] Comparative law theory brings into question the very possibility of such transpositions, variously referred to as transplants, transfers, and receptions.[153]

The classic debate on this issue revolves around a series of exchanges between Alan Watson and Pierre Legrand.[154] Watson views legal rules as propositional statements that can be borrowed and transported from one legal system to another; indeed, for Watson, the main source of legal change in the Western world has been the borrowing of legal rules, institutions, and doctrines from other systems.[155] Underlying this descriptive claim is the more radical assertion that there is no necessary functional relationship between law and the

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[151] *See, e.g.*, Furundzija, *supra* note 66, at ¶ 178; Kupreskic, *supra* note 78, at ¶ 677.

[152] Ellis, *supra* note 27, at 954; Olufemi Elias & Chin Lim, *'General Principles of Law', 'Soft' Law and the Identification of International Law*, 28 NETHERLANDS Y.B. INT'L. L. 3, 23-24 (1997); Raimondo, *supra* note 47, at 52.

[153] *See* Gianmaria Ajani, *Transplants, Legal Borrowing and Reception*, *in* ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES (David S. Clark ed., 2007) 1509.

[154] *See* Ellis, *supra* note 27, at 963-64.

[155] *See* Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA.. L. REV. 1121(1983); Michele Graziadei, *The Functionalist Heritage*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 100, 121 (Pierre Legrand and Roderick Munday eds., 2003)., P. G. Monateri, *"Everybody's Talking": The Future of Comparative Law*, 21 HASTINGS INT'L. & COMP. L. REV. 839 (1998).

society in which it operates.[156] Rather, law exhibits an autonomous life and logic of its own, due to the central role of the legal profession in its evolution and operation.[157] The culture of the legal elite, with its adherence to and respect for tradition and authority, accounts for the development of the law through borrowing from other systems.[158] A highly developed legal system can thus serve as a source or inspiration for another system, even if the latter operates in very different societal conditions.[159] It is simply easier and more efficient for the legal elite to borrow from a more mature and accessible legal system as a model instead of fashioning entirely new legal rules.[160]

In this borrowing exercise, considerations of the appropriateness of the borrowed rule are not always paramount. Other factors such as the general prestige of the donor legal system, national pride, accessibility, and sheer chance also play a role.[161] Watson is also not particularly concerned about systematic knowledge of the socio-economic context of the donor system for the purposes of transplantation. The 'idea' of the law can still be successfully transplanted,[162] even if the borrowing state is ignorant of this wider cultural background.[163]

This thesis is disputed vigorously by Legrand who dismisses the very idea of transplants.[164] Legrand understands rules to be "incorporative cultural forms"[165] which have a determinate content only within the meaning established

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156 Graziadei, *supra* note 155, at 121; Monateri, *supra* note 155, at 839-40; Annelise Riles, *Comparative Law and Socio-Legal Studies*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann and Reinhard Zimmermann eds., 2006) 775, 795.

157 Edward M. Wise, *The Transplant of Legal Patterns*, 38 AM. J. COMP. L. 1, 2-3 (1990).

158 Wise, *supra* note 157, at 3-5; *see also* Graziadei, *supra* note 155, at 121; Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 16 (1998).

159 Alan Watson, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95-96 (1974); Alan Watson, THE NATURE OF LAW 110-12 (1977); Wise, *supra* note 157, at 5-6.

160 Alan Watson, *Aspects of Reception*, 44 AM. J. COMP. L. 335 (1996).

161 *See,* Watson, *Legal Change*, *supra* note 155, at 1146-47; Watson, *Aspects of Reception*, *supra* note 160, at 339-40; Wise, *supra* note 157, at 6.

162 *See*, Harding, *supra* note 126, at 45.

163 Watson, LEGAL TRANSPLANTS, *supra* note 159, at 79; Esin Örücü, *Law as Transposition,* 51 INT'L. & COMP. L Q. 205, 219 (2002).

164 Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMP L. 111, 116-118 (1997); David Nelken, *Comparatists and Transferability*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS, *supra* note 155, at 437, 441.

165 Legrand, *supra* note 150, at 57.

by the languages and cultures that they inhabit.[166] Thus, any attempt to transfer a legal rule is futile; all that is being transplanted is a "meaningless form of words".[167]

Legrand's account is a useful reminder of the embedded nature of legal rules, and a cautionary tale against surface comparisons of textually similar rules which can give rise to misleading conclusions.[168] He has, however, been criticized for overstating his case. For instance, his insistence that rules will not survive translation into another language and culture implicitly assumes the unity and insularity of both. Cultures, pace Legrand, are not uniquely distinct whole entities; they are fragmented, constantly evolving and open-textured, and themselves constituted by borrowings.[169]

No matter which position one takes in the Watson/Legrand debate, the discussion surrounding transplants challenges the premise of Schachter's first category of general principles. If the legal principle that is abstracted from domestic legal rules truly does not survive its transposition to the international sphere (even Watson claims that it is the "idea" of the law that is transplanted), but evolves, adapts, irritates, and transforms, then this calls into question the legitimacy of municipal principles as proxies for state-consent, as fulfilling the the requirements of fairness and notice, and as accurate laboratories for testing the import of the legal rule.

The above analysis shows that international criminal law tribunals and commentators ignore the insights of comparative law methodology at their peril. In contrast with traditional public international law, general principles are widely expected to play a pivotal role in the development of international criminal law, but the method for their derivation remains opaque. International criminal law scholarship has uncritically endorsed Schachter's first conception of general principles, recommending only that the universe of legal systems be expanded to prevent a neo-colonialist imposition of the domestic laws of predominantly Western nations unto other countries through the agency of international criminal legal rules.

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166 Legrand, *supra* note 150, at 56-61; Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 156, at 441, 467; Riles, *supra* note 156, at 797.

167 Legrand, *Impossibility*, *supra* note 164, at 120; Graziadei, *supra* note 166, at 470.

168 Nelken, *supra* note 164, at 441.

169 Riles *supra* note 156, at 798-99; Graziadei, *supra* note 166, at 468-70; Teubner, *supra* note 158, at 14-15.

The critique of the concept of legal families in comparative law methodology brings into question the legitimacy of "representative" legal systems that ostensibly belong to different families, and that may appropriately be taken as reflecting the majority of the world's municipal criminal law systems. Even if this objection is brushed aside as a pragmatic compromise given the time and resource challenges facing international criminal courts, the worry about isolated legal rules that paint a misleading picture of the principle underlying the domestic legal rule still remains. Any consensus achieved by isolating the rule and ignoring its relationship to other parts of the legal systems and how it operates in practice is likely to be illusory and open to criticism. Finally, it remains controversial whether the domestic criminal law rule can truly be transplanted to the international legal regime without at least undergoing a transformation in its function and identity, which casts the material validity of the general principle generated thereby – whether that is based on consent, notice, or experience – in doubt.

If recourse to a comparative analysis of the municipal laws of the world's legal systems is insufficient to generate formally and materially valid general principles for international criminal law, are international criminal tribunals better served by relying on some of the other categories of general principles outlined by Schachter?

V. Alternative Conceptions of General Principles

Municipal legal systems play a subsidiary role in Schachter's second, fourth, and fifth categories of general principles. If international criminal tribunals adopt the second conception, the material validity of the general principles will be premised on the unique features of the international criminal law regime, while the formal validity may be gleaned from domestic as well as international sources. The fourth and fifth conceptions require the judges to assert principles that can be justified based on the universal nature of man as a rational being (material validity), which should thus be found in every legal system (formal validity). This is a deceptively simple solution, which also faces significant challenges from the requirement of legality.

The principle of legality has always been a thorny issue for international criminal law; the difficulty of reconciling legality with a legitimate and effective international criminal law regime has pervaded the work of international criminal tribunals ever since Nuremberg. The standard version of the legality principle, which has now been embraced by the Rome Statute of the ICC, counsels that if there is a gap in the law, the law's silence should be interpreted to favor the accused. However, it is argued that legality does not require that the law must be necessarily written or codified; indeed, the element of *lex scripta* has never been

properly recognized as fundamental to the common law version of *nullum crimen* in any case.[170] In the international criminal law context, international instruments such as the International Covenant on Civil and Political Rights (ICCPR)[171] and the European Convention on Human Rights (ECHR)[172] provide for recognition of non-written international law sources such as the "general principles of law" as valid bases for the imposition of criminal sanctions.[173]

Even if one dispenses with the formal requirement of written law, since the primary aim of the legality principle is to provide notice to the accused and prevent arbitrary exercise of power by authorities, the general principles of law will be a legitimate (additional) legal source only if they meet these demands. Scholars argue that if these general principles are based on widely accepted domestic rules, especially the criminal laws of the States that would normally exercise jurisdiction over the case, then it is possible to claim that the accused had adequate notice of the wrongfulness of his conduct.[174] This is a harder case to support if the general principles are merely asserted by judges, based on their own notions of the unique characteristics of international criminal law, or on ostensibly universal natural law-like principles, without any citation to formal legal sources.

One possible response to this objection is a normative argument based on the nature of legality as a principle of justice.[175] In this sense, legality is not an

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170 Haveman, *supra* note 14, at 41, 53; *see also* Darryl Robinson, *A Cosmopolitan Liberal Account of International Criminal Law*, 26 LEIDEN J. INT'L. L. 127, 148-49 (2013) (describing *lex scripta* as a contextually contingent technique rather than an elementary requirement of legality).

171 International Covenant on Civil and Political Rights art. 15, Dec. 19, 1966, 999 U.N.T.S. 171.

172 European Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222.

173 *See also* Susan Lamb, Nullum Crimen, Nulla Poena Sine Lege *in Internatioanl Criminal Law*, *in* I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 733, 749-50 (Antonio Cassese et al. eds., 2002) (discussing the compatibility of customary international law as a source of international criminal law with the principle of legality).

174 Yuval Shany, *Seeking Domestic Help: The Role of Domestic Criminal Law in Legitimizing the Work of International Criminal Tribunals*, 11 J. Int'l Crim. Just. 5, 10, 13-14 (2013); H.G. Van der Wilt, *A Small but Neat Utensil in the Toolbox of International Criminal Tribunals*, 10 INT'L. CRIM. L. REV. 209, 238 (2010). Prosecutor v. Milutinovic, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise* ¶¶ 40-41 (Int'l Crim. Trib. Former Yugoslavia May 21 2003) (stating that tribunal may have recourse to domestic law, in particular the law of the country of the accused, to establish that he had notice that his conduct was punishable).

175 A more extreme view is that legality is not even a principle of justice, but only a rule of policy designed to protect the citizens against arbitrary legislature and judges. This rule is not necessarily applicable at the international level and may be disregarded if circumstances dictate

absolute requirement which trumps all other considerations of substantive justice but must be balanced against them.[176] If the reason for an insistence on the *nullum crimen* maxim is to provide the accused with adequate notice of the wrongfulness of his conduct, this condition is more than satisfied in the case of international criminal law even if the offense is not strictly defined or codified beforehand, for an accused who commits the kinds of heinous acts which international criminal tribunals adjudicate cannot possibly have been unaware of their wrongful nature.[177] The notice requirement is in any case a fiction since even in domestic criminal law systems, ignorance of the law is generally not excused and the accused is presumed to be aware of the law by virtue of the fact of its official publication, though he may in fact have no knowledge of it.[178] Arguably, a more logical conceptualization of the "notice" standard even in the context of domestic criminal law would require only that citizens are aware of what kinds of acts are regarded by their political community as sufficiently intruding on the interests of others so as to warrant punishment.[179] If law-making, including by the courts, merely results in the criminalization of conduct that conscientious members of the community would (at the time of commission) have regarded as deserving of punishment, then it does not violate the legality principle.[180]

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otherwise. *United States v. Araki et al.,* Separate Opinion of Judge Röling, *in* 21 THE TOKYO MAJOR WAR CRIMES TRIAL 44-45A (R. John Pritchard & Sonia Magbanua Zaide eds., 1981). *See also*

[176] *See, e.g.,* Judgment, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 November 1945-1 October 1946, at 462 (1948) (note however, that the French text of the judgment does not speak of legality as a "principle of justice", but merely states that it is a rule which does not limit State sovereignty. Guido Acquaviva, *At the Origins of Crimes Against Humanity: Clues to a Proper Understanding of the* Nullum Crimen *Principle in the Nuremberg Judgment*, 9 J. INT'L. CRIM. JUST. 881, 890 (2011); L.C. Green, *The Maxim* Nullum Crimen Sine Lege *and the Eichmann Trial*, 28 BRIT. Y.B. INT'L. L. 457, 461 (1962); van Schaack, *supra* note 15, at 140-41.

[177] Nuremberg Judgment, *supra* note 176, at 462; Luban, *supra* note 15, at 584-85; van Schaack, *supra* note 15, at 156. *See also* Milutinovic, *supra* note 174, ¶ 42 (stating that the atrocious character of the acts may refute the claim that the accused was unaware of its criminality). As Robert Cryer notes, however, there is still some reluctance by tribunals to endorse a completely natural reason or morality justification for circumventing the strictures of the *nullum crimen* maxim, and even the Nuremberg judgment ultimately sought to bolster its decision by arguing in positivist terms through an unconvincing interpretation of international legal instruments as creating criminal liability. Cryer, *The Philosophy of International Criminal Law*, *in* RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW 232, 241-42 (Alexander Orakhelashvili ed., 2011).

[178] Luban, *supra* note 15, at 585; Jeffries, *supra* note 15, at 207-08.

[179] Peter K. Westen, *Two Rules of Legality in Criminal Law*, 26 LAW & PHIL. 229, 264 (2007).

[180] Westen, *supra* note 179, at 269, 272-74.

Though the argument from substantive justice is intuitively appealing, there are considerable problems in its application. It does not give much guidance as to what conduct or prohibition rightfully falls within its domain such that it warrants a displacement of the legality principle.[181] Neither is it obvious that the accused must be deemed to have notice that the kinds of acts which international law criminalizes could not but be wrongful. As the differences in the Opinions in *Erdemovic* demonstrate, it is far from clear what general principle on duress could be derived from the specific features of international criminal law, or from natural justice. While the majority Opinion considers duress to be unavailable in the case of murder due to the objectives of international criminal law and humanitarian law, Judge Stephen thinks it should apply as a matter of simple justice. It is thus difficult to argue that Erdemovic would have had sufficient notice as to the availability of the defense of duress because there were obvious general principles governing its application either based on the rational nature of man (can the law truly expect an individual in the terrible position in which Erdemovic was placed to have behaved otherwise) or on the specific characteristics of international criminal law.

VI. CONCLUSION

Problematizing the various conceptions of general principles that have been endorsed by scholars and applied by international criminal tribunals reveals serious concerns as to their legitimacy as a source of international criminal law. Since general principles were invoked only infrequently by international courts such as the PCIJ and the ICJ and never used as the sole legal source for an international decision, the indeterminacy surrounding their content, application, and hierarchy in the sources of law did not influence greatly the integrity of international legal proceedings. Their increasing relevance for the evolution of international criminal law poses a more complicated picture: as decisions such as *Erdemovic, Furundzija*, and *Kupreskic* demonstrate, general principles are being pressed into service where there are gaps in the definition and scope of offenses and defenses and in legal principles governing trial procedures and sentencing. Legal rules derived from the general principles can thus make a crucial difference in the substantive and procedural law applied by the tribunals, and to the acquittal or conviction of the accused. If there is no coherent methodology to sustain the reliance on municipal laws from which to derive general principles, and alternative conceptions of general principles fail to meet the challenges

[181] Robinson, *supra* note 170, at 148-49.

posed by the principle of legality, what must an international judge faced with the law's silence do?

One solution is to adopt Stone's skeptical stance towards the validity and application of general principles: the international judge is not, and should not be, a legislator. Thus, if a gap in the law exists, that is, if nothing in the text of the Statute or in conventional or customary international law is available as a means to resolution, it is better to not give the judge unbridled discretion to fill this lacuna. Instead, the law's silence should be interpreted in favor of the accused.[182] Any significant gaps in the law are better filled through gradual state practice, or even through amendments to the text of a treaty such as the Rome Statute.

This solution does not sit too well though with the self-image of international criminal justice. The hybrid identity of international criminal law embodies within itself contradictions and distortions that result from a mix of principles of criminal law one the one hand and assumptions stemming from human rights and humanitarian law on the other.[183] International criminal law is self-consciously victim-centric, in that victim protection is seen as a central, and even dominant, aim of the enterprise.[184] If we harken back to decisions like *Erdemovic* and *Furundzija*, as a matter of interpretation, an avowedly victim-protective regime is unlikely to allow an unrestricted defense of duress or hold that grave violations of sexual autonomy are not encompassed within the definition of rape.

The way out of this dilemma then is to recognize that judicial law-making that relies on general principles to fill in gaps is inescapable at this stage of international criminal justice. While the principles of legality and state consent perform vital legitimating functions in international criminal law, the effectiveness of international criminal tribunals (in attaining the object of ending impunity) is an equally important goal which must be weighed against these legitimacy concerns.[185] Given the embryonic nature of international criminal

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[182] Rome Statute, *supra* note 13, art. 22(2); Prosecutor v. Tadic, Case No. IT-94-I-A, Judgment, ¶ 662 (Int'l. Crim. Trib. Former Yugoslavia July 15, 1999); Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment, ¶ 114 (Int'l. Crim. Trib. Former Yugoslavia July 29, 2004); Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment ¶¶ 415-18 (Int'l. Crim. Trib. Former Yugoslavia Nov. 16, 1998).

[183] Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L. L. 925, 927-29 (2008).

[184] Robinson, *supra* note 183, at 935-38.

[185] Salvatore Zappalà, *Judicial Activism v. Judicial Restraint in International Criminal Justice*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 216, 217 (Antonio Cassese ed., 2009)

justice and the relatively incomplete and vague drafting of international criminal law treaties, judges have no choice but to exercise creative interpretation to fill these lacunae.[186] Indeed, some scholars suggest that in consenting to a legal order which includes the validity of general principles as a source of law, States have implicitly indicted their willingness to abide by a regime where there is significant gap-filling by judges.[187] This interpretation of their acquiescence is bolstered by the deliberate preference for a creatively ambiguous treaty text, in particular for controversial legal issues over which it was difficult to achieve consensus during the drafting process.[188] Some commentators view this as a temporary state of affairs, and prophesize that as the international criminal legal regime matures, international criminal rules will increasingly be codified and leave little scope for judicial creativity.[189] Others regard this as a less desirable development, and argue that in the circumstances in which international tribunals operate,[190] involving matters of extreme legal complexity, factual circumstances that would invariably pose ever-new legal conundrums, and with the aim of providing justice to victims (instead of securing the rights of defendants against arbitrary State power), judicial lawmaking will be necessary to secure their effectiveness.[191]

Once the necessity of general principles as a source of international criminal law – at least in this early phase – is acknowledged, the question then becomes how best their formal and material validity should be secured so as to maintain the legitimacy of international criminal justice. International courts must, at the very least, be able to deduce general principles of law that have the

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[186] Zappalà, *supra* note 185, at 217. The Special Tribunal for Lebanon has expressly recognized the impermissibility of a *non liquet* in international criminal law. Ayyash et al., Case No. STL-11-01/I, Interlocutory Decision of the Applicable law: Terrorism. Conspiracy. Homicide, Perpetration, Cumulative Charging ¶23 (Special Trib. Lebanon Feb. 16 2011).

[187] *See* Andreas Paulus, *International Adjudication*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 207, 222 (Samantha Besson and John Tasioulas eds., 2010).

[188] See, e.g., Michael Scharf, The Amnesty Exception to the Jurisdiction of the International Criminal Court, 32 CORNEL INT'L. L. J. 507, 521-22 (1999).

[189] *See, e.g.*, Héctor Olsáolo, *A Note on the Evolution of the Principle of Legality in International Criminal Law*, 18 CRIM. L. FORUM 301, 318 (2007); van Schaack, *supra* note 15, at 191.

[190] In other areas of public international law, scholars have argued that judicial lawmaking through the vehicle of customary international law is appropriate, and even desirable, in situations when conflicting State interests fail to achieve efficient outcomes and the tribunal is the only institution that can act to promote efficient norms. Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, *in*, THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL CO-OPERATION: THEORETICAL PERSPECTIVES 85, 86-87 (Eyal Benvenisti and Mosche Hirsch eds., 2004).

[191] Zappalà, *supra* note 185, at 221-22.

"potential for explanatory clarity",[192] that is, they should be fashioned in terms that can be explained to and comprehended by the accused and the larger international criminal law community.

The critique of various conceptions of general principles in this paper suggests that tribunals should be extremely cautious in importing municipal legal principles which are based on cursory surveys of a few ostensibly representative systems into international criminal law. These surface comparisons of isolated legal rules, without any attempt to broaden the range of legal jurisdictions and instruments under consideration, and with no enquiry into the underlying legal rationale, serve to establish neither the formal, nor the material validity of the general principle in question. Thus, even if a fragile consensus is achieved by examining these limited legal rules, it should not qualify as a "general principle of law". Instead, tribunals should pay far greater attention to clarifying the basis for material validity: what are the specific features of international criminal law which reveal an underlying general principle, and/or why may a certain principle be categorized as intrinsic to the nature of man or to the idea of justice. In this enterprise, they should be able to draw upon different formal sources of laws, including municipal legal systems where they are appropriate and helpful, and which might embody these principles. However, municipal principles, per se, will no longer be considered to signal state consent or satisfy the requirements of notice.

This focus on renewed attention to material validity when deriving general principles also means that the judge, who is thus called upon to "optimiz[e]… the rationality of the system"[193] will always be constrained by the obligation to give reasons for his decisions, which places some limits on arbitrary decision-making.[194] Moreover, this reasoned decision will then be open to the scrutiny of the stakeholders[195] in the international law community, including lawyers, defendants, victims, civil society representatives, and scholars. Given the close attention that pronouncements of international criminal courts typically invite, in particular on controversial questions, it is unlikely that judges will be able to renounce attempts at transparent and reasoned deliberation that yield applicable general principles. The practical working of the international criminal law regime will also serve as a check on judicial discretion. Since international criminal tribunals lack any police or enforcement powers and depend on States to secure funding, they function with the awareness that decisions which lack

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[192] Jeremy Horder, *Criminal Law and Legal Positivism*, 8 LEGAL THEORY 221, 236 (2002).

[193] Paulus, *supra* note 187, at 214.

[194] Jeffries, *supra* note 15, at 214-15.

[195] Jeffries, *supra* note 15, at 214-15.

legitimacy would place considerable strain on much needed State co-operation and support.[196]

Nonetheless, given the tensions with the principle of legality and the concerns with wide-ranging judicial discretion, general principles of law should play a minimal role in the international criminal law regime, and be considered subsidiary to other sources of international criminal law, namely treaty law and customary international law. In particular, international criminal law has severely neglected the area of treaty construction and interpretation and its potential to address the problems of legal gaps. Little effort has been expended in analyzing whether international criminal law treaties may profitably be construed using rules of interpretation which depart from traditional public international law principles of interpretation and that are closer to statutory construction of domestic criminal legislation. Principles of statutory interpretation in municipal systems that place a high premium on the doctrine of legality may prove especially useful in devising a more robust role for treaties in dealing with lacunae in the system of international criminal law.

[196] See Cryer, *supra* note 177, at 256.