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# COMPARATIVE INTERNATIONAL LAW AT THE ICTY: THE GENERAL PRINCIPLES EXPERIMENT

By *Neha Jain\**

## I. INTRODUCTION

For a significant period of time, the comparativist and the international lawyer were considered to inhabit different worlds: the former scrutinized similarities and differences between domestic legal systems while the latter focused on the universal realm of international law that overlays these systems. This comfortably segregated image has been conclusively shattered by numerous studies demonstrating the multiple areas of interaction between international and comparative law.<sup>1</sup> Of these, one of the ripest areas for further reflection is the “general principles of law” as a source of international law. Puzzlingly, given the traditional domestic law origins of the general principles of law, comparative law and methodology have rarely featured in the scholarship and jurisprudence on the general principles.<sup>2</sup> Thus, the attempt of the International Criminal Tribunal for the Former Yugoslavia (ICTY) to use the general principles as a freestanding source of international criminal law provides a particularly intriguing opportunity to study the interaction between international and comparative law.

International criminal tribunals, in particular the ICTY, have relied heavily on the concept of general principles of law in a number of cases dealing with procedural and substantive legal questions.<sup>3</sup> However, as this article will demonstrate, the ICTY has paid little heed to the promises and pitfalls of comparative law in its methodology for the derivation of general principles. At times, the Tribunal has adopted a natural law-oriented conception of general principles; on other occasions, it has relied on municipal legal systems to arrive at general principles, though with scarce mention of the appropriate methodology for conducting surveys and comparisons of domestic laws.<sup>4</sup>

Proper attention to comparative law is essential for tribunals and scholars to recognize the methodological problems of relying on surveys of municipal legal precepts to derive general

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<sup>1</sup> See, e.g., Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT'L L. 385 (2011); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57 (2011).

<sup>2</sup> Mathias Forteau, *Comparative International Law Within, Not Against International Law: Lessons from the International Law Commission*, 109 AJIL 498 (2015).

<sup>3</sup> See generally FABIÁN O. RAIMONDO, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS (2008) (providing a comprehensive analysis of the use of general principles by international criminal tribunals, including the ICTY).

<sup>4</sup> Ilias Bantekas, *Reflections on Some Sources and Methods of International Criminal and Humanitarian Law*, 6 INT'L CRIM. L. REV. 121, 126–29 (2006) (outlining some of the confused uses of general principles).

principles. At the same time, given the numerous difficulties this exercise poses, judges should be cautious in relying too heavily on them for gap-filling purposes and cognizant of their subsidiary nature in the hierarchy of the sources of international criminal law.

## II. GENERAL PRINCIPLES IN INTERNATIONAL CRIMINAL LAW

International legal scholarship regarding the nature of the general principles presents an extremely chaotic picture. The general principles are interpreted variously as: principles that are common to all or most domestic legal systems; general tenets that can be found underlying international legal rules; principles that are inherent principles of natural law; and principles that are deduced from legal logic.<sup>5</sup> Notwithstanding this uncertainty as to their characterization, interest in the use and application of the general principles has been revived in the context of the international criminal law regime, where treaty law and customary international law are relatively underdeveloped.<sup>6</sup> While a comprehensive analysis of references by international criminal tribunals to general principles would distract from the focus of this article, prominent ICTY cases wherein the Tribunal relied extensively on general principles<sup>7</sup> reveal two main trends in their application and derivation.

### *The Natural Law or Logic Conception of General Principles*

In some cases, ICTY judges adopt a conception of general principles that is not related to or derived from municipal legal systems. Instead they portray general principles as akin to principles of natural law and logic or as principles inherent in the nature of the international legal system. For instance, in the case of *Prosecutor v. Erdemović*,<sup>8</sup> Judge Stephen referred to the recognition of duress as a defense for all offenses (including murder) as a general principle of law,

<sup>5</sup> See, e.g., M. Cherif Bassiouni, *A Functional 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); Johan G. Lammers, *General Principles of Law Recognized by Civilized Nations*, in *ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER* 53 (Frits Kalshoven et al. eds., 1980) (and references therein); Hermann Mosler, *General Principles of Law*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 511, 512–17 (1995); H. Waldock, *The "Common Law" of the International Community—General Principles of Law*, 106 RECUEIL DES COURS 54, 55–57 (1962).

<sup>6</sup> On the creative use by judges of international law sources to address this problem, see, for example, *JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS* (Shane Darcy & Joseph Powderly eds., 2010) [hereinafter *JUDICIAL CREATIVITY*]; 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 (Lal Chand Vohrah et al. eds., 2003).

<sup>7</sup> See RAIMONDO, *supra* note 3, at 105–08, 117–20, 124–29; 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, 47–49 (Sienho Yee & Wang Tieya eds., 2001); Jaye Ellis, *General Principles and Comparative Law*, 22 EUR. J. INT'L L. 949, 967–70 (2011); André Nollkaemper, *Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY*, in *INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY* 277, 286–89 (Gideon Boas & William A. Schabas eds., 2003).

<sup>8</sup> *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), at <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf>.

not only because of its endorsement in civil law, but also as a matter of “simple justice.”<sup>9</sup> Similarly, in *Prosecutor v. Furundžija*,<sup>10</sup> the ICTY Trial Chamber identified the concept of respect for human dignity as a general principle of international law that is fundamental to international humanitarian law and human rights law and that permeates the corpus of international law as a whole. The Tribunal found that since forcible oral penetration is a severe and degrading attack on human dignity, it is consonant with the principle to classify it as rape.<sup>11</sup> *Prosecutor v. Kupreškić et al.*<sup>12</sup> saw the Trial Chamber addressing the question of the consequences of the Prosecutor’s erroneous legal classification of facts. The Chamber devised a detailed set of rules to guide its decision on the matter,<sup>13</sup> which were based on the “general principles of law consonant with the fundamental features and the basic requirements of international criminal justice.”<sup>14</sup>

These versions of general principles pose considerable problems for the legitimacy of an international criminal law regime that purports to be sensitive to the rights of the accused. International criminal tribunals claim the authority to punish individuals who are alleged to have violated fundamental norms of humanity. This ability to incarcerate individuals in the name of the international community places criminal tribunals in a unique position amongst international courts and immediately implicates the principle of *nullum crimen sine lege* (the principle of legality).<sup>15</sup>

The principle of legality has various aspects, which, depending on the legal system, apply to a greater or lesser degree: 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.<sup>16</sup> The principle is widely regarded as performing three main functions: preventing arbitrary exercise of the government’s punitive power; upholding popular sovereignty by preserving the legislature’s prerogative to define punishable conduct and determine sanctions; and providing the accused with fair notice of the range of permissible conduct.<sup>17</sup> Conceptions of general principles that are seemingly plucked out of thin air based on subjective notions of natural law, justice, or the

<sup>9</sup> *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, ¶ 26 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), at <http://www.icty.org/x/cases/erdemovic/acjug/en/erdasojs971007e.pdf>.

<sup>10</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), at <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

<sup>11</sup> *Id.* ¶ 183.

<sup>12</sup> *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), at <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>. For a useful summary of the Tribunal’s use of general principles, see RAIMONDO, *supra* note 3, at 119–24.

<sup>13</sup> *Kupreškić*, Judgment ¶¶ 740–48. 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 3, at 122–23.

<sup>14</sup> *Kupreškić*, Judgment ¶¶ 728–38.

<sup>15</sup> Rome Statute of the International Criminal Court art. 22, *opened for signature* July 17, 1998, 2187 UNTS 90.

<sup>16</sup> Roelof Haveman, *The Principle of Legality*, in SUPRANATIONAL CRIMINAL LAW: A SYSTEM *SUI GENERIS* 39, 40 (Roelof Haveman et al. eds., 2003); Aly Mokhtar, *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, 26 STATUTE L. REV. 41, 47–51 (2005); *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).

<sup>17</sup> John Calvin Jeffries, Jr., *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 & John Tasioulas eds., 2010); Beth van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121–22 (2008).

nature of the international legal regime are difficult to reconcile with the demands of the legality principle that requires notice to the accused as a guarantee against the arbitrary exercise of judicial discretion.

### *General Principles Derived from Municipal Legal Systems*

The legality problem may not be equally acute in the alternate strand of ICTY jurisprudence, which derives general principles based on comparative surveys of domestic legal systems. Often the same judgment features this competing notion of general principles, either applied by the court as a whole or by different judges, leading to dramatically different consequences for the accused. For instance, in *Erdemović*, Judges McDonald and Vohrah considered whether duress could be a defense to murder as a “general principle of law” by conducting a comparative survey of jurisdictions that were practically accessible to the court with a view to deducing general tenets underlying the concrete rules of those jurisdictions.<sup>18</sup> The judges undertook a “limited survey of . . . the world’s legal systems,” including civil law systems (Belgium, Chile, Italy, Finland, France, Germany, Mexico, Netherlands, Nicaragua, Norway, Panama, Spain, Sweden, Venezuela, and the former Yugoslavia), common law systems (Australia, Canada, England, India, Malaysia, Nigeria, South Africa, and the United States), and the criminal law of “other states” (China, Ethiopia, Japan, Morocco, and Somalia). This survey revealed no consistent rule and the variances in the legal systems could be neither reconciled nor explained as differences between the common law and civil law systems.<sup>19</sup>

The *Furundžija* Trial Chamber also turned to principles of criminal law common to the majority of the world’s legal systems to define rape,<sup>20</sup> only to conclude that there was no consensus on whether forced oral penetration is classified as rape or as sexual assault. Indeed, the ICTY has rarely managed to find commonality when it conducts even limited surveys of national laws to derive general principles. In *Šainović*, the ICTY Appeals Chamber referred to a relatively large number of municipal legislation and case law,<sup>21</sup> but failed to find evidence of any general principle requiring the element of “specific direction” for aiding and abetting liability.<sup>22</sup> Similarly, in *Delić*, the Appeals Chamber looked at the laws of a number of common law and civil law countries and found no consistency in the approach taken to the issue of the finality of the trial judgment in the event of a termination of proceedings pursuant to the appellant’s demise.<sup>23</sup>

<sup>18</sup> Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 57–58 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), at <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>.

<sup>19</sup> *Id.* ¶¶ 59–72.

<sup>20</sup> Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 177–82 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), at <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

<sup>21</sup> Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment, ¶¶ 1644–45 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014), at <http://www.icty.org/x/cases/milutinovic/acjug/en/140123.pdf> (citing national legislation and/or case law of Algeria, Australia, Belgium, Bulgaria, Burundi, Canada, China, Cambodia, the Democratic Republic of Congo, England, France, Germany, Ghana, Hong Kong, India, Indonesia, Iran, Israel, Japan, Laos, Luxembourg, Madagascar, Malaysia, Mali, Mauritania, Mexico, Morocco, New Zealand, Senegal, Singapore, South Africa, Tunisia, the United States, and Vietnam).

<sup>22</sup> *Id.* ¶¶ 1643–44.

<sup>23</sup> Prosecutor v. Delić, Case No. IT-04-83-A, Decision on the Outcome of the Proceedings, ¶¶ 11–13 (Int’l Crim. Trib. for the Former Yugoslavia June 29, 2010), at <http://www.icty.org/x/cases/delic/acdec/en/>

There are isolated instances where the court or individual judges have unearthed a general principle based on municipal law surveys. In the *Kupreškić* case, the Trial Chamber relied on general principles of criminal law common to the world's major legal systems to distinguish four principles that applied to the cumulation of charges: the reciprocal speciality test (Blockburger); the principle of speciality; the principle of consumption; and the principle of protected values.<sup>24</sup> Likewise, in *Limaj*, Judge Shahabuddeen declared *in dubio pro reo* as a "general principle of criminal law."<sup>25</sup> However, in these cases, the Tribunal's analysis of domestic legislation or case law was extremely sparse, with citations to the surface rules of only a handful of jurisdictions.<sup>26</sup>

On the face of it, the municipal-origins conception of general principles appears to better meet the requirements of a source of international criminal law when compared to its natural-law-or-logic counterpart. The accused is expected to be conversant with the rules governing his conduct at the domestic level and a general principle that takes municipal rules and concepts into account is arguably fairer and more predictable. Another reason for looking to municipal laws for general principles is the value of adopting laws that already have been tested at the domestic level. Using this approach, judges 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, an analysis of ICTY cases reveals that the methodology adopted by the Tribunal for deriving general principles from municipal precepts is often opaque and shows little understanding of similar methodological challenges that comparative law regularly confronts.

### III. COMPARATIVE LAW AND GENERAL PRINCIPLES

#### *The Problem with "Legal Families"*

The first challenge that tribunals face when conducting a comparative analysis of legal systems is the issue of selection. Given their time, resource, language, and knowledge constraints, it would be impossible for them to conduct a comprehensive analysis of every domestic criminal law system. The courts may then adopt the majority's stance in *Erdemović* and deduce general principles from systems that are "practically accessible" to the judges. This technique, which is familiar to social scientists conducting qualitative research, is called "convenience sampling" and gives rise to immediate concerns about rigor and cherry-picking.<sup>27</sup>

100629\_1.pdf (citing national legislation and/or case law of Azerbaijan, Sweden, Austria, France, Germany, Canada, the United Kingdom, New Zealand, Australia, and the United States).

<sup>24</sup> Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgment, ¶¶ 677–95 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), at <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

<sup>25</sup> Prosecutor v. Limaj et al., Case No. IT-03-66-A, Judgment, Declaration of Judge Shahabuddeen, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007), at <http://www.icty.org/x/cases/limaj/acjug/en/Lima-Jug-070927.pdf>.

<sup>26</sup> See *id.* (citing a few scholars and English and U.S. law).

<sup>27</sup> See Katerina Linos, *How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics*, 109 AJIL 475 (2015).

Judges alternately could carry out “random sampling,” choosing at random domestic legal systems such that each municipal system has an equal probability of being considered.<sup>28</sup> Though this method might avoid some of the cherry-picking concerns, it is likely to be prone to other biases, such as a preference for systems that have better or more readily accessible data, or unrepresentativeness, if one opts for a narrow range of systems.<sup>29</sup> Indeed, as the experience of the international criminal tribunals demonstrates, ostensibly random sampling poses a real danger that the domestic systems referred to would be heavily biased towards a few civil law and common law countries.<sup>30</sup>

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” in the analysis, notably those that follow Islamic law and legal frameworks applicable in Asian and African countries.<sup>31</sup> This method follows a “theoretically informed sampling” model that identifies important elements and characteristics that have an influence on the object of study and then chooses countries that embody diversity in these traits for comparison.<sup>32</sup>

However, comparative law literature on the concept of legal families<sup>33</sup> and its cognates seems to hold little promise for identifying specific legal rules (which are then considered general principles) of criminal law. International criminal courts and scholars appear to take for granted the validity of what have undoubtedly proved to be the two most influential groupings of legal families.<sup>34</sup> René David proposed the first grouping, which distinguishes 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, including Muslim law, Hindu law, the law of Far Eastern countries, and the law of Africa and Madagascar.<sup>35</sup> The second, proposed by Zweigert and Kötz, identifies eight legal families based on legal or juristic styles of legal systems and the history, mode of thought, institutions, sources,

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 479.

<sup>30</sup> See Bantekas, *supra* note 4, at 129; Michael Bohlander & Mark Findlay, *The Use of Domestic Sources as a Basis for International Criminal Law Principles*, in 1 THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW & JURISPRUDENCE 3 (Giuliana Ziccardi Capaldo ed., 2002); see also Mireille Delmas-Marty, *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, 1 J. INT'L CRIM. JUST. 13, 18–20 (2003); H. 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 (T. M. C. Asser Instituut ed., 1985) (presenting a similar suggestion in the context of traditional public international law).

<sup>31</sup> See, e.g., ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 32–33 (2003); Bantekas, *supra* note 4, at 129; Vladimír-Djuro Degan, *On the Sources of International Criminal Law*, 4 CHINESE J. INT'L L. 45, 81 (2005).

<sup>32</sup> Linos, *supra* note 27, at 479.

<sup>33</sup> See, e.g., RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS (1992); KONRAD ZWIEGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (1987); Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997); Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (Vernon Valentine Palmer ed., 2001); Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 AM. J. COMP. L. 1043 (2012).

<sup>34</sup> See John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 547 (1995); 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).

<sup>35</sup> DAVID & JAUFFRET-SPINOSI, *supra* note 33; Jaakko Husa, *Legal Families*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 491, 496 (Jan M. Smits ed., 2012); Mattei, *supra* note 33, at 8.

and ideology associated with such systems: Common Law; Far Eastern; Germanic; Hindu Law; Islamic; Nordic; Romanistic; and Socialist.<sup>36</sup>

However, an analysis of the trajectory of the different proposed families demonstrates the extent to which the classifications are contingent,<sup>37</sup> not only on the criteria used for categorization, but also on the area of the law under study. The most influential classifications are Eurocentric 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.<sup>38</sup> The existing classifications are also based primarily on private law and are not necessarily applicable to other areas, such as constitutional law, administrative law, and criminal law.<sup>39</sup> Moreover, the legal families typology is geared towards “macro-comparisons,” the comparison of entire legal systems, rather than “micro-comparisons,” which involve specific legal issues and institutions.<sup>40</sup> 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.

Some comparativists recently have sought to modify the legal families typology.<sup>41</sup> Others even seek to radically revise the traits that are important for classifying legal systems from which representatives might be chosen for comparison. For instance, Mattei divides legal systems according to the source of social behavior that plays a dominant role in the legal system.<sup>42</sup> 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.<sup>43</sup> This typology, however, 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.

The difficulty with applying any sampling model that would enable legal systems to be chosen in a manner that constitutes a legitimate basis for comparison and yields a sufficiently representative result raises serious questions about the municipal-origins conception of general principles.

<sup>36</sup> ZWEIGERT & KÖTZ, *supra* note 33; PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 34, 36 (2d ed. 1999); Pargendler, *supra* note 33, at 1060.

<sup>37</sup> 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).

<sup>38</sup> See Husa, *supra* note 35, at 499; Mattei, *supra* note 33, at 10–11. It is worth noting that, in keeping with the changed geopolitical map of the world, the independent significance of the “socialist” legal family has largely been eroded. See Jaakko Husa, *Classification of Legal Families Today: Is It Time for a Memorial Hymn?*, 56 REVUE INTERNATIONALE DE DROIT COMPARÉ 11, 15–16 (2004).

<sup>39</sup> See Husa, *supra* note 35, at 500; Hein Kötz, *Abschied von der Rechtskreislehre?*, 3 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 493, 494 (1998); Åke Malmström, *The System of Legal Systems: Notes on a Problem of Classification in Comparative Law*, 13 SCANDINAVIAN STUD. L. 127, 139–40 (1969); Esin Örcü, *What is a Mixed Legal System? Exclusion or Expansion*, 12 ELECTRONIC J. COMP. L. 1, 3 (2008).

<sup>40</sup> See Husa, *supra* note 35, at 491. The difference between macrocomparison and microcomparison is now generally recognized in the literature on comparative law methodology. See DE CRUZ, *supra* note 36, at 227.

<sup>41</sup> See, e.g., Palmer, *supra* note 33, at 4, 7–10 (mooting the category of “mixed jurisdictions”).

<sup>42</sup> Mattei, *supra* note 33, at 13–14.

<sup>43</sup> *Id.* at 16.



### *Legal Formants, Traditions, and Cultures*

Even if one were able to select appropriate legal systems, one still would need to understand the municipal legal precepts that could yield a general principle. Looking at the comparative surveys done by the ICTY, one rarely finds 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" comprises different and sometimes conflicting formative elements, including statutes, judicial decisions, scholarly opinion, conclusions and reasons in judicial opinions, declamatory statements that may relate to the law, philosophy, religion, and ideology, all of which must be consulted to arrive at a working rule.<sup>44</sup> Thus, if a judge at an international criminal tribunal relies only on a statutory provision or a rule in a given code, he or she may overlook the other legal formants of the system that could lead to a different result.

Even if tribunals were capable of conducting detailed comparisons, these might still be inadequate for obtaining a complete picture of domestic law. The literature on legal traditions,<sup>45</sup> for instance, is severely critical of the conception of law as a mere set of legal rules contained in books. Instead, a legal tradition is a set of "historically conditioned attitudes" about the nature of law, its role in society, and its formulation, operation, and application.<sup>46</sup> In a similar vein, Legrand, refers to a "legal *mentalité*," or the epistemological foundations of the cognitive structure of a legal culture.<sup>47</sup> Legal rules, in 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 also take into account the historical, social, and cultural context in which the rules are embedded to gain an appreciation of the cognitive structure of the legal culture.<sup>48</sup>

The challenges posed by these different conceptions of the law—legal formants, legal tradition, and legal *mentalité*—lead to the same conclusion: when international criminal tribunals rely on isolated legal rules in various domestic legal systems to identify a consensus that supposedly yields a general principle of law, the result will likely prove to be misleading. The legal rule contained in a single statutory provision or case may look very different when analyzed against the background of other laws in the system, institutional practices, and legal and non-legal culture. Thus, while a single legal rule may be a useful starting point for the identification of commonalities, it cannot be the end of the analysis.

### *Transposition and Legal Transplants*

The final difficulty with relying on municipal law to generate general principles comes from the task of transposition. The (ideal) transposition involves the following steps: identification

<sup>44</sup> Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1, 21–34 (1991); see also Esin Örüçü, *Developing Comparative Law*, in COMPARATIVE LAW: A HANDBOOK 43, 61 (Esin Örüçü & David Nelken eds., 2007).

<sup>45</sup> See, for example, Glenn's influential account of legal traditions as ongoing normative information: H. Patrick Glenn, *A Concept of Legal Tradition*, 34 QUEEN'S L.J. 427 (2008).

<sup>46</sup> Örüçü, *supra* note 44, at 59 (citing JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 2 (2d ed. 1985)); see also Reenen, *supra* note 37, at 73.

<sup>47</sup> Pierre Legrand, *European Legal Systems are Not Converging*, 45 INT'L & COMP. L.Q. 52, 56–61 (1996).

<sup>48</sup> *Id.*

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.<sup>49</sup> An analogue to the transposition process can be found in comparative law debates on transplants, transfers, and receptions.<sup>50</sup>

The classic debate on this issue revolves around a series of exchanges between Alan Watson and Pierre Legrand.<sup>51</sup> Watson views legal rules as propositional statements that can be borrowed and transported from one legal system to another.<sup>52</sup> For Watson, there is no necessary functional relationship between law and the society in which it operates.<sup>53</sup> 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.<sup>54</sup> The “idea” of the law can still be successfully transplanted,<sup>55</sup> even if the borrowing state is ignorant of the wider socioeconomic context of the donor system.<sup>56</sup> This thesis is disputed vigorously by Legrand, who dismisses the very idea of transplants.<sup>57</sup> Legrand understands rules to be “incorporative cultural forms”<sup>58</sup> that have a determinate content only within the meaning established by the languages and cultures that they inhabit.<sup>59</sup> Thus, any attempt to transfer a legal rule is futile; all that is being transplanted is a “meaningless form of words.”<sup>60</sup>

More recently, comparativists have tried to reconcile these positions. Teubner proposes the concept of “legal irritants,” when the borrowed foreign rule is not domesticated, but irritates the domestic legal discourse and the social discourse to which it is attached, thus leading to an evolution in the meaning of the external rule and its internal context.<sup>61</sup> The “IKEA theory of legal transplants” developed by Frankenberg suggests yet another alternative.<sup>62</sup> The domestic legal rule found in a particular socio-legal culture is decontextualized and turned into a marketable commodity in the form of an abstract design or set of information. In this commodified

<sup>49</sup> Ellis, *supra* note 7, at 954; see also RAIMONDO, *supra* note 3, at 45; Olufemi Elias & Chin Lim, “General Principles of Law,” “Soft” Law, and the Identification of International Law, 28 NETH. Y.B. INT’L L. 3, 23–24 (1997).

<sup>50</sup> See Gianmaria Ajani, *Transplants, Legal Borrowing and Reception*, in 3 ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES 1508 (David S. Clark ed., 2007).

<sup>51</sup> See Ellis, *supra* note 7, at 963–64.

<sup>52</sup> See Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121 (1983); see also Michele Graziadei, *The Functionalist Heritage*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 100, 121 (Pierre Legrand & Roderick Munday eds., 2003); P. G. Monateri, “Everybody’s Talking”: *The Future of Comparative Law*, 21 HASTINGS INT’L & COMP. L. REV. 825, 839–40 (1998).

<sup>53</sup> Graziadei, *supra* note 52, at 121; Monateri, *supra* note 52, at 839–40; Annelise Riles, *Comparative Law and Socio-Legal Studies*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 775, 795 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

<sup>54</sup> Edward M. Wise, *The Transplant of Legal Patterns*, 38 AM. J. COMP. L. 1, 3–4 (1990).

<sup>55</sup> See Andrew Harding, *Global Doctrine and Local Knowledge: Law in South East Asia*, 51 INT’L & COMP. L.Q. 35, 45 (2002).

<sup>56</sup> Esin Öricü, *Law as Transposition*, 51 INT’L & COMP. L.Q. 205, 219 (2002).

<sup>57</sup> Pierre Legrand, *The Impossibility of “Legal Transplants”*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 116–18 (1997); see also David Nelken, *Comparatists and Transferability*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS, *supra* note 52, at 437, 441.

<sup>58</sup> Legrand, *supra* note 47, at 57.

<sup>59</sup> Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 53, at 441, 467; Legrand, *supra* note 47, at 56–61; Riles, *supra* note 53, at 797.

<sup>60</sup> Graziadei, *supra* note 59, at 470; Legrand, *supra* note 57, at 120.

<sup>61</sup> Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 12, 28 (1998).

<sup>62</sup> Günter Frankenberg, *Constitutional Transfer: The IKEA Theory Revisited*, 8 INT’L J. CONST. L. 563 (2010).

form, it is transferred as a formal rule to another domestic system, where it is in turn recontextualized.<sup>63</sup> This last stage can yield different results: the rule may be successful, it may produce irritants, or it may be rejected by the domestic system.<sup>64</sup> This observation is consistent with some of the empirical literature on transplants, which shows mixed results on their potential and success.<sup>65</sup>

Though the transplants process is different from the inductive methodology for deriving general principles of international criminal law—in the latter case, the effort is to abstract from specific legal rules and find consensus amongst different municipal systems before adapting this result to the international legal system—it has clear implications for the municipal origins concept of general principles. If the legal principle that is abstracted from domestic legal rules truly does not survive its transposition to the international sphere, but evolves, adapts, irritates, and transforms, then using municipal principles to fulfill the requirements of fairness and notice, as well as regarding them as emerging from laboratories that test the impact of legal rules, seems problematic.

#### IV. GENERAL PRINCIPLES AS A FREESTANDING INTERNATIONAL CRIMINAL LAW SOURCE

The above analysis demonstrates that international criminal law tribunals and commentators urging greater use of general principles as a way to circumvent the lacunae in other sources, such as treaties and customary international law,<sup>66</sup> ignore the insights of comparative law at their peril. The ICTY's experiment with the application of general principles to fill in gaps in the fabric of international criminal law demonstrates a worrying propensity to pick and choose municipal systems for their derivation, with little attention to questions of selection, depth of analysis, and the appropriateness of transposition.

Comparative law methodology has much to offer, both as a critique to this approach towards induction and as a means for reconceptualizing the role of general principles as a source of international criminal law. If judges and courts are truly committed to a municipal-origins conception of general principles, they will have to address issues related to the sampling of legal systems, the situation of an isolated legal rule or standard in its socio-legal context, and the possibility of successful transposition of a municipal legal principle to the international context such that it serves the demands of legality and accurately reflects tried and tested municipal precepts.

The experience of comparative law and the literature on domestic transplants also sounds a cautionary tale about the unexpected and undesirable consequences of borrowing legal rules

<sup>63</sup> Ralf Michaels, "One Size Can Fit All"—Some Heretical Thoughts on the Mass Production of Legal Transplants, in ORDER FROM TRANSFER: COMPARATIVE CONSTITUTIONAL DESIGN AND LEGAL CULTURE 56, 59–60 (Günter Frankenberg ed., 2013).

<sup>64</sup> *Id.* at 60.

<sup>65</sup> Daniel Berkowitz, Katharina Pistor & Jean-François Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 841–42 (2003).

<sup>66</sup> See Mary Fan, *Custom, General Principles and the Great Architect Cassese*, 10 J. INT'L CRIM. JUST. 1063, 1064 (2012); Fabián O. Raimondo, *General Principles of Law, Judicial Creativity, and the Development of International Criminal Law*, in JUDICIAL CREATIVITY, *supra* note 6, at 45, 46; 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 (Association Internationale de Droit Pénal ed., 2004).

and principles. Deriving general principles by uncovering commonalities across domestic legal criminal law systems may result in the adoption of a legal rule that does not represent the most progressive criminal law principles. The prospect of integrating into an international criminal law regime an outdated and even regressive principle is problematic on its own. The recursive nature of international criminal law norms and rules may compound this effect at the domestic level. For example, states that enact implementing legislation to comply with their obligations under the Rome Statute of the International Criminal Court may end up entrenching general principles recognized at the international level into their municipal systems, thus disseminating inapposite international criminal law norms into domestic law.

Comparative law methodology shines much-needed light on the various pitfalls that attend any exercise in extracting principles from surveys of municipal legal systems. These difficulties should, at the very least, make judges and courts wary of an over-reliance on general principles as a free-standing source of international criminal law.

There may yet be another place for considering domestic laws and rules in the refinement of international criminal legal sources. They may serve to guide the interpretation of other international criminal law sources such as treaties, in particular the constitutive instruments of tribunals. Indeed, in contrast to the extensive practice and analysis of treaty interpretation in the context of other specialized regimes such as human rights and trade law,<sup>67</sup> international criminal tribunals are only beginning to properly address questions of treaty interpretation.<sup>68</sup> Human rights courts, for instance, have relied on comparative analysis of national laws and principles (albeit in a more limited way and in a different context) to flesh out the content and scope of treaty provisions.<sup>69</sup> If carried out with proper attention to comparative methodology, similar studies could become a powerful tool for criminal tribunals. They could generate principles and rules that remain moored to the constitutive treaty text.

## V. CONCLUSION

The ICTY's experiment with the induction and generation of general principles suggests that the failure to integrate comparative legal methodology into generating principles for international criminal law has led to unpersuasive, if not illegitimate, solutions. In the few cases where the Tribunal's survey of municipal legal systems has led to the identification of a general principle, the sampling has been extremely limited and cursory. Even where the ICTY has considered a broader range of systems, the problems of selectivity and superficial comparisons have persisted. Somewhat ironically, even this slightly more expansive sampling often has led to a negative finding of no consensus amongst legal systems, rendering the search for general principles futile.

<sup>67</sup> See, e.g., George Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, 15 EUR. J. INT'L L. 279 (2004); Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 VA. J. INT'L L. 103 (2011).

<sup>68</sup> Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment, ¶¶ 43–57 (Mar. 7, 2014), at <http://www.icc-pi.int/iccdocs/doc/doc1963464.pdf> (stating that the court will follow the rules of treaty interpretation endorsed in the Vienna Convention on the Law of Treaties, but unclear on their relationship to the principle of legality).

<sup>69</sup> Letsas, *supra* note 67, at 282–83.

Even if judges at international criminal tribunals were capable of adopting the lessons of comparative law, it is far from clear that municipal surveys will indicate any commonality sufficient to sustain a general principle of law. Thus international criminal tribunals should be wary of putting too much faith into general principles as an independent source of international criminal law.