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Judicial Lawmaking and General Principles of Law in International Criminal Law

Neha Jain
University of Minnesota Law School, njain@umn.edu

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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 misguided. Given that general principles have been used to settle crucial legal issues that affect the rights of the accused, the confusion concerning their application threatens the legitimacy of international criminal justice. This Article critiques the various conceptions of general principles developed by scholars and tribunals based on the criteria of formal and material validity and exposes the problems with their application in light of comparative law and criminal law theory. The Article challenges international criminal tribunals' reliance on surveys of municipal legal rules as the primary tool for the derivation of general principles. It recommends a more limited role for general principles focused on material validity in the development of international criminal law. Additionally, it urges tribunals to engage with other sources, especially treaties, to alleviate the problem of gaps in international criminal law.

INTRODUCTION

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

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1. This scenario is based on the case of *Prosecutor v. Erdemović* decided by the International Criminal Tribunal for the Former Yugoslavia. Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf.

sources of law to address the lacuna.[2] One of the most flexible, but deeply controversial, sources in their arsenal is the notion of "general principles of law."[3] This Article shows how reliance on "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 international criminal courts. 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 and 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.

A coherent account of the general principles of law is vital, as these principles 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 therefore has far-reaching implications for the legitimacy of the enterprise of international criminal justice. International criminal trials' claims of ending impunity and preventing 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 I briefly describes the use of general principles as the traditional gap-filling mechanism in international law. It analyzes the different notions of general principles existing in legal scholarship and judicial opinions through the lens of formal and material validity. Part II scrutinizes the various conceptions of general principles at

2. On creative uses of international law sources by judges, see, e.g., 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).

3. International criminal tribunals have also had recourse to customary international law to elucidate new principles, but some of this reliance has been equally problematic. *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, 463–68 (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. Van damme & 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, 126–29 (2006).

play in the Rome Statute of the International Criminal Court ("ICC") and in the practice of the International Criminal Tribunal for the former Yugoslavia ("ICTY"). The analysis demonstrates the profound confusion in the jurisprudence, with different judges and courts slipping and sliding between different notions of general principles 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 in other instances, they operate as a last resort when comparative analyses of domestic laws of the world's major legal systems yield no common denominator. Parts III and IV demonstrate how these varying approaches to general principles are problematic in the context of international criminal law. Part III adopts a comparative law theory framework to challenge the formal and material validity of general principles derived from canvassing isolated legal rules in a limited number of municipal legal systems. Part IV argues that alternative conceptions of general principles associated with natural law, which may satisfy the criterion of material validity, are rarely explicated in any detail by courts. This leaves them open to the criticism that they are merely a vehicle for judges to assert their own views regarding the norm that is substantively desirable or objectively just for 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 that reveal an underlying general principle, and/or why may international criminal tribunals categorize a certain principle as intrinsic to the nature of man or to the idea of justice? Additionally, the Article recommends greater engagement with other sources of international criminal law, such as treaties, to flesh out ways in which rules of treaty interpretation can help alleviate the problem of gaps in international criminal law.

I. The Problem of Gaps in International Criminal Law

A. General Principles as a Gap-filling Mechanism 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, or simply unavailable to resolve an issue.[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 by scholars. Hans Kelsen, for instance, considers systemic *non liquet* a logical impossibility, since every issue is either settled by a specific legal rule, or 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 fill that gap.[7] For international lawyers such as Hersch Lauterpacht, general principles of law are one of the tools that the international judge is not only permitted, but also obligated, to use to fill in gaps in the fabric of the law to ensure 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 judges with creating law and risking the imposition of artificial or arbitrary solutions, Stone prefers to allow evolving state practice and treaty law to fill the gap gradually.[10] He is also critical of Lauterpacht's suggestion of using general principles of law (which Lauterpacht takes to be based on natural law) on the ground that they do not provide any clear guidance to the judges on what rule is applicable.[11]

B. 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

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 LEGAL ORDER AND JUSTICE 63, 63–84 (Kaiyan H. Kaikobad & Michael Bohlander eds., 2009).

6. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 306 (1952); *see also* Neff, *supra* note 5, at 65. For a critical view of this interpretation and a proposed 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 65; *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 & Philippe Sands eds., 1999).

8. HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 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 anniversaire 196, 205 (1958).

9. *See* LAUTERPACHT, *supra* note 5, at 94; Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 8 EUR. J. INT'L L. 215, 227–28 (1997).

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).

11. *Id.* at 133–35.

field are intertwined inextricably with its criminal law elements.[12] The incomplete and vague drafting of international criminal law statutes and treaties leads to lacunae in significant substantive and procedural matters that demand resolution if the judge is to decide the case. The judges of international criminal tribunals are then placed in a difficult position: international criminal tribunals are relatively new creatures and judges often work on a clean slate, sometimes with little institutional experience or case law to guide them. The judges, much like the broader community of international criminal law practitioners and scholars, also come from very different professional backgrounds and national training in different legal systems. While some judges are seasoned international lawyers, career diplomats, and scholars, they may have little if any experience conducting a criminal trial.[13]

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. International criminal tribunals represent the exercise of coercive power by the international community, where the tribunals claim the authority to try and punish individuals alleged to have violated fundamental norms of humanity. This ability to incarcerate individuals in the name of the international community places international criminal tribunals in a unique position among international courts and immediately implicates the principle of *nullum crimen sine lege*, the principle of legality.[14]

The principle of legality has various aspects that 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.[15] 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

12. On the hybrid identity of international criminal law, see, e.g., 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. *See* Rome Statute of the International Criminal Court art. 36, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (requiring a mix of judges with expertise in criminal law and procedure and in international law); Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 Wash. U. J. L. & Pol'y 87, 94–95 (2001) (commenting on the background of the judges at the ICTY).

14. Rome Statute, *supra* note 13, art. 22.

15. 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).

conduct and determine sanctions; and providing the accused with fair notice of the range of permissible conduct.[16]

These features of international criminal law and practice—the coercive power exercised by tribunals with tangible consequences for the accused; the relatively unsophisticated state of the law; and the comparative inexperience and diversity of international criminal law practitioners—pose unique challenges for the sources of law that international criminal judges may look to for interpretation and gap-filling. Given the underdeveloped character of international criminal law, primary sources of international law such as treaties and customary international law are likely to prove unhelpful for this purpose.[17] Even more so than in other areas of public international law, general principles are therefore expected to play an important role in the development of international criminal legal rules. However, the use of general principles to avoid a *non liquet*, or to aid interpretation, has the potential to cause conflicts with the demands of legality, especially the elements of notice and strict construction of statutes.[18]

The putative character and content of general principles determines the force of this challenge: are general principles sufficiently clear and determinate as a source of law to satisfy the requirements of the legality principle?

C. Conflicting Conceptions of General Principles in Public International Law

International legal scholarship on the nature of the general principles presents an extremely chaotic picture. These principles are interpreted variously as principles common to all or most domestic legal systems, as general tenets underlying international legal rules, as inherent principles of natural law, and as principles deduced from legal logic.[19] Article 38(1)(c) of the

16. 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 & 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).

17. *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).

18. *See* Vladimir-Djuro Degan, *On the Sources of International Criminal Law*, 4 CHINESE J. INT'L L. 45, 50–51 (1989); Jaye Ellis, *General Principles and Comparative Law*, 22 EUR. J. INT'L L. 949, 951 (2011); Fan, *supra* note 17, at 1065.

19. *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); 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); H. Waldock, *The "Common Law" of the International Community—General Principles of Law*, 106 RECUEIL DES COURS 54, 55–57 (1962).

Statute of the International Court of Justice ("ICJ"), which is deemed authoritative on the sources of international law, simply states, "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . the general principles of law recognized by civilized nations."[20]

Oscar Schachter has developed one of the more comprehensive accounts of the various possible meanings of the term general principles. Schachter identifies five types of principles invoked in international law[21]:

1) Principles of municipal law that are recognized by civilized nations;[22]

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;[23]

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;[24]

4) Universalist principles that are "valid through all kinds of human societies" and that echo the idea of natural law, such as the principles of human rights;[25] and

5) Principles of justice that are premised on the rational and social nature of human beings and that include principles of natural justice outlined in human rights instruments and the concept of equity.[26]

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 be meaningfully re-characterized in terms of responses to two of the most fundamental questions in determining sources of law: from where does the legal precept originate and where might it be located (formal validity), and what lends this precept legitimacy and authoritativeness (material validity)?[27]

D. The Basis for the Validity and Authoritativeness of General Principles

The debate regarding the true nature and authority of general principles becomes clearer once viewed through the lens of formal and material validity. On one end of the spectrum is Schachter's first category of general principles: general principles are tenets that can be found in the majority of

20. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.
21. Oscar Schachter, International Law in Theory and Practice 50 (1991).
22. *Id.* at 50–53.
23. *Id.* at 53.
24. *Id.* at 53–54.
25. *Id.* at 54–55.
26. *Id.*
27. I borrow this framing of the sources question from Hugh Thirlway, who uses the concepts of material and formal validity somewhat differently. *See* Hugh Thirlway, The Sources of International Law 3–5 (2014).

municipal legal systems (formal validity).[28] Furthermore, the fact that most, if not all, legal systems adhere to them provides a basis for applying them in the international sphere. The rationale for accepting general principles as a source of law arises from the notion that international law is based on the consent of states, so their presence in most municipal legal systems serves as a proxy for state consent (material validity).[29]

This municipal law conception of general principles either does not address, or addresses only in vague terms, the question 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 principles applicable to the case,[30] or even to avoid the suggestion of bias or arbitrariness on the part of an international tribunal.[31] However, scholars 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.[32]

The municipal law conception of general principles can be distinguished from Schachter's third category of principles that are basic to all legal systems since they are inherent to the idea of law. Schachter includes rules of legal reasoning and logical maxims, such as the rule of *lex specialis* in this category.[33] In this third conception, municipal laws still constitute the source of formal validity, but 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 natural law-associated fourth and fifth conceptions 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 authority 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, (though the source of formal validity is unclear) and in human rights instru-

28. *See* Lammers, *supra* note 19, 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).

29. *See* Ellis, *supra* note 18, at 953, 955; *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 (James Crawford & Sarah Nouwen eds., 2012).

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

31. 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).

32. 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 19, at 519; Akehurst, *supra* note 31, at 816.

33. SCHACHTER, *supra* note 21, at 54.

ments (which suggests 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[34] that are normative principles "grounded in the universality of the human condition."[35] Such postulates have inherent validity and must form part of any legal system.[36] 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 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.[37] 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.'"[38]

Schachter's second category of general principles that stem from the specific characteristics of the international community is the only conception where municipal laws appear to play little to no role. The material validity is based on features of the international rather than the domestic community. Although the formal source of validity is unspecified, it is unlikely to consist of municipal laws that will be geared toward specific domestic issues.

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 akin to natural law. However, the text was expressly amended to clarify that it referred to principles recognized and applied *in foro domestico*.[39] This interpretation, while plausible, only demonstrates that municipal law was explicitly recognized as the source of formal validity. In contrast, mem-

34. *See* Ellis, *supra* note 18, at 953–55; Charney, *supra* note 19, at 191.

35. *See* Martti Koskenniemi, *General Principles: Reflexions on Constructivist Thinking in International Law*, *in* Sources of International Law 359, 364 (Martti Koskenniemi ed., 2000) (referring to the opinions of scholars such as Verdross and Favre).

36. *See, e.g.*, 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 19, at 1044.

37. Jalet, *supra* note 19, at 1075, 1078.

38. South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. 4, at 298 (July 18) (dissenting opinion by Tanaka, J.); *see also* Christina Voigt, *The Role of General Principles in International Law and their Relationship to Treaty Law*, 31 Retfærd Årgang 2/121, 3, 6 (2008).

39. Waldock, *supra* note 19, 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) [hereinafter Cassese, *Contribution of the ICTY*].

bers of the Advisory Committee of Jurists that drafted article 38(1)(c) held differing opinions on 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 concerned with the fundamental law of justice can differ from nation to nation. They must form part of the "legal conscience of civilized nations."[40] This conception is closer to Schachter's fourth and fifth categories of general principles. Dr. Bernard Cornelia Johannes Loder of the Netherlands referred to them as "rules universally recognized and respected by the whole world" that are "not yet of the nature of positive law,"[41] which calls into question the exact place of municipal law as a source of formal validity.

The judgments of the Permanent Court of International Justice ("PCIJ") and the ICJ are not particularly instructive on how the concept of general principles should be understood or where they may be found. These courts have resorted to general principles infrequently and general principles have not been used exclusively as the basis for any decision.[42] Although these courts have acknowledged that a norm must exist in a sufficiently large number of states in order to be accorded the status of a general principle,[43] the courts have not provided any actual survey of national legal systems to determine any such principle's existence.[44] The formal and material validity of the general principles as a source of law thus remains unclear.

II. 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,[45] the International Criminal Tribunal for Rwanda ("ICTR"),[46] the Special Court for

40. Baron Descamps, *14th Meeting*, July 2, 1920, *Proceedings of the Advisory Committee of Jurists for the Establishment of a Permanent Court of International Justice*, June 16th–July 24th League of Nations (The Lawbook Exchange, Ltd. 2006), at 310–11.

41. Jalet, *supra* note 19, at 1049 (citing Bernard Loder, 13th Meeting, July 1, 1920, *Proceedings of the Advisory Committee of Jurists for the Establishment of a Permanent Court of International Justice,* June 16th–July 24th League of Nations (The Lawbook Exchange, Ltd. 2006), at 294).

42. *See* Ellis, *supra* note 18, at 950; Cassese, *Contribution of the ICTY*, *supra* note 39, at 45–46; Waldock, *supra* note 19, at 62.

43. *See* South West Africa Cases, 1966 I.C.J. at 299; North Sea Continental Shelf (*F.R.G. v. Den.*; *F.R.G. v. Neth.*), Judgment 1969 I.C.J. 101, at 229 (Feb. 20) (dissenting opinion by Lachs, J.); Bassiouni, *supra* note 19, at 788–89.

44. Cassese, *Contribution of the ICTY*, *supra* note 39, at 45; Charney, *supra* note 19, at 190–91.

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

46. S.C. Res. 955, Statute of the International Criminal Tribunal for Rwanda, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994).

Sierra Leone ("SCSL"),[47] the Extraordinary Chambers in the Courts of Cambodia ("ECCC"),[48] and the Special Tribunal for Lebanon ("STL"),[49] do not contain any specific provision dealing with the application of the sources of international law or their hierarchy.[50] 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. Although a comprehensive analysis of the ad hoc tribunals' reference to general principles would distract from the focus of this Article,[51] three cases decided by the ICTY are especially useful for illustrating the ambiguities in the tribunal's jurisprudence.[52]

A. *The ICTY's Experiment with Different Conceptions of General Principles*

1. Prosecutor v. Erdemović

In *Erdemović*,[53] 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 involve the killing of innocent people.[54] 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.[55] They turned next to the "general principles of law recognized by civilized nations," not-

47. U.N. Secretary-General, *Rep. on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, 55th Sess., U.N. Doc. S/2000/915 (Oct. 4, 2000).

48. G.A. Res. 57/228, 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, 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. 27, 2004).

49. S.C. Res. 1757, Statute of the Special Tribunal for Lebanon, U.N. Doc. S/RES/1757 app. (May 30, 2007).

50. 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).

51. *See* Fabian O. Raimondo, General Principles of Law in the Decisions of International Criminal Courts and Tribunals (2008) (conducting a comprehensive analysis of the jurisprudence of the international criminal tribunals).

52. *See* Cassese, *Contribution of the ICTY*, *supra* note 39, 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 18, at 968–70; Raimondo, *supra* note 51, at 105–08, 117–20, 124–29.

53. Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), www.icty.org/x/cases/erdemovic/acjug/en/erdaj971007e.pdf.

54. *Id.* ¶ 19.

55. Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 41–55 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

ing that this did not require a comprehensive survey of the specific legal rules in all domestic systems, but rather 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.[56] The judges thus undertook a "limited survey of . . . the world's legal systems": civil law systems (France, Belgium, Spain, the Netherlands, Italy, Germany, Norway, Sweden, Finland, Venezuela, Nicaragua, Chile, Panama, Mexico, and the former Yugoslavia); common law systems (England, the United States, Australia, Canada, South Africa, India, Malaysia, and Nigeria); and the criminal law of "other states" (Japan, China, Morocco, Somalia, and 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.[57]

The judges then approached the issue in light of policy considerations specific to international humanitarian law and the normative mandate of international criminal law.[58] In analyzing these policy arguments, the judges drew liberally on the reasoning of domestic courts, in particular those of England and Italy.[59] 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.[60]

In his separate and dissenting opinion, Judge Stephen also relied on the "general principles of law."[61] 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 that it was the common law systems that were the exception.[62] If 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."[63] Judge Stephen went on to comprehensively examine 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 duress as a defense when the accused had

56. *Id.* ¶¶ 57–58.
57. *Id.* ¶¶ 59–72.
58. *Id.* ¶ 72.
59. *Id.* ¶¶ 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. Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).
60. Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 75–89 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).
61. Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, ¶ 25 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).
62. *Id.* ¶ 25.
63. *Id.* ¶ 26.

a choice between saving his life and that of another, and not when both persons would be killed in any case.[64]

According to Judge Stephen, a general principle of law rested on an inquiry 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.[65]

Erdemović has been the subject of heated debate. 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.[66] Less attention has been paid to the differences in how the judges conceptualized general principles as a source of law and how this affected their decisions.

Judges McDonald and Vohrah appeared 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 conducted only a limited survey of the surface legal rules of a number of domestic systems and were unable to discern any consensus in terms of the extent to which duress is permitted as a defense to murder. They also did not explicitly state the material basis for the application of these municipal principles at the international level. Instead, they called 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. For this purpose, they relied on the material basis for the denial of the defense of duress in two domestic legal systems, but they did not characterize this as a general principle of law.

Judge Stephen also undertook a comparative survey of domestic criminal law systems to support his reasoning (formal validity), but was more concerned with discovering a general principle that embodies the reasons for the creation of a legal rule and its application (material validity).[67] For this reason, he probed deeper into the rationale behind the common law's exceptional position in the case of duress as a defense to murder and examined why this rationale may or may not have applied to Erdemović's case.[68] Municipal legal systems thus formed a source of both formal and material valid-

64. *Id.* ¶¶ 29–58.

65. *Id.* ¶¶ 64, 66.

66. *See, e.g.*, Luis E. Chiesa, *Duress, Demanding Heroism, and Proportionality*, 41 VAND. J. TRANSNAT'L L. 741 (2008); 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); Thomas Weigend, *Kill or Be Killed: Another Look at* Erdemović, 10 J. INT'L CRIM. JUST. 1219 (2012).

67. *See* RAIMONDO, *supra* note 51, at 107–08.

68. *See* Ellis, *supra* note 18, at 969–70 (approving this methodology).

ity in his reasoning. However, 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 Erdemović, he would nonetheless have allowed the defense as a matter of "simple justice."[69] 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.

2. Prosecutor v. Furundžija

In *Furundžija*,[70] the ICTY Trial Chamber was concerned with the definition of the crime of rape and, 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.[71] Thus, the Chamber turned to principles of criminal law common to the majority of the world's legal systems to define rape.[72]

The Chamber's survey of national and state legislation (citing the penal laws of Chile, China, Germany, Japan, Socialist Federal Republic of Yugoslavia (SFRY), Zambia, Austria, France, Italy, Argentina, Pakistan, India, South Africa, Uganda, New South Wales, the Netherlands, England, and Bosnia and Herzegovina for different aspects of the offense) 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.[73] 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.[74]

The Chamber found an applicable general principle in the concept of human dignity, which was fundamental to international humanitarian and human rights law and 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.[75] Defining forcible oral penetration as rape rather than sexual assault did not violate the principle of legality because the act would have been criminalized in any

69. *See* RAIMONDO, *supra* note 51, at 107.

70. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf.

71. *Id.* ¶ 177.

72. *Id.* ¶¶ 175–77.

73. *Id.* ¶¶ 179–81.

74. *Id.* ¶ 182.

75. *Id.* ¶ 183.

case.[76] 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.[77]

Although one can sympathize with the Chamber's ultimate conclusions, the methodology it used 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.[78] 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,[79] rather than applying the principle of *in dubio pro reo*.[80]

Furundžija also appears to introduce new sources of international criminal law that 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.[81] In this sense, these principles are distinct from the "general principles of criminal law recognized by the community of nations" that Cassese labels as a subsidiary source and that are discovered through a comparative survey of domestic legal systems.[82]

Furundžija and Cassese thus seem to recognize various notions of general principles that are similar to Schachter's classifications. For Cassese, the surface comparison of domestic legal systems (formal validity) yields general principles that are a "subsidiary source" and only come into play once the other versions of general principles prove unhelpful. This conception is akin to Schachter's first municipal law category, where municipal legal systems are canvassed in search of general principles. In both cases, 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 *Furundžija* does not expend any effort in analyzing the actual rationale behind the municipal rules and merely notes their presence in the various

76. *Id.* ¶ 184.

77. *Id.*

78. *See* Ellis, *supra* note 18, at 968.

79. 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.

80. *See id.* at 126; Swart, *supra* note 3, at 468; Raimondo, *supra* note 51, at 114.

81. Cassese, International Criminal Law, *supra* note 12, at 31; Cassese, *Contribution of the ICTY*, *supra* note 39, at 52–53.

82. Cassese, International Criminal Law, *supra* note 12, at 32.

municipal systems. Cassese's 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. A parallel may nonetheless be sought in Schachter's third conception of principles that are inherent in the logic of the law and basic to all legal systems. One could argue that for Cassese, criminal law principles such as the rule of legality are inherent in criminal legal systems around the world and intrinsic to the idea of criminal law. The nature of the "general principles of international law" is even less clear. *Furundžija* 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.

3. Prosecutor v. Kupreškić

In *Kupreškić*,[83] the ICTY Trial Chamber dealt with the issue of cumulative charging: when may the same conduct offend multiple international criminal law rules? How should this be reflected in sentencing? When may a prosecutor pursue cumulative convictions?[84] 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; or, (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.[85]

The Chamber subsequently relied on general principles of criminal law common to the world's major legal systems to distinguish four legal principles that applied to cumulation of charges.[86] The first is the reciprocal speciality test, 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 offense does not.[87] The Chamber cited two cases decided by United States courts and referred, without further elaboration, to

83. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000). For a useful summary of the Chamber's use of general principles, see RAIMONDO, *supra* note 51, at 124–29.

84. *Kupreškić*, *supra* note 83, ¶ 670.

85. *Id.* ¶ 591.

86. *Id.* ¶¶ 677–95.

87. *Id.* ¶¶ 680–82, 685.

"civil law courts" for its recognition.[88] If the reciprocal speciality rule was not satisfied and one offense fell entirely within the scope of another, then according to the second principle of the rule of speciality (citing the penal codes of the Netherlands and Italy), the special provision governing the act took precedence over the general provision.[89] The third principle is the principle of consumption in the civil law, which can be likened to the doctrine of the "lesser included offense" in the common law. This principle holds that if all the elements of a less serious offense are present in the commission of a more serious one, then the criminality of the former is fully encompassed by the criminality of the latter.[90] The Chamber relied on the jurisprudence of the Inter-American Court on Human Rights, the European Commission and Court of Human Rights, Austrian courts, German courts, and English legal scholarship for the acceptance of and rationale behind this principle.[91] The final principle identified by the Chamber is the principle of protected values: 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.[92] For this principle, the Chamber cited Canadian, French, Austrian, and Italian court decisions.[93]

It is interesting to note that the Chamber's methodology for the derivation of these general principles corresponds to Schachter's first municipal law conception of general principles. However, the Chamber provided very little authority for the acceptance of these four principles in municipal systems.[94] Further, though the Chamber addressed the reasoning behind each of the four principles, it did not do so with any depth, thus leaving the material basis for the validity unclear.

The Chamber had to abandon the search for a commonality across systems when it came to the issue of how a double conviction for the same act should be reflected in sentencing.[95] It referred to article 24(1) of the ICTY Statute, which provides that the Chamber should have recourse to the general practice on sentencing in the former Yugoslavia for determining the term of imprisonment.[96] The Chamber opined that the sentencing practice of courts in the former Yugoslavia did not exhaust the sources on which the ICTY could rely. [97] With respect to this issue, it noted the differences between the provisions of the SFRY, Croatian, and Italian Criminal Code on the one hand,[98] and "other legal systems such as Germany" on the other.[99] In light

88. *Id.*
89. *Id.* ¶¶ 683–84.
90. *Id.* ¶¶ 686–88.
91. *Id.* ¶¶ 686–92.
92. *Id.* ¶ 694.
93. *Id.* ¶¶ 693–95.
94. *See* RAIMONDO, *supra* note 51, at 128; Nollkapemer, *supra* note 52, at 289.
95. *Kupreškić, supra* note 83, ¶ 713.
96. ICTY Statute, *supra* note 45, art. 24(1).
97. *Kupreškić, supra* note 83, ¶ 716.
98. *Id.* ¶¶ 713–15.

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 practiced by military courts" referred to by the Nuremberg Military Tribunal.[100] 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.[101]

Similarly, the Chamber was unable to find any consistency in the approaches various municipal systems took to the question of the consequences of the Prosecutor's erroneous legal classification of facts (surveying England, the United States, Zambia, Nigeria, the former Yugoslavia, Croatia, Germany, Spain, France, Italy, and Austria).[102] Therefore, it was compelled to search for a "general principle of law consonant with the fundamental features and the basic requirements of international criminal justice."[103] In 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.[104] 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.[105]

Kupreškić 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" that 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 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.

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99. *Id.* ¶ 716.

100. *Id.* ¶¶ 716–17 (quoting Trial of the Major War Criminals Before the International Military Tribunal, 1947, Vol. I, at 221).

101. *Id.* ¶ 718.

102. *Id.* ¶¶ 728–38.

103. *Id.* ¶ 738.

104. *Id.* ¶¶ 724–26, 739.

105. *Id.* ¶¶ 740–48. For the observation that this is not an application of general principles, but an instance of lawmaking by the judges, see RAIMONDO, *supra* note 51, at 129.

The above analysis of *Erdemović*, *Furundžija*, and *Kupreškić* 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.

B. The Applicability of General Principles at 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 after 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.[106] Nevertheless, several parts of the ICC Statute remain relatively unrefined—the provisions on modes of responsibility,[107] command responsibility,[108] and defenses such as necessity[109]—are just a few places 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 gaps.[110] The ICC Statute and jurisprudence to date

106. *See* Raimondo, *supra* note 51, at 57.
107. Rome Statute, *supra* note 13, art. 25.
108. *Id.* art. 28.
109. *Id.* art. 31.
110. Claus Kress, *International Criminal Law*, *in* Max Planck Encyclopedia of Public International Law ¶ 40 (2013); *see also* Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 Crim. L. Forum 1, 32 (2009).

do 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; b) second, treaties, principles, and rules of international law; and c) 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.[111]

The list of sources in article 21 is, in some respects, quite different from the one 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, 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.[112] Additionally, 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.[113]

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 as part of "international criminal practice."[114] Another possibility is that the phrase is simply a reference to customary international law rules and principles.[115] 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.[116] Thus, the material source of validity stems from the nature of the

111. Rome Statute, *supra* note 13, art. 21.

112. Bitti, *supra* note 50, 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).

113. Pellet, *supra* note 112, at 1073.

114. Bitti, *supra* note 50, 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. *See* Prosecutor v. Kony, 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 from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification ¶ 19 (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 (Nov. 30, 2007).

115. Pellet, *supra* note 112, at 1070–72; *see* Dapo Akande, *Sources of International Criminal Law*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 41, 50 (Antonio Cassese ed., 2009).

116. *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) (distin-

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,[117] which preceded the Rome Statute and greatly influenced it,[118] 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 include 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.[119] 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, including, when appropriate, the law of the state that would exercise jurisdiction.[120] 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 that 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.[121]

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).[122] 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

guishing, however, between "rules" and "principles" of international law to argue that "rules" refer to customary international law).

117. *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, U.N. GAOR, 49th Sess., U.N. Doc. A/49/10, at 44 (1994).

118. *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).

119. *Summary Records of the Meetings of the Forty-Sixth Session*, [1994] 1 Y.B. Int'l Comm'n, U.N. Doc. A/CN.4/SER.A/1994.

120. Rome Statute, *supra* note 13, art. 21(1)(c).

121. Pellet, *supra* note 112, at 1075.

122. *See, e.g.*, deGuzman, *supra* note 116, at 702–03; Pellet, *supra* note 112, 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).

jurisdiction.[123] 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 Rome Statute.[124] It has also considered the use of general principles in a few cases but failed to define what they may consist of and why. For instance, in a decision concerning *Situation in the Democratic Republic of Congo*,[125] 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 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.[126]

Similarly, in *Lubanga*, Trial Chamber I rejected the practice of witness proofing as a general principle of law.[127] The prosecutor 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.[128] 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.[129]

These decisions tend toward Schachter's first category of general principles that are derived from 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.

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123. *See, e.g.*, deGuzman, *supra* note 116, at 702–03; Pellet, *supra* note 112, at 1075; Saland, *supra* note 122, at 215. It is not clear, however, which states would be counted as normally exercising jurisdiction, especially when the question of universal jurisdiction is at issue. *See* J. Verhoeven, *Article 21 of the Rome Statute and the Ambiguities of Applicable Law*, 33 NETH. Y.B. INT'L L. 3, 10 (2002).

124. *See* Prosecutor v. Lubanga, 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 (Dec. 14, 2006).

125. Situation in the Democratic Republic of Congo, 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 (Int'l Crim. Court Appeals Chamber July 13, 2006).

126. *Id.* ¶¶ 26–32.

127. 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, ¶ 41 (Nov. 30, 2007).

128. *Id.* ¶¶ 7–10, 37.

129. *Id.* ¶¶ 39–42.

III. 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, without, however, an explicit acknowledgement of the material validity for this reliance. Various justifications can be adduced for the ostensible material basis for the validity of general principles 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. An additional reason for looking to municipal laws for general principles could consist of the value of adopting laws that have 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 also 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, the manner in which international tribunals have surveyed and adopted municipal laws calls into question the formal and material validity of general principles derived from this exercise.

A. Problems with Using "Legal Families" to Conduct Comparative Surveys

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, resources, language, and knowledge constraints of the courts, this would prove an impossible exercise. The courts may then adopt the majority's stance in *Erdemović* and deduce general principles from systems that are "practically accessible" to the judges.[130] As the experience of the ad hoc tribunals bears out, this approach poses the very real danger that the domestic systems referred to would be heavily biased toward a few "civil law" and "common law" countries.[131] The way out of this insularity, which

130. Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 57 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

131. *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. & Juris. 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); 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

has been acclaimed unanimously in the scholarly community, is to consciously include in the analysis representatives from other "legal families," notably those that follow Islamic law and countries from Asia and Africa.[132]

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.[133] International criminal courts and scholars appear to take for granted the validity of what have proved to be the two most influential groupings of legal families.[134] The first grouping was proposed by René 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 that included Muslim law, Hindu law, the law of Far Eastern countries, and the law of Africa and Madagascar.[135] The second grouping is Konrad Zweigert and Hein 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.[136] 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[137] and by Zweigert and Kötz[138] were conspicuously absent.[139] Indeed, the legal scholarship on this distinction seems now to have come full circle,

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THE GROTIAN HERITAGE 173, 182 (1985) (positing a similar suggestion in the context of traditional public international law).

132. *See, e.g.*, CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 12, at 32–33; Bantekas, *supra* note 4, at 129; Degan, *supra* note 18, at 81.

133. *See, e.g.*, RENÉ DAVID & JAUFFRET SPINOSI, LES GRANDES SYSTEMES DE DROIT CONTEMPORAINS (10th ed. 1992); KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (2d. ed. 1987); Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, *in* MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 3–15 (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).

134. *See, e.g.*, 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).

135. *See, e.g.*, DAVID & SPINOSI, *supra* note 133; Mattei, *supra* note 133, at 8; Jaakko Husa, *Legal Families*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 491, 496 (Jan M. Smits ed., 2012) [hereinafter Husa, *Legal Families*].

136. *See, e.g.*, ZWEIGERT & KÖTZ, *supra* note 133; PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 34, 36 (2d ed. 1999); Pargendler, *supra* note 133, at 1060.

137. DAVID & SPINOSI, *supra* note 133. Indeed, as Pargendler notes, in his earlier 1950 treatise, *Traité éléméntaire de droit civil comparé*, 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 133, at 1053.

138. ZWEIGERT & KÖTZ, *supra* note 133.

139. Pargendler, *supra* note 133, at 1047–53; *see also* Husa, *Legal Families*, *supra* note 134, at 491–96.

with several prominent academics questioning whether the civil law-common law distinction is coherent or whether it is best abandoned.[140]

An analysis of the trajectory of the different families proposed demonstrates the extent to which the classifications are contingent,[141] not only on the criteria used for categorization but also on the area of the law under study. The most influential classifications focus on Europe, an imbalance that is reflected in the uncertain knowledge about legal systems in other parts of the world hastily grouped together as "Far Eastern" and "Islamic" families.[142] As Andrew Harding remarks in the context of Southeast Asia, the legal families tradition persists in labeling these legal systems as "Confucian" or "authoritarian,"[143] yet the truth is that the very idea of legal families with its orientation toward the general style of the legal system is completely ill-equipped to deal with the "nomic din" of Southeast Asia, where "every kind of legal sensibility is represented except perhaps for African law and Eskimo law."[144] Similarly, in her critique of the treatment of Islamic law in comparative legal scholarship, Lama Abu-Odeh exposes the unhappy consequences of conflating "Muslim law" with the "law in Muslim countries."[145] Rejecting this synonymy, she argues persuasively that Islamic law is at best a partial source of law in Muslim countries that have been deeply influenced by and largely adopted European models of civil law.[146]

This inability of the legal families approach to account for a significant section of the world's legal systems should suffice 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 criminal law.[147] Moreover, the

140. *See* James Gordley, *Common Law und Civil Law: eine überholte Unterscheidung*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 498 (1993) (suggesting that the differentiation between common law and civil law is overemphasized and outdated); *see also* Hein Kötz, *Abschied von der Rechtskreislehre*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 493, 497–504 (1998) (arguing for a moderate version of the convergence thesis).

141. 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).

142. *See* Mattei, *supra* note 133, at 10–11; Husa, *Legal Families*, *supra* note 135, at 499. It is worth noting that, in keeping with the changed geopolitical map of the world, at least the independent significance of the Socialist legal family has largely eroded. Jaakko Husa, *Classification of Legal Families Today: Is It Time for a Memorial Hymn?*, REVUE INTERNATIONALE DE DROIT COMPARÉ 11, 15–16 (2004) [hereinafter Husa, *Classification*].

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

144. *Id.* at 47 (relying on CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FACTS AND LAW IN COMPARATIVE PERSPECTIVE 226 (1980)).

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

146. *Id.*

147. Kötz, *supra* note 140, at 494; *see*, *e.g.*, Husa, *Legal Families*, *supra* note 135, at 500; Esin Örücü, *What is a Mixed Legal System: Exclusion or Expansion*, 12 ELECTRONIC J. COMP. L. 34, 36 (2008) [hereinaf-

legal families approach seems better geared toward "macro-comparison," that is, the comparison of entire legal systems, rather than "micro-comparison," which involves specific legal issues and institutions.[148] 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.[149] In contrast, "formal unitary systems" like in Italy do not recognize this distinction, whereas "functional unitary systems" like in Austria formally distinguish between the two but do not consider secondary responsibility to be derivative.[150] 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.

Nor would it be helpful to look to more recent attempts to revise the traditional legal families approach. For instance, Vernon Palmer has mooted the category of "mixed jurisdictions"[151] 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.[152] This description, however, has 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.[153]

Another novel approach to categorization has been developed by Ugo Mattei, who divides legal systems according to the source of social behavior that plays a dominant role in the legal system.[154] 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.[155] The rule of professional law is characterized by a separation between law on the one hand and religion, philosophy, and polit-

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ter Örücü, *What is a Mixed Legal System?*]; Åke Malmström, *The System of Legal Systems: Notes on a Problem of Classification in Comparative Law*, 13 SCANDINAVIAN STUD. L. 127, 139–40 (1969).

148. *See* Husa, *Legal Families*, *supra* note 135, at 491. The difference between macrocomparison and microcomparison is now generally recognized in the literature on comparative law methodology. *See* DE CRUZ, *supra* note 136, at 227.

149. *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).

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

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

152. *Id.* at 7–10.

153. Örücü, *What is a Mixed Legal System?*, *supra* note 147, at 48–49.

154. Mattei, *supra* note 133, at 13–14.

155. *Id.* at 16.

ics on the other.[156] In the rule of political law, political considerations and relationships determine the outcome of the legal process.[157] In the rule of traditional law, there is no secularization of the law, and the dominant legal pattern is based on a religion or philosophy.[158]

While Palmer's taxonomy does not challenge or question the traditional legal families approach directly, Mattei's scheme is a more daring reconfiguration of dividing the world's legal systems.[159] Neither of these would be of much help, though, in searching for representatives from which 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 that 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.

B. Identifying the "Law" Through 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 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 Rodolfo Sacco's influential theory of "legal formants" demonstrates, the "living law" is comprised of different formative elements, including statutes, judicial decisions, scholarly opinions, conclusions and reasons in judicial opinions, and declaratory statements that may relate to the law, philosophy, religion, or ideology, which must all be consulted together to arrive at a working rule.[160] Indeed, a legal system may have a multiplicity of conflicting legal formants, some constituting rules of conduct and others providing abstract justifications or formulations of the rules.[161]

156. *Id.* at 23. This family includes the common law and civil law systems, Scandinavian systems, and some mixed systems like Louisiana, Scotland, South Africa, and Québec. *Id.* at 26.

157. *Id.* at 28. Mattei would include in this family the majority of countries in the ex–Socialist legal family, as well as underdeveloped nations in Latin America and Africa. *Id.* at 30.

158. *Id.* at 35–36. This encompasses nations that follow Islamic law, Indian law or Hindu law, and Asian or Confucian conceptions of law. *Id.* at 36.

159. Mattei's classification of Islamic law and Southeast Asian legal systems has invited criticism. *See, e.g.*, Harding, *supra* note 143, at 49; Abu-Odeh, *supra* note 145, at 821–22.

160. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 Am. J. Comp. L. 343, 364–77 (1991).

161. *Id.* at 376–77; *see also* Esin Örücü, *Developing Comparative Law*, *in* Comparative Law: A Handbook 43, 61 (David Nelken & Esin Örücü eds., 2007) [hereinafter Örücü, *Developing Comparative Law*].

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 scarcely decide 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 plurality of legal orders approach rejects the exclusive emphasis on top-down state-centric law and posits the existence of a multiplicity of state and nonstate legal orders, which operate alongside each other: "official law" and "non-state" law can even occupy equal status within the same political unit.[162]

While there are different formulations of the idea of legal culture[163] or tradition,[164] what they have in common is an antipathy to the conception of law as a mere set of legal rules on the books. Knowledge of the law cannot consist of simply looking at legal doctrine, but must also take into account its historical, socio-economic, and ideological context.[165] 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.[166] 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.[167] Comparing legal systems is not possible without situating these systems in their legal cultures, and in the wider societal cultures that give rise to the legal cultures.[168]

A similar analysis is conducted by Pierre Legrand, who refers to a "legal mentalité," or the epistemological foundations of the cognitive structure of

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162. Örücü, *Developing Comparative Law*, *supra* note 161, at 61 (citing BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE 89 (2002)).

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

164. *See generally* H. Patrick Glenn, *A Concept of Legal Tradition*, 34 QUEENS L.J. 427 (2008) (an influential account of legal traditions as ongoing normative information).

165. 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).

166. Örücü, *Developing Comparative Law*, *supra* note 161, 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 141, at 73.

167. Örücü, *Developing Comparative Law*, *supra* note 161, at 59 (citing John S. Bell, *English Law and French Law—Not So Different?*, 48 CURRENT LEGAL PROBS. 63, 70 (1995); van Hoecke & Warrington, *supra* note 165, at 498).

168. Van Hoecke & Warrington, *supra* note 165, at 498.

a legal culture.[169] 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.[170]

The challenges posed by these different conceptions of the law—legal formants, legal tradition, legal culture, and legal mentalité—point in the same direction: if international criminal tribunals rely on isolated legal rules in various domestic legal systems to identify a consensus that yields a general principle of law, there is a grave danger that this approach will provide a misleading or sometimes 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. Surface-level similarities in 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.

C. *Challenges in Transplanting Municipal Concepts to the International Level*

The final challenge to the reliance on municipal law to generate general principles comes from the task of transplantation. 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.[171] 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 transplantation debate.

The ideal transplantation 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 transplantation to the international plane, taking into account the specificities of the international legal order.[172] Comparative law theory calls into question the very possibility of

169. Pierre Legrand, *European Legal Systems are Not Converging*, 45 Int'l & Comp. L.Q. 52, 60 (1996) [hereinafter Legrand, *European Legal Systems*].

170. *Id.* at 56–61.

171. *See, e.g.*, Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 178 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 677 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

172. Ellis, *supra* note 29, at 954; 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); Raimondo, *supra* note 51, at 52.

such transplants, variously referred to as transpositions, transfers, and receptions.[173]

The classic debate on this issue revolves around a series of exchanges between Alan Watson and Pierre Legrand.[174] Watson views legal rules as propositional statements that can be borrowed and transplanted 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.[175] Underlying this descriptive claim is the more radical assertion that there is no necessary functional relationship between law and the society in which it operates.[176] 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.[177] 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.[178] A highly developed legal system can thus serve as a source of inspiration for another legal system, even if the latter operates in very different societal conditions.[179] 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.[180]

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.[181] 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 trans-

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

174. *See* Ellis, *supra* note 18, at 963–64.

175. *See* Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121 (1983) [hereinafter Watson, *Legal Change*]; 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 (1998).

176. Graziadei, *supra* note 175, at 121; Monateri, *supra* note 175, 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).

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

178. Wise, *supra* note 177, at 3–5; *see also* Graziadei, *supra* note 175, 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).

179. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95–96 (1974) [hereinafter WATSON, LEGAL TRANSPLANTS]; ALAN WATSON, THE NATURE OF LAW 110–12 (1977); Wise, *supra* note 177, at 5–6.

180. Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996) [hereinafter Watson, *Aspects of Reception*].

181. *See* Watson, *Legal Change*, *supra* note 175, at 1146–47; Watson, *Aspects of Reception*, *supra* note 180, at 339–40; Wise, *supra* note 177, at 6.

planted successfully,[182] even if the borrowing state is ignorant of this wider cultural background.[183]

Legrand, who dismisses the very idea of transplants, disputes this thesis vigorously.[184] Legrand understands rules to be "incorporative cultural forms"[185] that have a determinate content only within the meaning established by the languages and cultures that they inhabit.[186] Thus, any attempt to transplant a legal rule is futile; all that is being transplanted is a "meaningless form of words."[187]

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 that can give rise to misleading conclusions.[188] 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 they themselves are constituted by borrowings.[189]

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 municipal legal rules truly does not survive its transplantation to the international sphere (even Watson claims that it is the "idea" of the law that is transplanted), but rather evolves, adapts, irritates, and transforms, then this calls into question the legitimacy of municipal principles as proxies for state consent, as fulfilling 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

182. *See* Harding, *supra* note 143, at 45.

183. Esin Örücü, *Law as Transposition,* 51 Int'l. & Comp. L.Q. 205, 219 (2002).

184. Pierre Legrand, *The Impossibility of "Legal Transplants*," 4 Maastricht J. Eur. & Comp. L. 111, 116–118 (1997) [hereinafter Legrand, *Impossibility*]; David Nelken, *Comparativists and Transferability*, *in* Comparative Legal Studies: Traditions and Transitions, *supra* note 175, at 437, 441.

185. Legrand, *European Legal Systems*, *supra* note 169, at 57.

186. *Id.* at 56–61; Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, *in* The Oxford Handbook of Comparative Law, *supra* note 176, at 467; Riles, *supra* note 176, at 797.

187. Legrand, *Impossibility*, *supra* note 184, at 120; Graziadei, *supra* note 186, at 470.

188. *See* Nelken, *supra* note 184, at 441.

189. Riles, *supra* note 176, at 798–99; Graziadei, *supra* note 186, at 468–70.

domestic laws of predominantly Western nations onto other countries through the agency of international criminal legal rules.[190]

The critique of the concept of legal families in comparative law methodology calls 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 that isolated legal rules may 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. Further, it remains controversial whether the domestic criminal law rule can truly be transplanted to the international legal regime without 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.

An additional concern with reliance on select domestic legal principles to generate a general principle of international criminal law is that this search for a common denominator may result in the adoption of a legal rule that does not necessarily represent the best or the most progressive criminal law principles. The prospect of an outdated and even regressive principle getting integrated into the international criminal law regime is problematic on its own; its effects are potentially compounded at the domestic level through the recursive nature of international criminal law norms and rules. States that enact implementing legislation to comply with their obligations under the Rome Statute of the ICC may end up entrenching general principles recognized at the international level into their municipal systems, in turn contributing to the dissemination of inapposite international criminal law norms into domestic law.

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?

IV. Alternative Conceptions of General Principles

Municipal legal systems play a subsidiary role in Schachter's second, fourth, and fifth conceptions 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 crim-

190. *See, e.g.*, Bantekas, *supra* note 4, at 129.

inal 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 therefore 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 necessarily require the law to be 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.[191] In the international criminal law context, international instruments such as the International Covenant on Civil and Political Rights ("ICCPR")[192] and the European Convention on Human Rights ("ECHR")[193] 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.[194]

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 prove a legitimate (additional) legal source only if they meet these criteria. 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.[195] 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

191. Haveman, *supra* note 15, 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).

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

193. 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.

194. *See also* Susan Lamb, Nullum Crimen, Nulla Poena Sine Lege *in International Criminal Law*, *in* 1 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).

195. *See* 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. for the Former Yugosla-

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.[196] In this sense, legality is not an absolute requirement that trumps all other considerations of substantive justice but must be balanced against them.[197] 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 that international criminal tribunals adjudicate cannot possibly have been unaware of their wrongful nature.[198] 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 the accused may in fact have no knowledge of it.[199] 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.[200] If lawmaking, including by the courts, merely results in the criminalization of conduct that conscientious members of the

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via 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).

196. 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 legislatures and judges. This rule is not necessarily applicable at the international level and may be disregarded if circumstances dictate otherwise. United States v. Araki, Separate Opinion of Judge Röling, Military Tribunal for the Far East, *reprinted in* 21 THE TOKYO MAJOR WAR CRIMES TRIAL 44–45A (R. John Pritchard & Sonia Magbanua Zaide eds., 1981).

197. *See, e.g.*, Judgment, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 November 1945–1 October 1946, at 219 (Int'l Military Trib., Nuremberg 1947). 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 that does not limit state sovereignty. *See also* 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 16, at 140–41.

198. Judgment, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 November 1945–1 October 1946, at 219 (Int'l Military Trib., Nuremberg 1947); Luban, *supra* note 16, at 584–85; van Schaack, *supra* note 16, at 156; *see also* Prosecutor v. Milutinovic, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—*Joint Criminal Enterprise*, ¶ 42 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003) (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. Robert 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).

199. Luban, *supra* note 16, at 585; Jeffries, *supra* note 16, at 207–08.

200. Peter K. Westen, *Two Rules of Legality in Criminal Law*, 26 LAW & PHIL. 229, 263–64 (2007).

community would, at the time of commission, have regarded as deserving of punishment, then it does not violate the legality principle.[201]

Though the suggestion that the principle of legality may be limited in the interests of 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.[202] Nor is it obvious that the accused must be deemed to have notice that the kinds of acts that international law criminalizes must be wrongful. As the differences in the opinions in *Erdemović* demonstrate, it is far from clear what general principle of 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 therefore difficult to argue that Erdemović 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 Erdemović was placed to have behaved otherwise?) or on the specific characteristics of international criminal law.

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, the indeterminacy surrounding their content, application, and hierarchy in the sources of law did not greatly influence 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 *Erdemović, Furundžija*, and *Kupreškić* demonstrate, general principles are being pressed into service where there are gaps in the definition and scope of offenses and defenses, as well as where there are gaps in legal principles governing trial procedures and sentencing. Legal rules derived from the general principles can therefore 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

201. *Id.* at 269, 272–74.
202. Robinson, *supra* note 191, at 148–49.

fail to meet the challenges 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 toward the validity and application of general principles[203]: the international judge is not, and should not be, a legislator. Therefore, 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 not to give the judge unbridled discretion to fill this space. Instead, the law's silence should be interpreted in favor of the accused.[204] 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, however, does not sit too well 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 on the one hand and assumptions stemming from human rights and humanitarian law on the other.[205] International criminal law is self-consciously victim-centric, in that victim protection is seen as a central, and even dominant, aim of the enterprise.[206] If we harken back to decisions like *Erdemović* and *Furundžija*, 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. Moreover, as the cases at the ICTY demonstrate, the gaps in international criminal law are not confined to substantive matters that directly affect the accused's rights, but extend to procedural and other questions that must be resolved in order for the trial to proceed.

Another possible response is for courts to make a concerted effort to exploit more fully other sources of international criminal law, especially treaties. International criminal law scholarship and jurisprudence have 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 that 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 gaps in the system of international criminal law, though

203. Stone, *supra* note 10, at 133–35.

204. *See* Rome Statute, *supra* note 13, art. 22(2).

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

206. *Id.* at 935–38.

these principles will have to be carefully tailored to the institutional and substantive specificities of the international criminal law regime.

There is, of course, the danger that an expansive approach to treaty interpretation, especially in situations where no answer is clearly forthcoming from the text, may result in exactly the sort of judicial discretion that makes criminal lawyers skeptical of devices such as general principles. However, the treaty text serves as a check on the interpretive power of the adjudicator in a manner that is absent in the deduction of general principles. Therefore, legal terms in the treaty text, while countenancing some indeterminacy, limit the interpretative choices that are available to the judge with the treaty text acting as the "first authoritative reference point."[207] Much of the canonical literature on treaty interpretation assumes common rules for interpretation regardless of the subject matter of the treaty, though there have been a few more recent attempts arguing for differential treaty interpretation rules, in particular for human rights conventions.[208] International criminal law treaties are, in some respects, closer to domestic criminal law statutes than to traditional treaties that primarily govern the relationship between states. Thus, scholarship and jurisprudence on statutory construction at the domestic level could prove a useful resource for formulating principles of interpretation for international criminal law treaties, and may serve to reduce the need to resort to general principles. For instance, there is a rich debate on the correct approach to statutory construction at the domestic level, ranging from an emphasis on fidelity to the legal text, to a broad-based actor-relative institutional analysis, to the idea of disciplining rules for interpretation that are recognized as authoritative by an interpretive community.[209] Scholars and courts can draw on these debates at the domestic level to fashion appropriate principles for the interpretation of international criminal law treaties that are helpful for gap-filling while respecting the demands of the legality principle.

Notwithstanding the role treaty construction may play in narrowing the possibility of legal gaps, it is unlikely to be particularly helpful in situations in which the treaty text simply does not contemplate an issue. Given the embryonic nature of international criminal justice and the relatively incomplete and vague drafting of international criminal law treaties, judges may have no choice but to exercise creative interpretation to fill these gaps.[210]

207. Gleider I. Hernández, *Interpretation*, *in* International Legal Positivism in a Post-Modern World 317, 322 (Jörg Kammerhofer & Jean D'Aspremont eds., 2014).

208. *See, e.g.*, George Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 Eur. J. Int'l L. 509, 512 (2010).

209. *See, e.g.*, Owen M. Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739 (1982); Richard Ekins, *Interpretive Choice in Statutory Interpretation*, 59 Am. J. Juris. 1 (2014) (discussing Cass Sunstein, Adrian Vermeule, and Scott Shapiro on statutory interpretation).

210. 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). The Special Tribunal for Lebanon has expressly recognized the impermissibility of a *non liquet* in international criminal law. Ayyash, Case No. STL-11-01/I, Interlocutory Decision of the Applicable Law: Ter-

Indeed, some scholars suggest that in consenting to a legal order that includes the validity of general principles as a source of law, states have implicitly indicated their willingness to abide by a regime in which there is significant gap-filling by judges.[211] This interpretation of state acquiescence is bolstered by the deliberate preference for a creatively ambiguous treaty text, in particular for controversial legal issues over which it proves difficult to achieve consensus during the drafting process.[212] 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 room for judicial creativity.[213] Others regard the push toward comprehensive codification as less desirable[214] and argue that in the circumstances in which international tribunals operate—involving matters of extreme legal and factual complexity and with the aim of providing justice to victims—judicial lawmaking will be necessary to secure their effectiveness.[215]

The way out of this dilemma then is to recognize that judicial lawmaking 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 that must be weighed against these legitimacy concerns.[216] 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 their formal and material validity should best 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 "potential for explanatory clarity,"[217] 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.

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rorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ 23 (Special Trib. Lebanon Feb. 16, 2011).

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

212. *See, e.g.*, Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 521–22 (1999).

213. *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 16, at 191.

214. 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. *See, e.g.*, Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, *in* THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 85, 86–87 (Eyal Benvenisti & Mosche Hirsch eds., 2004).

215. Zappalà, *supra* note 210, at 221–22.

216. *Id.* at 217.

217. Jeremy Horder, *Criminal Law and Legal Positivism*, 8 LEGAL THEORY 221, 236 (2002) (emphasis omitted).

The critique of various conceptions of general principles in this paper suggests that tribunals should exercise extreme caution before importing municipal legal principles that 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 inquiry into the underlying legal rationale, serve to establish neither the formal, nor the material validity of the general principle in question. Therefore, even if a fragile consensus is achieved by examining these limited legal rules, it should not qualify as a "general principle of law." Instead, international criminal tribunals should pay far greater attention to clarifying the basis for material validity: what are the specific features of international criminal law that 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, international criminal tribunals should be able to draw upon different formal sources of laws, including municipal legal systems when appropriate and helpful and when such systems might embody these principles. However, municipal principles per se will no longer be considered to signal state consent or satisfy the requirements of notice.

On the face of it, this exercise in deducing and applying general principles looks suspiciously similar to the manner in which common law judges developed the early criminal law. Much like Frederick Schauer's statement on the common law, the general principles are "nowhere canonically formulated" and "will be remade in the process of application."[218] There are, however, considerable differences. One of the primary elements of the common law is custom: the common law is based on long experience, or historical continuity, where the force of the rule that is received and accepted by the political community is integrated into its constitution and normative structure.[219] Additionally, while the common law is based on reason, this is not the reason of the natural lawyer, but rather a method of reasoning in which the rule must survive scrutiny and dispute. The common lawyer, unlike the natural lawyer, does not look to extraneous moral principles to fill in legal gaps, but to long-standing tradition and experience provided by the body of the common law.[220] The international criminal judge, faced with a relatively new discipline and only a few decades of experience following World War II trials, does not have the benefit of the collective fund of experience and example that the common law judge possesses. Therefore, while he may borrow from some of the techniques of the common law, in particular, from the common law's method of reasoning, the process of deducing general princi-

218. Frederick Schauer, *Is the Common Law Law?*, 77 Cal. L. Rev. 455, 455 (1989).

219. Gerald J. Postema, *Philosophy of the Common Law*, *in* The Oxford Handbook of Jurisprudence and Philosophy of Law 588, 591–92 (Jules L. Coleman & Scott Shapiro eds., 2002).

220. *Id.* at 593.

ples will ultimately differ greatly and rely more heavily on extra-legal moral or policy considerations.

The 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,"[221] will always be constrained by the obligation to give reasons for his decisions, placing some limits on arbitrary decision making.[222] Moreover, this reasoned decision will then be open to the scrutiny of the stakeholders[223] 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 that lack legitimacy would place considerable strain on much needed state cooperation and support.[224]

Notwithstanding this necessary role that general principles will play at this early stage of international criminal justice and the institutional constraints that will influence the capacity of judges to develop these principles, tensions with the principle of legality and concerns with wide-ranging judicial discretion will remain. International criminal tribunals should, therefore, be attentive to the subsidiary nature of the general principles in the hierarchy of the sources and refrain from relying too heavily on them as a freestanding source of international criminal law.

221. Paulus, *supra* note 211, at 214.
222. Jeffries, *supra* note 16, at 214–15.
223. *Id.*
224. *See* Cryer, *supra* note 198, at 256.