General Principles of Law in the Decisions of International Criminal Courts and Tribunals

Fabián O. Raimondo

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To Mercedes and Julia, the light of my life.

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PREFACE

When, by the end of 2002, I decided to study the role of general principles of law as a source of international criminal law, I was a bit surprised that the effort had not already been made, especially in view of the importance of the topic and the voluminous literature on international criminal law. I was thus happy to have the chance to write a book on an original topic and, in doing so, to contribute to the development of that field of international law.

I carried out a great deal of the investigation during my three-year stay at the University of Amsterdam as a research fellow. In addition, many people have helped in the writing of this book. I would like to thank Professor Gutiérrez Posse (University of Buenos Aires) for encouraging me to write on this topic. Special thanks are due to Professors Nollkaemper and de Wet (University of Amsterdam) for their interest in and support of my work. I am grateful to Professors Delmas-Marty (Collège de France), Lambert-Abdelgawad (CNRS), and Fronza (University of Trento), who gave me the wonderful opportunity to present my preliminary findings at the Collège de France and the University of Bologna in the context of their research project 'Les sources du droit international pénal'. I am grateful to my former colleagues in the Amsterdam Centre for International Law, in particular Nwamaka Okany, for their fellowship and constructive views on earlier drafts of the book. The very kind librarians at the Law Faculty and the Peace Palace Library at The Hague have helped me a lot with my research; thanks so much to them too. I am indebted to Jaap van den Herik for helping me to put the whole work together. Special thanks are also due to Professors Ambos (University of Göttingen), Brus (University of Groningen), Van Genugten (University of Tilburg), Swart (University of Amsterdam), and Van der Wilt (University of Amsterdam) for their constructive comments. Finally, many thanks to Larissa van den Herik for her invaluable help in many forms.

ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACJ	Advisory Committee of Jurists
AJIL	*American Journal of International Law*
AIDI	*Annuaire de l'Institut de Droit International*
BJIL	*Brooklyn Journal of International Law*
BYIL	*British Year Book of International Law*
CJIL	*Chinese Journal of International Law*
CJTL	*Columbia Journal of Transnational Law*
CLF	*Criminal Law Forum*
CWILJ	*California Western International Law Journal*
ECHR	European Convention on Human Rights and Fundamental Freedoms
EJIL	*European Journal of International Law*
FYIL	*The Finnish Yearbook of International Law*
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICLR	*International Criminal Law Review*
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal for the Trial of German Major War Criminals
IMTFE	International Military Tribunal for the Far East
IRRC	*International Review of the Red Cross*
JICJ	*Journal of International Criminal Justice*
LJIL	*Leiden Journal of International Law*
MJIL	*Michigan Journal of International Law*
NEP	*Nouvelles Etudes Pénales*
NILR	*Netherlands International Law Review*
NYIL	*Netherlands Year Book of International Law*
NYJHR	*New York Law School Journal of Human Rights*

NYJIL	*New York University Journal of International Law and Politics*
ÖZÖR	*Österreichische Zeitschrift für öffentliches Recht*
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RCADI	*Recueil des cours de l'Académie de droit international*
REDI	*Revista Española de Derecho Internacional*
RP	Rules of Procedure
RPE	Rules of Procedure and Evidence
RGDIP	*Revue générale de droit international public*
SCSL	Special Court for Sierra Leone
SFRY	Social Federal Republic of Yugoslavia
TICLJ	*Temple International and Comparative Law Journal*
TLR	*Tulane Law Review*
UCLAR	*University of California in Los Angeles Law Review*

ARBITRAL AWARDS AND JUDICIAL DECISIONS

International Arbitral Tribunals

GREAT BRITAIN–PORTUGAL

- *Affaire Yuille, Shortridge et Cie., arbitrage de la Commission désignée par le Sénat de la Ville libre de Hambourg, sentence du 21 octobre 1861*

GREAT BRITAIN–PERU

- *Décision de la commission, chargée, par le Sénat de la Ville libre hanséatique de Hambourg, de prononcer dans la cause du capitaine Thomas Melville White, 13 avril 1864*

GREAT BRITAIN–ARGENTINA

- *Sentence du Président du Chili, au sujet des réclamations présentées par des sujets anglais à la République argentine pour les pertes provenant du décret du 13 février 1845, 1 août 1870*

BRAZIL–SWEDEN, NORWAY

- *Affaire du Queen, sentence du 26 mars 1872*

RUSSIA–TURKEY

- *The Russian Indemnity Case, PCA, Award, 11 November 1912*

PCIJ

- *Jaworzina, Advisory Opinion, 1923, PCIJ, Series B, No. 8*
- *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, PCIJ, Series A, No. 2*
- *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, PCIJ, Series B, No. 12*
- *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No. 9*
- *Lotus, Judgment No. 9, 1927, PCIJ, Series A, No. 10*

ICJ

- *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992*, p. 240
- *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, ICJ Reports 1992*, p. 351
- *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p. 226
- *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p. 7
- *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Counter Claim, Order of 10 March 1998, ICJ Reports 1998*, p. 190
- *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, Merits, ICJ Reports 2003*

IMT

- *Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946*

IMTFE

- *Judgment of the International Military Tribunal for the Far East, Tokyo, 4–12 November 1948*

ICTY

- *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case No. IT-94-1-AR72, App. Ch., 2 October 1995
- *Prosecutor v. Tadić, Decision on the Defence Motion on the Principle of Non Bis in Idem*, Case No. IT-94-1-T, T. Ch. II, 14 November 1995
- *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T, T. Ch. I, 29 November 1996
- *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997

- *Prosecutor v. Erdemović, Judgment*, Case No. IT-96-22-A, App. Ch., 7 October 1997
- *Prosecutor v. Blaškić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95-14-AR108*bis*, App. Ch., 29 October 1997
- *Prosecutor v. Erdemović, Sentencing Judgment,* Case No. IT-96-22-T *bis*, T. Ch. II*ter*, 5 March 1998
- *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998
- *Prosecutor v. Furundžija, Judgment*, Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998
- *Prosecutor v. Tadić, Judgment*, Case No. IT-94-1-A, App. Ch., 15 July 1999
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- *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-R77, App. Ch., 31 January 2000
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- *Prosecutor v. Kordić & Čerkez, Judgment,* Case No. IT-95-14/2-T, T. Ch. T. Ch. III, 26 February 2001
- *Prosecutor v. Tadić, Appeals Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin,* Case No. IT-94-1-A-AR77, App. Ch., 27 February 2001
- *Prosecutor v. Aleksovski, Judgment on Appeal by Anto Nobilo against Finding of Contempt,* Case No. IT-95-14/1-AR77, App. Ch., 30 May 2001
- *Prosecutor v. Jelisic, Judgment,* Case No. IT-95-10-A, App. Ch. 5 July 2001

- *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23 & IT-96-23/1-A, App. Ch., 12 June 2002
- *Prosecutor v. Milutinović et al., Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise –*, Case No. IT-99-37-AR72, App. Ch., 21 May 2003
- *Prosecutor v. Stakić, Judgment,* Case No. IT-97-24-T, T. Ch. II, 31 July 2003
- *Prosecutor v. Banović, Sentencing Judgment,* Case No. IT-02-65/1-S, T. Ch. III, 28 October 2003
- *Prosecutor v. Nikolić, Sentencing Judgment*, Case No. IT-02-60/1-S, T. Ch., 2 December 2003
- *Prosecutor v. Nikolić, Sentencing Judgment,* Case No. IT-94-2-S, T. Ch. II, 18 December 2003
- *Prosecutor v. Češić, Sentencing Judgment,* Case No. IT-95-10/1-S, T. Ch. I, 11 March 2004
- *Prosecutor v. Deronjić, Sentencing Judgment,* Case No. IT-02-61-S, T. Ch. II, 30 March 2004
- *Prosecutor v. Krstić, Judgment*, Case No. IT-98-33-A, App. Ch., 19 April 2004
- *Prosecutor v. Brdanin, Judgment*, Case No. IT-99-36-T, T. Ch., 1 September 2004
- *Prosecutor v. Kordić et al., Judgment*, Case No. IT-95-14/2-A, App. Ch., 17 December 2004
- *Prosecutor v. Nikolić, Judgment on Sentencing Judgment*, Case No. IT-94-2-A, App. Ch., 4 February 2005
- P*rosecutor v. Mejakic et al., Decision on Joint Defence Appeal Against Decision on Referral under Rule 11bis,* Case No.: IT-02-65-AR11*bis*. 1, App. Ch. 27 April 2006
- *Prosecutor v. Milutinović et al., Decision on Ojdanić Motion to Prohibit Witness Proofing,* Case No. IT-05-87-T, T. Ch., 12 December 2006

ICTR

- *Prosecutor v. Akayesu, Judgment,* Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998
- *Prosecutor v. Kayishema and Ruzindana,* Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999
- *Barayagwiza v. Prosecutor, Decision*, Case No. ICTR-97-19-AR72, App. Ch., 3 November 1999

- *Prosecutor v. Musema, Judgment and Sentence,* Case No. ICTR-96-13-T, T. Ch. I, 27 January 2000
- *Barayagwiza v. Prosecutor, Decision (Prosecutor's request for review or reconsideration)*, Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000
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- *Prosecutor v. Karemera et al., Decision on Interlocutory Appeal Regarding Witness Proofing*, Case No. ICTR-98-44-AR73.8, App. Ch., 11 May 2007

ICC

- *Situation in Uganda, 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*, Case No.: ICC-02/04-01/05, PT. Ch. II, 28 October 2005
- *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo*, Case No.: ICC-01/04-01/06, PT Ch. I, 24 February 2006
- *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecution Motion for Reconsideration*, Case No.: ICC-01/04-01/06, PT. Ch. I, 23 May 2006
- *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal*, Case No.: ICC-01/04-01/06, PT. Ch. I, 23 June 2006
- *Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, Case No.: ICC-01/04, App. Ch., 13 July 2006

- *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Practices of Witnesses Familiarization and Witness Proofing,* Case No.: ICC-01/04-01/06, PT. Ch. I, 8 November 2006

SCSL

- *Prosecutor v. Norman et al., Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment),* Case No. SCSL-04-14-AR72(E), App. Ch., 31 May 2004
- *Prosecutor v. Norman et al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-14-PT, T. Ch., 2 June 2004
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- *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days*, Case No. SCSL-04-15-T, T. Ch., 12 July 2004
- *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Accused, Sesay and Kallon to Appear for their Trial*, Case No. SCSL-04-15-T, T. Ch., 12 January 2005
- *Prosecutor v. Brima et al., Judgment,* Case No. SCSL-04-16-T, T. Ch. II, 20 June 2007
- *Prosecutor v. Fofana and Kondewa, Judgment*, Case NO. SCSL-04-14-T, 2 August 2007

Chapter One

INTRODUCTION

The expression 'general principles of law' has been given different meanings in the context of international law. Traditionally, international legal scholars have employed it in the sense of general principles generally recognized in national law.[1] Some others refer to the general principles of international legal relations, such as the principle of non-intervention and the prohibition of the use of force.[2] In addition there are scholars who employ that term to mean legal principles recognized in all kinds of legal relations, that is, national law, international law, the law of international organizations, etc.[3] Finally, a fourth group of scholars includes the principles of legal logic within the meaning of the term.[4]

The general principles of law that are the object of this book are the legal principles generally recognized in national law. The reason for this choice is that the application of this kind of legal principles by international courts and tribunals raises interesting and challenging questions. This is so because, as explained in chapter 2, (i) the application of general principles of law by international courts and tribunals may require their prior determination at the level of national legal systems and (ii) their subsequent transposition into international law may be restricted.

The determination of general principles of law at the level of national legal systems may consist of two separate moves, which I call the 'vertical move' and the 'horizontal move', respectively. The vertical move consists in an abstraction of legal rules from national legal systems aimed at deriving an underlying legal principle. The horizontal move, in contrast, consists of a comparison of national legal systems aimed at verifying whether the generality of States recognizes the legal principle thus obtained.[5]

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[1] See Mosler, Hermann, 'General Principles of Law', in Bernhardt, Rudolf (ed.), *Encyclopedia of Public International Law*, North-Holland, Elsevier, 1995, Vol. II, pp. 511–512.

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

[5] Cf. Elias, Olufemi and Lim, Chin, ' "General Principles of Law", "Soft" Law and the Identification of International Law', *NYIL*, Vol. 28, 1997, pp. 3–49.

The discussion starts with the vertical move. Given that, by definition, general principles of law are *abstractions* of legal rules from national legal systems, they are not as precise as the legal rules which form their origin.[6] Thus, general principles of law derived at a very high level of abstraction may be unsuitable for settling particular legal issues because of their imprecision.

As a result, it may be argued that the criminalization of conduct by general principles of law may be a perilous judicial activity, as it may jeopardize the *nullum crimen nulla poena sine lege* principle (or principle of legality of crimes and penalties). This principle is a basic and non-derogable human right[7] that encompasses at least the requirements of *lex praevia* (formulated in the principle of the prohibition of retroactive criminal laws in *malam partem* or prohibition of laws *ex post facto*) and *lex certa* (that is, the certainty of the elements of the crime and of the kind and size of the penalty).

Consider, for example, Article 15 of the ICCPR.[8] This provision does not prohibit the criminalization of conduct by unwritten legal rules and principles, such as custom and general principles of law. However, pursuant to that legal provision States must define all crimes and punishments exactly by law, in the interests of legal certainty.[9] Thus, even

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[6] 'The generality of the [legal] principles puts them beyond the realm of operation of simple rules. On the one hand, their legal content is not so narrow, it is not so defined in an as precise way as it is in rules; but at the same time it is not so broad as general political concepts or words used in the social fashion of a given moment'. Kolb, Robert, 'Principles as Sources of International Law', *NILR*, Vol. LIII, No. 1, 2006, p. 9.

[7] See Articles 4, paragraph 2 and 15, ICCPR; Articles 7 and 15, paragraph 2, ECHR; Articles 9 and 27, paragraph 2, ACHR; Article 7, paragraph 2, ACHPR (yet, this legal instrument is silent about the non-derogability of the rights it grants).

[8] Article 15 of the ICCPR reads as follows: '1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations'.

[9] See Novak, Manfred, *U.N. Covenant on Civil and Political Rights/ICCPR Commentary,* Kehl/Strasbourg/Arlington, N.P. Engel Publisher, 1993, pp. 275–276; Ambos, Kai, '*Nulla Poena sine Lege* in International Criminal Law', in Haveman, Roelof and Olusanya, Olaoluwa (eds.), *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, Antwerp/Oxford, 2006, pp. 17–23. See also Human Rights Committee, General Comment 29, § 7, where the Committee stated that Article 15 of the ICCPR includes the requirement that 'criminal liability and punishment [be] limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place'.

though the ICCPR allows the criminalization of conduct by means of unwritten legal rules and principles, its criminalization by general principles of law (and also by custom) may conflict with the requirement of *lex certa* because the existence of a general principle of law may be uncertain and its normative content imprecise.

With regard to the horizontal move that may be necessary in order to determine general principles of law, scholars usually agree that in order to become a general principle of law, a legal principle must be recognized by the main legal families of the world.[10] However, the question is whether it suffices that a legal principle be recognized by national legal systems that are representative of the Romano-Germanic and the Common Law legal families only,[11] or whether other legal families or conceptions of law ought to be taken into account as well.[12]

Whereas in the eyes of some scholars Islamic law needs to be examined for such purpose,[13] for others comparative research encompassing both the Romano-Germanic and the Common Law legal families is sufficient.[14] Yet, it seems that having recourse to the classification of national legal systems in legal families may be pointless in the quest for deriving general principles of law pertaining to criminal law. The reason is that in connection with criminal law such classification may be unhelpful. For instance, a national legal system such as the Italian, which is rooted in the Romano-Germanic legal tradition, now has a criminal procedure based on some of the principles of the adversarial model, i.e., a model

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[10] See, for instance, Barberis, Julio, *Formación del derecho internacional,* Buenos Aires, Ábaco, 1994, p. 246; Pellet, Alain, 'Applicable Law', in Cassese, Antonio *et al*. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. II, pp. 1073–1074.

[11] Scholars have traditionally considered the Romano-Germanic and the Common Law as the main legal families of the world. See David, René and Jauffret-Spinosi, Camille, *Les grands systèmes de droit contemporains*, 11e édition, Paris, Dalloz, 2002, p. 15 *et seq*.

[12] Simma, Bruno and Paulus, Andreas, 'Le rôle relatif des différentes sources du droit international public: dont les principes généraux du droit', in Ascensio, Hervé *et al*. (eds.), *Droit international pénal*, Paris, Pedone, 2000, pp. 55–69, p. 63, § 14; Cassese, Antonio, *International Criminal Law*, New York, Oxford University Press, 2003, pp. 32–33.

[13] Pellet, Alain, *op. cit*. 10; Degan, Vladimir, 'On the Sources of International Criminal Law', *CJIL*, Vol. 4, No. 1, 2005, p. 81.

[14] Ambos, Kai, *La parte general del derecho penal internacional: bases para una elaboración dogmática*, Montevideo/Bogotá, Duncker & Humboldt/Konrad Adenauer Stiftung/Temis, 2005, pp. 40–41. In Ambos' view, the limitation of national legal systems to the Romano-Germanic and the Common Law legal families is due in the main to the language limitations of Western authors, not to their unwillingness to consider other conceptions of law.

that originated in the Common Law legal tradition.[15] As a result, mixed criminal procedures cannot be included either in the Romano-Germanic or in the Common law legal family because the distinction between adversarial and inquisitorial criminal procedures is not always completely clear.[16] Thus, having recourse to the Romano-Germanic/Common Law or inquisitorial/adversarial dichotomies to derive general principles of law pertaining to criminal law may be futile. For this reason, it is worth investigating whether there may be some other criterion appropriate to selecting the national legal systems to be examined in the search for general principles of criminal law.

Further in this regard it can be asserted that a general principle of law should be more than a legal principle common to two or to a handful of national legal systems. If a legal principle derived from national legal systems is going to be part of *international* law, then that legal principle should arguably be more universally recognized.

These queries and points of debate constitute the rationale for an investigation into how international criminal courts and tribunals have determined general principles of law in their practice.

With regard to the transposition issue, international courts and tribunals, as well as some international legal scholars, have pointed to the existence of legal obstacles that may hamper the direct application of general principles of law in international law. They have in the main invoked the prevalence of the principle of State sovereignty in international relations and the special character of international law.[17]

Indeed, international criminal courts and tribunals, as well as some of their members, have sometimes referred to the existence of legal obstacles that may hamper the application of general principles of law at the international level. In particular, they have affirmed that the differences between national legal systems and international law (differences in structure, subjects, sources, and enforcement mechanisms) would prevent the mechanical transposition of legal principles from the former to the latter.[18]

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[15] See Pradel, Jean, *Droit pénal comparé*, 2ᵉ édition, Paris, Dalloz, 2002, §§ 99, 111, pp. 141, 159–160. More generally, see Vogler, Richard, *A World of Criminal Justice*, Aldershot, Ashgate, 2005, pp. 330.

[16] See Pradel, Jean, *ibid.*, pp. 160–161.

[17] See Simma, Bruno and Paulus, Andreas, *op. cit*. 12, pp. 63–64, § 15; Cassese, Antonio, *op. cit*. 12, p. 33; Rivello, Roberto, 'Les principes généraux de droit et le droit international pénal', in Chiavario, Mario (ed.), *La justice pénale internationale entre passé et avenir*, Milano, Giuffrè, 2003, p. 96.

[18] See section 4.4.

However, it is unclear whether such structural differences are real obstacles to the application of general principles of criminal law at the international level. There are two reasons why this would not be the case. First, international criminal proceedings are not legal disputes between States and thus the principle of State sovereignty is not always at stake. Secondly, at first glance international criminal proceedings are essentially analogous to national proceedings, as both aim to ascertain whether a crime has been committed as well as criminal responsibility. An examination of the transposition issue is thus necessary in order to verify whether these are valid reasons for asserting that in the domain of international criminal law general principles of law can be directly applied, or whether in fact there are legal obstacles, either traditional or new ones, hindering the transposition of general principles of law into international criminal law.

Given that this book is about the application of general principles of law by international criminal courts and tribunals, the main object of study is judicial decisions.[19] I have examined the awards of early international arbitral tribunals, the judgments and advisory opinions of the PCIJ and the ICJ, and decisions (including judgments) of international criminal courts and tribunals. An overview of the awards of early international arbitral tribunals will lead to an understanding of the manner in which general principles of law began to be applied in international law. The judgments and advisory opinions of the PCIJ and the ICJ are extremely relevant because of the authority and prestige of these international courts (the ICJ is the principal judicial organ of the UN, in accordance with Article 92 of the UN Charter). Thus, the awards of early international arbitral tribunals and the judgments and advisory opinions of the PCIJ and the ICJ serve as an appropriate reference point for evaluating the manner in which international criminal courts and tribunals have dealt with general principles of law.

An examination of the decisions of international criminal courts and tribunals is at the core of this study. These are the IMT, the IMTFE, the ICTY, the ICTR, the ICC, and the SCSL. The decisions of the ICTY

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[19] On the legal value of judicial decisions under international law see *inter alia* Article 38, paragraph 1(d) of the ICJ Statute; Diez de Velasco, Manuel, *Instituciones de Derecho Internacional Público*, 10ª edición, Madrid, Tecnos, 1994, reimpresión, 1996, Vol. I, pp. 136–140; Daillier, Patrick and Pellet, Alain, *Droit international public*, 7e édition, Paris, Librairie Générale de Droit et Jurisprudence, 2002, pp. 393–398; Kooijmans, Pieter, *Internationaal publiekrecht in vogelvlucht*, 9th edition, Deventer, Kluwer, 2002, pp. 14–15.

constitute the main raw material, as this international criminal tribunal has dealt with general principles of law much more often than the others and, therefore, has developed a rich jurisprudence on this matter.

The decisions examined here cover not only instances of the effective application of general principles of law, but also those instances where the categorization of a given legal principle as a general principle of law or the applicability of general principles of law not followed by effective application were at stake. Such instances are relevant for this study because they may shed light on the issues of the determination of general principles of law at the level of national legal systems and their transposition into international law. These issues are two of the most problematic aspects of general principles of law as a source of international law in general, and of international criminal law in particular.

First this study revisits the rather broad topic of general principles of law as a source of international law (chapter 2) and then investigates the more specific topic of general principles of law as a source of international criminal law (chapters 3 and 4). The discussion is presented in this manner because it enables the reader to appreciate the contribution made by international criminal courts and tribunals to the determination, transposition, and application of general principles of law. Finally, conclusions are presented in chapter 5.

Chapter Two

GENERAL PRINCIPLES OF LAW: A SOURCE OF INTERNATIONAL LAW

2.1. Preliminary Remarks

It may happen that a given legal issue cannot be settled in conformity with specific legal rules, simply because the rules needed for a decision do not exist. In such circumstances, several national legal systems allow for the application of legal principles derived from consolidated branches of law, such as private law, and from law in general, i.e., Law.[20] In this manner, the legal principles fill the gap left by the absence of specific legal rules applicable to the issue at stake.

Since a huge range of human and State activities have been regulated, it is likely that nowadays national courts and tribunals will resort to general principles of law to fill gaps less frequently than in the past.

Nevertheless, national courts and tribunals can turn to general principles of law for other purposes as well. They may have recourse to these principles with the intention of interpreting legal rules. Furthermore, they may invoke general principles of law in addition to legal rules, in order to confirm decisions primarily grounded in such rules and, thus, to reinforce the legal reasoning underlying these decisions.

The situation is the same in international law. For a long time, international courts and tribunals have turned to general principles of law for the same purposes as the national ones have done: filling legal gaps, interpreting legal rules, and reinforcing legal reasoning.

As the relations between subjects of international law are to some extent analogous to those between subjects of national law, legal principles derived

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[20] For example, Article 16 of the Civil Code of the Argentine Republic (Código Civil de la República Argentina) stipulates: 'Si una cuestión civil no puede resolverse, ni por las palabras, ni por el espíritu de la ley, se atenderá a los principios de leyes análogas; y si aún la cuestión fuere dudosa, se resolverá por los principios generales del derecho, teniendo en consideración las circunstancias del caso'. Text in *Código Civil de la República Argentina y Normas Complementarias*, Buenos Aires, Depalma, 2000, 1480 pp. For more examples see Cheng, Bin, *General Principles of Law as Applied by International Courts and Tribunals*, London, Stevens & Sons Limited, 1953, pp. 400–408.

from national legal systems may be suitable for regulating international legal issues. Therefore, international courts and tribunals have resorted to such principles where necessary and possible. In fact, some legal institutions are common to all legal systems, national and international, such as the acquisition of legal personality and the conclusion of an agreement.

The application of general principles of law took place rather frequently in early international arbitral practice[21] and continues to this day in many respects.[22] However, since international law, analogously to national legal systems, has continued to develop, the need for international courts and tribunals to resort to general principles of law in order to decide issues arising in now well-established branches of international law, such as State responsibility,[23] has clearly decreased.[24] Yet, they may still often turn to general principles of law when they are dealing with less-developed branches of international law, such as international institutional law and international criminal law.[25] The reason is that these branches of law do not consist of a fully-fledged set of legal rules sufficient to regulate all the legal issues that may arise in judicial practice.

2.2. Early International Arbitral Tribunals

Three empires – the Carolingian, the Byzantine, and the Islamic – ruled Europe in the High Middle Ages, the formative period of international law. At different times, these empires split up into a large number of

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[21] Plenty of examples concerning recourse to private law during the formative period of international law are found in the following works: Lauterpacht, Hersch, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)*, London, Longman, Green and Co., 1927, *passim*; Cheng, Bin, *op. cit*. 20, *passim*.

[22] For instance, the Iran-United States Claims Tribunal applies general principles of private law. See the examples given by Charney, Jonathan, 'Is International Law Threatened by Multiple International Tribunals?', *RCADI*, Vol. 271 (1998), pp. 196–197.

[23] See Sorensen, Max, 'Principes de droit international public. Cours général', *RCADI*, Vol. 101, (1960-III), p. 18.

[24] 'Decreased' does not mean 'disappeared'. For instance, a member of the ICJ argued that the general principle of joint-and-several responsibility was applicable to the case at hand. See *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, Merits, Separate Opinion of Judge Simma, ICJ Reports 2003,* § 65–74.

[25] For general principles of law applied by international administrative tribunals, see Charney, Jonathan, *op. cit*. 22, pp. 226–228, and Amerasinghe, Chattharanjan, *Principles of the Institutional Law of International Organizations*, 2nd edition, Cambridge, Cambridge University Press, 2005, pp. 288–290.

kingdoms, princedoms, feudal, and other political entities. Those that emerged from the Carolingian and Byzantine empires were the most involved in contributing to the creation of international law. Roman law was the law applied within them, as well as in their reciprocal relations.

At the same time, scholars such as Bartolus of Saxoferrato and Baldus of Ubaldi deemed that Roman law was universal and formulated general principles of law in terms of legal maxims, which they derived from opinions given by Roman lawyers. Since the 12th century, Roman law has frequently been applied in international relations, above all in international arbitration. From a historical perspective, international law extensively relied on general principles of Roman law.[26]

It is possible to select from the early international arbitral awards many examples of recourse to general principles of law. I refrain from such selection, since this study is not a historical investigation but a contribution to the current state of the art of general principles of law in the decisions of international criminal courts and tribunals. Therefore, the historic overview starts with cases from the 18th, 19th, and early 20th centuries and continues until the adoption of the PCIJ Statute in 1920.

The structure of this section is as follows. Subsection 2.2.1 shows from which formulations of their applicable law arbitral tribunals derived the power to apply general principles of law. Then, subsection 2.2.2 gives five examples of recourse to general principles of law by international arbitral tribunals. Finally, subsection 2.2.3 provides a brief analysis of that international practice.

2.2.1. *The Formulation of Applicable Law*

States lay down the law applicable to international arbitral tribunals in treaties, but the formulation of the applicable law has varied from time to time. For example, international arbitral tribunals were bound to apply 'justice, equity and the law of nations',[27] or 'the principles of justice, the

[26] See Sorensen, Max, *op. cit*. 23 p. 16; Barberis, Julio, *op. cit*. 10, pp. 222–223.

[27] Article 7, Treaty of Amity, Commerce and Navigation between His Britannic Majesty and the United States of America, 19 November 1794. Text in De Martens, Georg, *Recueil des principaux traités d'alliance, de paix, de trêve, de neutralité, de commerce, de limites, d'échange, etc., conclus par les puissances de l'Europe tant entre elles qu'avec les puissances et États dans d'autres parties du monde depuis 1761 jusqu'à présent*, seconde édition revue et augmentée par De Martens, Charles, Gottingue, Dieterich, 1826, Vol. 5 (1791–1795), pp. 640 *et seq*.

law of nations and the stipulations of the treaty',[28] or they had to decide the cases 'on the basis of respect of law'.[29]

Hence, States gave early international arbitral tribunals the power to apply not only conventional law ('the stipulations of the treaty') and customary law ('the law of nations'), but also other sorts of rules and principles, such as 'equity' and 'justice'. These examples suggest, on the one hand, that in the view of States, conventional and customary rules of international law were insufficient to settle all international legal disputes; on the other, that a further kind of legal rules and principles could be applied as international law.[30] It was clear that general principles of law were among them. Expressions such as 'general principles of law', 'principles of justice', and 'principles of equity' were employed in arbitration treaties as denoting law, in contradistinction to decisions taken *ex aequo et bono*.[31]

2.2.2. *Five Examples from before the Adoption of the PCIJ Statute*

The five examples given below arose before the adoption of the PCIJ Statute in 1920. I selected these examples because they are characteristic of the development of the application of general principles of law in the settlement of international legal disputes. They are discussed in chronological order. The main line of argument is that arbitral tribunals conceived of general principles of law as a subsidiary source of international law, derived from Roman law and national legal systems from Europe, and transposed and applied in international law without any major obstacles.

2.2.2.1. *Affaire Yuille, Shortridge et Cie*

The first example is the award in the Affaire Yuille, Shortridge et Cie. In this case, the arbitral tribunal dealt with a claim for interest the total

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[28] Article 4, Convention for the Adjustment of Claims of Citizens of the United States against Mexico, 11 April 1839. Text in Bancroft Davis, John, *Treaties and Conventions Concluded Between the United States of America and Other Powers Since July 4, 1776*, Washington, Government Printing Office, 1889, p. 678 *et seq*.

[29] Article 15, The Hague Convention of 1899 for the Pacific Settlement of International Disputes; Article 37, The Hague Convention of 1907 for the Pacific Settlement of International Disputes. Texts available at the website of the PCA: www.pca-cpa.org.

[30] See Lauterpacht, Hersch, *op. cit*. 21, pp. 60–62.

[31] *Ibid*., p. 63. On the functions of equity see Akehurst, Michael, 'Equity and General Principles of Law', *ICLQ*, Vol. 25, 1976, pp. 801–802; Herrero de la Fuente, Alberto, *La equidad y los principios generales en el derecho de gentes*, Valladolid, Universidad de Valladolid, Cuadernos de la Cátedra 'J. B. Scott', 1973, pp. 46–49.

amount of which largely exceeded the principal amount due. In the award, the arbitral tribunal recognized interest rates for an amount equal to the capital, based on '*droit commun'*. This was, it said, the only law applicable to the case.[32]

The tribunal applied the Roman law principle *alterum tantum*, i.e., that accumulated interest cannot exceed the amount of the original principal.[33] It turned to this principle because conventional and customary international law lacked a specific rule regulating the extinctive prescription of interests. By applying the *alterum tantum* principle, the tribunal filled the gap left by the absence of specific rules of international law applicable to the case.

The tribunal derived the *alterum tantum* principle directly from Roman law. It stated not only that the *droit commun* constituted the only law applicable to the case, but even went on to quote the pertinent provisions of Justinian's Digest. In brief, the tribunal settled the legal dispute on the basis of a legal principle transposed directly from Roman law into international law.

2.2.2.2. *Affaire du Capitaine Thomas Melville White*

The Affaire du Capitaine Thomas Melville White provides the second example. The case arose out of the arrest and imprisonment of an English citizen in Peru. In the British Government's view the arrest was illegal. In the award, the arbitral tribunal observed that the rules of criminal procedure to be respected by the courts in any State are to be judged exclusively in accordance with the legislation in force there. For this reason, it found no fault on the part of Peru.[34]

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[32] 'Il paraît également équitable d'adjuger … les intérêts. Mais, comme, d'après le droit commun, seul applicable ici, le cumul des intérêts arriérés s'arrête lorsqu'ils atteignent le principal (Dig., de cond. Indeb., 12, 6; Code, de usuris, 10, 32), on a dû restreindre les intérêts'. *Affaire Yuille, Shortridge et Cie., arbitrage de la Commission désignée par le Sénat de la Ville libre de Hambourg, sentence du 21 octobre 1861*. In De la Pradelle, Albert and Politis, Nicolas (eds.), *Recueil des Arbitrages Internationaux*, 2e édition, Paris, Les Éditions Internationales, Vol. II, p. 108.

[33] See Lauterpacht, Hersch, *op. cit*. 21, pp. 269–270.

[34] '[T]he British Government … proceeds on the erroneous supposition that the rules of criminal procedure in England are to be held good and applied in the criminal proceedings in Peru; but, little doubt as there can be that the rules of procedure to be observed by the courts in any country are to be judged solely and alone according to the legislation in force there, it is quite as certain that in the proceedings in White's case no fault can be found with the Peruvian courts of justice, or with the Peruvian Government, since they were fully justified according to the Peruvian procedure'. *Décision de la commission, chargée, par le Sénat de la Ville libre hanséatique de Hambourg, de*

The arbitral tribunal decided the legal issue at stake in accordance with the *lex fori* principle.[35] In so doing, it filled the gap left by the lack of conventional and customary rules applicable to the issue at hand. The tribunal did not state how it had determined the existence and scope of application of the principle in question.

In this award, the tribunal also declared that no general principle of law prevented a judge from ordering that arrested persons be held *incommunicado*.[36] Put differently, had such a principle existed, the arbitral tribunal would have deemed Captain Melville White's solitary confinement illegal. In short, the tribunal considered general principles of law as being binding norms of international law.

2.2.2.3. *Affaire au sujet des réclamations présentées par des sujets anglais à la République argentine pour les pertes provenant du décret du 13 février 1845*

One of the legal issues examined by the arbitrator in this case was the interpretation of the words 'and other losses' that were employed in an international treaty relevant to the case. The arbitrator interpreted these words in conformity with the object and purpose of the treaty. Then, he confirmed the resulting interpretation in accordance with the ordinary meaning of the words 'and other losses', which were also employed in another international treaty relevant to the case.[37]

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prononcer dans la cause du capitaine Thomas Melville White, datée de Hambourg du 13 avril 1864. In La Fontaine, Henri, *Pasicrisie internationale, 1794–1900, Histoire documentaire des arbitrages internationaux*, The Hague/Boston/London, Martinus Nijhoff Publishers, 1997, p. 48.

[35] *Lex fori* means 'the law of the forum; the law of the jurisdiction where the case is pending'. See Garner, Bryan (ed.), *Black's Law Dictionary,* 8th edition, St. Paul, Thomson/West, 2004, p. 929.

[36] 'It would be unjust to deny the judge [the power to hold an arrested person *incommunicado*] on the general principles of law; it ought rather to be taken for granted that, when a person has been arrested on suspicion of a serious crime, the judge can often only secure the necessary disclosures by preventing all communication with the prisoner, and thus avoid the danger of collusion, by which the investigation might be prejudiced'. *Décision de la commission, chargée, par le Sénat de la Ville libre hanséatique de Hambourg, de prononcer dans la cause du capitaine Thomas Melville White, datée de Hambourg du 13 avril 1864*. In La Fontaine, Henri, *op. cit*. 34, p. 50.

[37] '[T]he signification just given to Article I of the Convention of the 21st of August 1858, is confirmed by the literal tenor of Article VI of the Additional Convention of the 18th of August 1859. *Sentence du Président du Chili, au sujet des réclamations présentées par des sujets anglais à la République argentine pour les pertes provenant du décret du 13 février 1845, rendu à Santiago de Chile, le 1er août 1870*. *Ibid.,* p. 65.

The arbitrator applied the principles of teleological and literal interpretation of treaties, respectively. While according to the former a treaty should be interpreted in the light of its object and purpose, pursuant to the latter words and phrases are to be given their usual and natural meaning in the context in which they occur.[38] In this example, the arbitrator applied these principles to the interpretation of conventional law. The arbitrator did not clarify how he identified the principles of teleological and literal interpretation of treaties.

Later in the same award, the arbitrator applied the principle that 'a person who exercises his proper right harms no one'.[39] This principle originated in Roman law and is reflected in the maxim *qui iure suo utitur, nemini facit iniuriam*.[40] The arbitrator did not apply this principle to fill legal gaps or to interpret legal rules, but simultaneously with other legal rules, apparently as a means of reinforcing the legal reasoning underlying the decision. In fact, the principle in question was one of the six legal grounds upon which the arbitrator based his decision.

2.2.2.4. *Affaire du Queen*

The Affaire du Queen provides another example relevant to this study. In the award, the arbitral tribunal applied the 'principle of universal jurisprudence' which places the burden of proof upon the claimant.[41] In other words, it applied the principle *onus probandi actori incumbit*.[42]

The tribunal determined the existence of this general principle of law by pointing out that 'the legislation of all nations' recognizes it. This is one of those rare awards where the arbitral tribunal says explicitly that the general principle of law that it is applying derives from national legal systems.

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[38] On general principles of interpretation of treaties see Fitzmaurice, Malgosia, 'The Practical Working of the Law of Treaties', in Evans, Malcolm (ed.), *International Law*, 2nd edition, New York, Oxford University Press, 2006, pp. 198–203.

[39] '[I]t is a principle of universal jurisprudence that he who uses his right offends no one'. *Sentence du Président du Chili, au sujet des réclamations présentées par des sujets anglais à la République argentine pour les pertes provenant du décret du 13 février 1845, rendu à Santiago de Chile, le 1er août 1870*. In La Fontaine, Henri, *op. cit.* 34, p. 67.

[40] See Garner, Bryan (ed.), *op. cit*. 35, p. 1750.

[41] '[D]ans l'examen de cette question, on doit suivre, comme règle générale de solution, le principe de jurisprudence, consacré par la législation de tous les pays, qu'il appartient au réclamant de faire la preuve de sa prétention'. *Sentence du 26 mars 1872 (Affaire du Queen)*. De la Pradelle, Albert and Politis, Nicolas (eds.), *op. cit*. 32, p. 708.

[42] See Cheng, Bin, *op. cit*. 20, pp. 327–328.

2.2.2.5. *The Russian Indemnity Case*

This case involved Russia and Turkey. It concerned the issue of State responsibility for the non-payment of pecuniary debts, more precisely, the question of the obligation to pay interest arising from non-payment of such debts. Russia demanded interest from Turkey for the delayed payment of certain sums of compensation provided for in the Treaty of Constantinople of 1879. On the other hand, Turkey submitted that the status of a State is not identical to that of ordinary debtors under national law, that the resources at its disposal limit its responsibility, and that it can itself decide how it will satisfy its creditors.[43] Nevertheless, Turkey did not hesitate to base its argument on private law.[44]

Because of the lack of conventional and customary laws regulating the legal issue at stake, the tribunal transposed into the international arena rules of private law governing analogous relations between individuals and made it clear that it was applying public international law. In this vein, the tribunal denied that States have a right to assert privileged status with respect to monetary debts because of their sovereign character.[45] After drawing a broad analogy with legal relations between individuals, the tribunal concluded, 'the general principle of the responsibility of States implies a special responsibility in the matter of delay of payment of a money debt, unless the existence of a contrary custom is proven'.[46] Turkey could not prove the existence of such custom. On the form of that special responsibility, the tribunal declared:

> All the private legislation of the States forming the European concert admits, as did formerly the Roman law, the obligation to pay at least interest for delayed payments as legal indemnity when it is a question of the non-fulfilment of an obligation consisting in the payment of a sum of money fixed by convention, clear and exigible, such interest to be paid at least from the date of the demand made upon the debtor in due form of law.[47]

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[43] For a summary of this case see Scott, James Brown (ed.), *The Hague Court Reports*, New York, Oxford University Press, Carnegie Endowment for International Peace, 1916, p. 297.

[44] See Lauterpacht, Hersch, *op. cit*. 21, p. 256.

[45] *The Russian Indemnity Case (Russia and Turkey), PCA, Award*, 11 November 1912. In Scott, James (ed.), *op. cit.* 43, p. 311. See also Lauterpacht, Hersch, *op. cit.* 21, p. 257.

[46] *The Russian Indemnity Case (Russia and Turkey), PCA, Award*, 11 November 1912. In Scott, James (ed.), *op. cit.* 43, p. 312 et seq. See also Lauterpacht, Hersch, *op. cit.* 21, pp. 257–258.

[47] *The Russian Indemnity Case (Russia and Turkey), PCA, Award*, 11 November 1912. In Scott, James (ed.), *op. cit.* 43, p. 316.

It follows from this passage that the tribunal determined the existence of a general principle of law whereby debtors must pay interest for delayed payments. The tribunal determined, transposed, and applied this principle to the case because, as Lauterpacht pointed out, 'positive international law was silent on the issue' at hand.[48] In other words, the arbitral tribunal applied the principle to fill the legal gap.

As for the determination of the principle in question, the tribunal left no doubt from where this general principle of law comes: the private law rules laid down in the legislation of the States of the then European concert and indirectly from Roman law.

This award is of much interest with regard to the issue of the transposition of general principles of law. The interest resides in the fact that the arbitral tribunal refused to treat the 'special position' of the State as an impediment to the application in the settlement of inter-State legal disputes of a legal principle derived from the law regulating relations between individuals. The tribunal found a relevant analogy between the two kinds of relations and therefore deemed the principle applicable to the case.

Positivist scholars, such as Strupp and Anzilotti, criticized the award on the ground that no analogy was a good reason for transposing that general principle of law into international law, as no conventional or customary law reflected the principle.[49] Other scholars, such as Lauterpacht, held the opposite view. According to him, the analogy made by the arbitral tribunal was consistent with earlier arbitrations and, crucially, accorded with the needs of international relations. In addition, when submitting their legal disputes to arbitral tribunals, States must accept that they are subject to a legal rule the provisions of which, if not found in treaties and custom, may be sought in private law because this also governs the relations of co-ordinated entities.[50] It is clear that the tribunal's view on this particular point was more akin to Lauterpacht's than to Anzilotty and Strupp's, as it did not hesitate in the settlement of an inter-State legal dispute to apply the principle that debtors must pay interest on delayed payments.

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[48] Lauterpacht, Hersch, *op. cit*. 21, p. 257.
[49] *Ibid.,* p. 260.
[50] *Ibid.,* p. 261.

2.2.3. *A Brief Analysis of International Practice*

The arbitral awards referred to above are part of a much broader international practice on the matter. Scholars have demonstrated that this practice was general and consistent.[51]

In those awards, filling legal gaps was the most important function of general principles of law. These were also useful for interpreting legal rules and for reinforcing the legal reasoning underlying the awards. In this situation, arbitrators used to apply general principles of law together with other legal rules or principles.

Arbitral tribunals derived general principles of law directly from Roman law, as in the *Affaire Yuille, Shortridge et Cie*, or from national laws which reflected Roman law principles. This procedure was frequently adopted because such principles were part of the arbitrators' legal culture. Given that the large majority of the legal systems of the States of the European concert was grounded in Roman law and many arbitrators were nationals of such States, it was natural that in case of necessity they would have recourse to their common legal heritage, namely Roman law. It is clear from those awards that arbitrators did not apply general principles of law as the legal principles or rules of one particular national legal system. Hence, it is possible to conclude by way of implication that arbitral tribunals conceived of general principles of law as being legal principles originating from Roman law and common to various national legal systems (especially those of the European concert).

One may also note in those awards that arbitral tribunals used to apply general principles not just of private law (*alterum tantum*; teleological interpretation of treaties, etc.) but also of public law (such as *lex fori* and *onus probandi actori incumbit*).

Finally, it should be noted that, notwithstanding some occasional argument to the contrary (such as in the *Russian Indemnity Case*), arbitral tribunals did not hesitate to transpose national law principles into international law.

The next section shows, first, that the inclusion of the general principles of law as part of the applicable law of the PCIJ cemented their role as a source of international law. Secondly, it illustrates that the general principles of law played a rather marginal role in the judgments and advisory opinions of the PCIJ and the ICJ, less important than the role they played in earlier arbitral awards.

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[51] *Ibid., passim*; Verdross, Alfred, 'Les principes généraux du droit dans la jurisprudence internationale', *RCADI*, Vol. 52 (1935-II), pp. 207–219.

2.3. The PCIJ and the ICJ

The above examples adequately illustrate that, well before the adoption of the PCIJ Statute in 1920, there was already an international practice of applying general principles of law in the settlement of inter-State legal disputes. Article 38 of the PCIJ Statute (on the applicable law of the Court) confirmed this practice, as it empowered the PCIJ to apply conventional law, customary law, *and* general principles of law.

This section provides some background information on the adoption of Article 38 in subsection 2.3.1. Then subsection 2.3.2 examines the scope of this provision as regards general principles of law. Subsection 2.3.3 explains how to find general principles in the judgments and advisory opinions of the PCIJ and the ICJ. The core of this section is subsection 2.3.4, which discusses eight judgments and advisory opinions involving the application of general principles of law by those international courts. Finally, subsection 2.3.5 provides a brief analysis of those judgments and advisory opinions.

2.3.1. *The Adoption of the PCIJ Statute*

Early in 1920, the Council of the League of Nations appointed a group of legal experts – the ACJ[52] – to prepare a report on the establishment of the PCIJ. The ACJ submitted a report containing a draft scheme to the Council in August 1920. The Council examined and amended the report and sent it to the Assembly of the League of Nations, which opened in November 1920. The Assembly instructed its Third Committee to examine the question of the PCIJ's constitution. In December 1920, after a sub-committee had undertaken a careful study of the report, the Third Committee submitted the revised draft which the Assembly adopted unanimously somewhat later. This was the Statute of the PCIJ.[53]

In the preparation of the report, the ACJ discussed the place of general principles of law in international law when it addressed the issue of

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[52] The ACJ was made up of ten individuals: Adatci (Japan); Altamira (Spain); Bevilaqua (Brazil; in the course of the proceedings he was replaced by Fernandes, from the same country); Descamps (Belgium); Hagerup (Norway); De la Pradelle (France); Loder (the Netherlands); Phillimore (United Kingdom); Ricci-Busatti (Italy); and Root (USA). See Permanent Court of International Justice/Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee*, June 16th – July 24th, The Hague, Van Langenhuysen Brothers, 1920, preface.

[53] See International Court of Justice, *The International Court of Justice*, The Hague, United Nations, 1996, 4th edition, pp. 14–15.

the applicable law of the PCIJ.[54] The debate started with the proposal by the President of the ACJ, Descamps. He was of the opinion that the PCIJ had to apply conventional law, international custom, 'the rules of international law as recognized by the legal conscience of civilized nations', and international jurisprudence, in that order.[55] This proposal led to a debate on the functions of the court, as set out below.

According to Root, the PCIJ ought not to have the power to legislate. He deemed it inconceivable that States would have accepted the jurisdiction of a court basing its verdicts on subjective conceptions of justice or general principles.[56]

Phillimore arrived at the same conclusion as Root. In his view, international law is created only by universal agreement of all States; therefore, no international court should have the power to create international law. Furthermore, international custom encompasses both the rules of international law 'as recognized by the legal conscience of civilized nations' and international jurisprudence.[57] For these reasons, he considered it unnecessary to declare that the 'rules of international law as recognized by the legal conscience of civilized nations' and international jurisprudence are part of the applicable law of the PCIJ.

Hagerup pointed to the necessity of laying down an appropriate legal rule aimed at avoiding the possibility of the PCIJ declaring itself incompetent (*non liquet*) where there are no relevant conventional and customary rules applicable to the case.[58] Loder and De la Pradelle were of the same opinion.[59] Descamps, in his turn, affirmed that a judge should never fail to administer justice because of the lack of conventional and customary rules applicable to the case. He furthermore stated that 'the fundamental law of justice and injustice' (or 'the law of objective justice', as he later called it) has its most authoritative expression in the legal conscience of civilized nations, which a judge cannot disregard.[60]

Against that background and with the aim of reaching an agreement on the issue of the applicable law of the PCIJ, Root proposed the formula

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[54] Permanent Court of International Justice/Advisory Committee of Jurists, *op. cit*. 52, p. 293 *et seq*.
[55] *Ibid.,* pp. 306, 318.
[56] *Ibid.,* p. 309.
[57] *Ibid.,* pp. 295, 311.
[58] *Ibid.,* p. 296.
[59] *Ibid.,* p. 312.
[60] *Ibid.,* pp. 310–311, 324.

'general principles of law as recognized by civilized nations', which was eventually accepted, as an alternative to Descamps' original proposal.[61]

Further in this regard, Phillimore stated that the general principles of law are part of international law and that they consist of legal principles accepted by all nations *in foro domestico*, such as the principles of *res iudicata,* good faith, and 'certain principles of procedure'.[62] He also declared that by 'general principles of law' he meant legal maxims.[63] No member of the ACJ objected to his statements, and ultimately Root's proposal was accepted.

In addition, the ACJ considered whether there was a hierarchy among the sources of applicable law. Descamps' proposal directed the PCIJ to apply conventional rules, international custom, and the 'rules of international law as recognized by the legal conscience of civilized nations', in that sequence.[64] Ricci-Busatti and Hagerup disagreed on this point and asked for the deletion of the words '*dans l'ordre successif*'. In their view, pursuant to the fundamental legal principle of *lex specialis derogat legi generali*, such reference would have been superfluous because conventional and customary rules are *lex specialis,* and general principles of law *lex generalis*. Moreover, the expression '*dans l'ordre successif*' failed to recognize that the PCIJ could apply all three sources at once.[65] Ricci-Busatti's argument prevailed and, as a result, Article 38 of the PCIJ Statute did not establish any hierarchy among the sources of applicable law. This legal provision reads as follows:

> The Court shall apply: 1. International conventions, whether general, or particular, establishing rules expressly recognized by the contesting States; 2. International custom, as evidence of a general practice accepted as law; 3. The general principles of law recognized by civilized nations; 4. Subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

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[61] *Ibid.,* p. 344.

[62] By legal principles recognized *in foro domestico*, Phillimore meant legal principles generally recognized in national law. See Simma, Bruno, 'The Contribution of Alfred Verdross to the Theory of International Law', *EJIL,* Vol. 6, No. 1, 1995, p. 49.

[63] Permanent Court of International Justice/Advisory Committee of Jurists, *op. cit*. 52, pp. 316, 335.

[64] *Ibid.,* p. 306.

[65] *Ibid.,* pp. 337–338.

To sum up, in the view of the ACJ, general principles of law are an autonomous source of international law, that is, a source independent of conventional and customary law. These are legal principles generally recognized by States in national law. Their main function is to fill legal gaps, so as to avoid declarations of *non liquet*. Finally, there is no hierarchy among the sources of international law; thus, the PCIJ could apply rules derived from the three sources (conventions, custom, and general principles of law) simultaneously.

2.3.2. *The Scope of Article 38*

Despite the arbitral practice referred to above, scholars began to be interested in the general principles of law source only after the adoption of the PCIJ Statute.

In fact, the issue of the scope of Article 38, paragraph 3 of the PCIJ Statute provoked a large amount of literature and debate.[66] The most debated issue was whether this legal provision describes the then existing general international law, or the particular international law applicable by the PCIJ.[67] The debate ended in the 1930s, when many scholars concluded that Article 38 described the existing general international law.[68]

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[66] Between 1921 and 1934 the following publications appeared among others: Del Vecchio, Giorgio, *Sui principi generali del diritto*, Modena, Società Tipografica Modenese (Antica Tipografica Soliani), 1921, 62 pp.; Lauterpacht, Hersch, *op. cit*. 21; Balladore-Pallieri, Giorgio, *I 'principi generali del diritto riconosciuti dalle nazioni civili' nell'articolo 38 dello Statuto della Corte permanente di Giustizia internazionale*, ("Serie II, Memoria XI"), Torino, Istituto Giuridico della R. Università, 1931, 89 pp.; Wolff, Karl, 'Les principes généraux du droit applicables dans les rapports internationaux', *RCADI*, Vol. 36 (1931-II), pp. 479–553; Verdross, Alfred (rapporteur), 'Les principes généraux de droit comme source du droit des gens', *AIDI*, Bruxelles, Librairie Falk et Fils, Paris, Pedone, Vol. 37, 1932, pp. 283–328; Le Fur, Louis, 'La coutume et les principes généraux du droit comme sources du droit international public', in Appleton, Charles *et al*., *Recueil d'études sur les sources du droit en l'honneur de François Gény,* Paris, Sirey, 1934, T. III, pp. 363–374.

[67] Whereas general international law regulates relations between all the members of the international society, specific international law regulates relations between some of these members. Thus, while the rules of particular international law apply to only some of the subjects of international law, the rules of general international law apply to all its subjects. Particular international law is generally created by treaties, but it may also be created by particular custom. See Podestá Costa, Luis and Ruda, José, *Derecho Internacional Público*, Buenos Aires, TEA, 2da reimpresión de la edición actualizada de 1985, Vol. 1, pp. 29–30.

[68] For instance, see Lauterpacht, Hersch, *op. cit*. 21, p. 71; Balladore-Pallieri, Giorgio, *op. cit*. 66, pp. 49 *et seq*.; Wolff, Karl, *op. cit*. 66, p. 483; Verdross, Alfred (rapporteur), *op. cit*. 66, pp. 287–289.

Subsequent international practice has confirmed the view that Article 38 of the PCIJ Statute correctly reflected the then existing general international law.[69] Ultimately, the inclusion of a *chapeau* in Article 38 of the ICJ Statute[70] which reads, 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply…' reaffirmed that general principles of law are part of general international law.

By introducing that *chapeau* into Article 38, the drafters of the ICJ Statute stated clearly that international law consisted of the legal rules and principles indicated in that legal provision, among which are general principles of law. Finally, it is worth noting that even today international legal scholars agree that Article 38 of the ICJ Statute reflects general international law.[71]

2.3.3. *How to Find General Principles of Law in the Judgments and Advisory Opinions of the PCIJ and the ICJ*

As illustrated above, before the adoption of the PCIJ Statute early international arbitral tribunals had applied general principles of law in the settlement of inter-State legal disputes, in particular, in order to fill the gaps left by the absence of applicable conventional and customary rules of international law.

The PCIJ and the ICJ have also resorted to general principles of law in their judgments and advisory opinions, as early international arbitral tribunals did before them. On those occasions, they did not always make it clear that they were applying Article 38 paragraph 3/Article 38, paragraph 1(c) of their Statutes. The ICJ referred only once to Article 38, paragraph 1(c), and it did so in order to rule out the application of a particular legal principle rather than to apply a general principle of law.[72] In contrast, in separate and dissenting opinions, members of the PCIJ and ICJ and *ad hoc* judges have often referred to the relevant paragraph of Article 38.[73]

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[69] See Barberis, Julio, *op. cit*. 10, pp. 229–230, and the practice described therein.

[70] The ICJ is a kind of successor to the PCIJ, and its Statute reproduces the PCIJ Statute almost entirely.

[71] See, e.g., Daillier, Patrick and Pellet, Alain, *op. cit*. 19, p. 114, § 59.

[72] *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p. 47, § 88.

[73] For instance, see *Lighthouses in Crete and Samos, Judgment, 1937, PCIJ, Series A/B, No. 71, Separate Opinion by Judge Séfériadès*, pp. 137–138; *International Status of South West Africa, Advisory Opinion, Separate Opinion by Sir McNair*, *ICJ Reports 1950*, p. 148; *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, Dissenting*

For that reason, and given that both customary rules and general principles of law are unwritten law, it is sometimes difficult to ascertain whether the PCIJ and the ICJ applied the former or the latter. Yet, it is possible to find general principles of law in their judgments and advisory opinions by taking into account some signs of their application. For example, one of these signs is the use of some particular terms, such as 'established principle' and 'general concept of law'. Sometimes, the terms employed by the PCIJ and the ICJ are explicit, such as when they use the precise term 'general principle of law'. Other evidence consists of their calling the legal principles *eo nomine*, such as *res iudicata*. All this can be appreciated in the next subsection.

2.3.4. *Eight Judgments and Advisory Opinions*

The following eight judgments and advisory opinions are relevant examples of the role played by the general principles of law in the practice of the PCIJ and the ICJ. The judgments and advisory opinions are dealt with in chronological order. The main line of argument is that general principles of law have played a marginal role in the practice of the PCIJ and the ICJ, in that neither has based any ruling exclusively on these principles. Generally, the PCIJ and the ICJ have not explained how they arrived at the existence of the general principles of law that they invoked. In addition, the issue of the suitability of general principles of law for regulating international law issues normally does not arise in judgments and advisory opinions but in separate opinions. Whether the issue has come up during the deliberations of both international courts is uncertain, given that these are private and are to remain secret.[74]

Opinion of Judge Levi Carneiro, *ICJ Reports 1952*, p. 161; *Application of the Convention of 1902, Governing the Guardianship of Infants, Judgment, Separate Opinion of Judge Moreno Quintana, ICJ Reports 1958*, p. 107; *Right of Passage over Indian Territory, Merits, Judgment, Separate Opinion of Judge Wellington Koo*, *ICJ Reports 1960*, pp. 66–67; *Temple of Preah Vihear, Merits, Judgment, Dissenting Opinion of Judge Alfaro, ICJ Reports 1962*, pp. 42–43; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Declaration of Judge Fleischhauer, ICJ Reports 1996*, pp. 308–309; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, Merits, Separate Opinion of Judge Simma, ICJ Reports 2003*, §§ 66–74.

[74] See Article 54, paragraph 3, ICJ Statute.

2.3.4.1. *Jaworzina*

The Jaworzina advisory opinion provides us with the first example relevant to our discussion.[75] In these advisory proceedings, the PCIJ gave an opinion on the question whether the issue of the delimitation of the frontier between Poland and Czechoslovakia was still open.[76]

The Allied Powers had decided to settle the legal dispute by directly dividing the territories in question between Poland and Czechoslovakia. To this end, they set up a Conference of Ambassadors, whose task consisted in undertaking the division of territories.[77] According to the preamble to the Decision of the Conference of Ambassadors, the Conference intended conclusively and definitively to carry out the terms of the resolution adopted by the Allied Powers.[78] However, Poland submitted that the Decision of the Conference of Ambassadors did not decide the entire legal dispute, as it did not fix the territory of Jaworzina. Poland quoted a letter from the Conference in which it stated that the Decision had not fixed the frontier concerning the Jaworzina sector.[79] Poland argued that the letter was relevant to its case, pursuant to the *eius est interpretare legem cuius condere* principle.[80]

The PCIJ dismissed Poland's argument because the letter it referred to could not outweigh the plain language of the Conference's Decision. It held that the Decision had a dual nature legally: it had much in common with arbitration and it had the force of a contractual obligation.[81] Moreover, the requirements for the application of the 'traditional principle' *eius est interpretare legem cuius condere* had not been met.[82]

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[75] *Jaworzina, Advisory Opinion, 1923, PCIJ, Series B*, No. 8.
[76] *Ibid.,* p. 10.
[77] *Ibid.,* pp. 25–26.
[78] *Ibid.,* p. 28.
[79] *Ibid.,* pp. 34–36.
[80] According to this principle, 'It is that person's to interpret whose it is to enact'. See Garner, Bryan (ed.), *op. cit*. 35, p. 1715.
[81] *Jaworzina, Advisory Opinion, 1923, PCIJ, Series B, No. 8*, pp. 28, 30, 36.
[82] 'Without success it has been maintained … that the letter … from the Conference of Ambassadors … is the most authoritative and most reliable interpretation of the intention expressed at that time, and that such an interpretation, being drawn from the most reliable source, must be respected by all, in accordance with the traditional principle: *eius est interpretare legem cuius condere*. Even if it was possible to accept the assimilation between this decision and internal legislation (an assimilation on which this contention is based) to be well founded, it will suffice, in order to reduce this objection

For this reason among others,[83] the PCIJ was of the opinion that the Conference's Decision, which was definitive, had settled the issue of the delimitation of the frontier between Poland and Czechoslovakia.[84]

It follows from the above that the PCIJ interpreted the Decision in accordance with the principle of textual interpretation (since it referred to the 'plain language' of the Decision) and not pursuant to the *eius est interpretare legem cuius condere* principle.

The PCIJ applied the principle of textual interpretation as a means of interpretation of the Decision. The interpretation thus made did not decide the whole issue at stake, but was rather one legal argument among others considered by the PCIJ.

The PCIJ did not explain how it determined the existence of the principle of textual interpretation. Such a way of proceeding is understandable, as early international arbitral tribunals had repeatedly applied the principle in their awards.[85] In fact, the principle of textual interpretation of treaties was already a well-known general principle of law.

Furthermore, the example makes it clear that the applicability of general principles of law at the international level may depend on the existence of a relevant analogy between the legal issue at stake at the international level and a given institution of national law. In this particular case, the PCIJ accepted as relevant the analogy between national legislation and contracts (the source of the analogy) and the Decision of the Conference of Ambassadors (the target of the analogy). Yet it was unable to apply the *eius est interpretare legem cuius condere* principle because the conditions for its application had not been met in the case at hand.

2.3.4.2. *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*

This advisory opinion provides another example germane to this study.[86] It concerns the question of the determination of the Southern frontier between Turkey and Iraq by application of Article 3, paragraph 2, of the

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to its true value, to observe that it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it. Now … the Conference of Ambassadors did not retain this power'. *Ibid.,* p. 37.

[83] *Ibid.,* pp. 37–58.

[84] *Ibid.,* p. 57.

[85] See subsection 2.2.2.3, above.

[86] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, PCIJ, Series B, No. 12*.

Treaty of Lausanne. The Council of the League of Nations had requested the PCIJ to give an advisory opinion on the following three questions. First, what was the character of the decision to be taken by the Council by virtue of Article 3, paragraph 2, of the Treaty of Lausanne? Secondly, did the decision have to be unanimous or might a majority take it? Thirdly, might the representatives of the interested Parties take part in the vote?[87]

With respect to the first question, the PCIJ was of the opinion that the decision to be taken by the Council pursuant to Article 3, paragraph 2, of the Treaty of Lausanne was binding upon the parties to the dispute and a definitive determination of it.[88]

As for the second question, it recalled that four permanent members and six non-permanent members formed the Council of the League of Nations and that this organ could invite a State to sit on the Council where the State had an interest in a particular item of the Council's agenda. The Council invited Turkey to sit with it in connection with the legal dispute at stake.[89] The PCIJ found that the decision to be adopted by the Council pursuant to Article 3, paragraph 2 of the Treaty of Lausanne ought to have been unanimous, in accordance with Article 5, paragraph 1 of the Convenant of the League of Nations, given the silence of the Treaty of Lausanne on the matter.[90]

With reference to the third question, namely whether the representatives of the interested States could take part in the vote, the PCIJ observed that Article 5, paragraph 1 of the Covenant of the League of Nations does not regulate the particular situation where the Council is adjudicating upon a legal dispute. Then it turned to Article 15, paragraphs 6 and 7 of the Covenant, which concerns the adoption of recommendations by the Council. Pursuant to these legal provisions, the votes of the interested States are not taken into account in ascertaining whether there is unanimity. For these reasons, it concluded that it was this concept of the rule of unanimity that had to apply to the legal dispute before the Council.[91]

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[87] *Ibid.,* pp. 6–7.
[88] *Ibid.,* pp. 27–28, 33.
[89] *Ibid.,* p. 29.
[90] *Ibid.,* p. 31.
[91] 'The question which arises, therefore, is solely whether … unanimity is sufficient or whether the representatives of the Parties must also accept the decision. The principle laid down by the Covenant [of the League of Nations] in paragraphs 6 and 7 of Article 15, seems to meet the requirements of a case such as that now before the Council [of the League of Nations], just as well as the circumstances contemplated in that article. The well-known rule that no one can be judge in his own suit holds good'. *Ibid.,* p. 32.

It thus follows that the PCIJ resorted to the *nemo iudex in re sua* (no one can be judge in his own action) principle to intepret Article 5, paragraph 1 of the Covenant, as this legal instrument was silent on whether the representatives of the interested States could take part in the vote. The PCIJ identified that general principle of law in the provisions of Article 15, paragraphs 6 and 7 of the Covenant of the League of Nations. It is worth noting that international arbitral tribunals had often applied the *nemo iudex in re sua* principle in their awards.[92] Thus, it is likely that the existence of the principle was plain and clear to the eyes of the members of the PCIJ.

The application of this principle to settle the legal issue at stake before the PCIJ attests to the malleability of the content and scope of the general principles of law. This is so because, although the rationale of the *nemo iudex in re sua* principle consists in ensuring the impartiality of the judiciary,[93] the PCIJ applied it in connection with proceedings before the Council of the League of Nations, i.e. a political organ of an international organization. Yet, the decision of the PCIJ to apply this general principle of law does not seem to be capricious; in fact, Article 15 of the Covenant of the League of Nations, which regulates the adoption of recommendations by the Council, reflects the principle in question. Moreover, the application of the principle in the context of political organs rather than of judicial organs has transcended the legal regime of the League of Nations. Article 27 of the UN Charter is proof of this, as it sets out the principle in respect of certain aspects of the voting process in the Security Council.[94]

2.3.4.3. *Factory at Chorzów*

This case relates to reparations alleged to be due from Poland to Germany.[95] Poland objected to the jurisdiction of the PCIJ,[96] because,

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[92] See the examples in Cheng, Bin, *op. cit*. 20, p. 279 *et seq*.

[93] *Ibid.,* p. 284.

[94] Article 27, paragraph 3 of the UN Charter reads as follows: 'Decisions of the Security Council on all matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; *provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting*' (my italics). For a thorough commentary on this legal provision see Conforti, Benedetto, *The Law and Practice of the United Nations*, 3rd revised edition, Martinus Nijhoff Publishers, Leiden/Boston, 2005, pp. 74–80.

[95] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No. 9*.

[96] *Ibid.,* p. 20.

inter alia, there were other tribunals in which the injured companies represented by Germany could assert their right to an indemnity.[97]

The PCIJ considered the issue in the light of Article 23, paragraph 2 of the Geneva Convention concerning Upper Silesia. Based on this legal provision, it concluded that it had jurisdiction over the case.[98] It also invoked the *nullus commodum capere de sua iniuria propria* principle in order to confirm the decision based on Article 23.[99]

This example reveals that when an international court or tribunal applies a general principle of law together with other legal rules, the application may purport to validate a decision primarily adopted on the basis of the other legal rules. In other words, the invocation of general principles of law may reinforce the legal reasoning leading to the decision. In this example, the PCIJ decided the issue at stake in accordance with Article 23, paragraph 2 of the Geneva Convention concerning Upper Silesia, and then it confirmed the decision in the light of the *nullus commodum capere de sua iniuria propria* principle.

As for the determination of the existence and contents of that general principle of law, the PCIJ relied not only on awards of international arbitral tribunals but also on decisions of national courts, as the PCIJ itself stated.

Finally, this example shows that the application of general principles of law by international courts and tribunals is not necessarily subject to their prior transposition from national legal systems into international law. This is the case with the general principles of law that are already part of international jurisprudence.

2.3.4.4. *Graeco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*

In this advisory opinion, the PCIJ interpreted the conditions governing appeals to the arbitrator referred to in Article VII of the Final Protocol to the Graeco-Turkish Agreement of 1 December 1926.[100]

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[97] *Ibid.,* p. 25.

[98] *Ibid.,* p. 25 *et seq*.

[99] 'It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some other means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him'. *Ibid.,* p. 31.

[100] *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, PCIJ, Series B, No. 16*, p. 5.

The PCIJ interpreted Article VII in accordance with the principle of textual interpretation and then resorted to the *compétence de la compétence* principle to reinforce the accuracy of that interpretation.[101] In short, the PCIJ resorted to two general principles of law together to settle the legal issue at stake.

The PCIJ did not explain how it ascertained the existence of both general principles of law. Such a course of action is understandable, given that early international tribunals and the PCIJ itself had already applied both principles.[102] In fact, textual interpretation of treaties and *compétence de la competence* were well-known general principles of law.

2.3.4.5. *Corfu Channel*

In this case, the ICJ examined whether Albania knew about mine-laying in its territorial waters.[103] Given the difficulties in gathering direct evidence relevant to the case, it accepted indirect evidence because this 'is admitted in all systems of law' if it leaves 'no room for reasonable doubt'. For this reason, it admitted evidence by way of factual inference or circumstantial evidence.[104]

The ICJ thus determined the existence of the principle that 'proof may be administered by means of circumstancial evidence' and applied it to the case.[105] In so doing, it filled the gap left by the absence of relevant provisions in the Rules of Court.

The determination of the existence of that general principle of law is relevant to this study because the principle applies not only in the context

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[101] 'For, according to its very terms, Article 4 of the Final Protocl expressely contemplates questions which may arise within the Mixed Commission; there can, therefore, be no doubt that only questions arising in the course of the deliberations of the Commission are contemplated. But, that being so, it is clear – having regard amongs other things to the principle that, as a general rule, any body possessing jurisdictional power has the right in the first place itself to determine the extent of its jurisdiction- that questions affecting the extent of the jurisdiction of the Mixed Commission must be settled by the Commission itself without action by any other body being necessary'. Ibid., p. 20.

[102] With respect to the principle of textual interpretation, see *Affaire au sujet des réclamations présentées par des sujets anglais à la République argentine pour les pertes provenant du décret du 13 février 1845*, and *Jaworzina*, above. With regard to the compétence de la competence principle, see the relevant jurisprudence in Lauterpacht, Hersch, *op. cit.* 21, p. 208; and Cheng, Bin, *op. cit.* 20, pp. 275–278.

[103] *Corfu Channel, Merits, Judgment, ICJ Reports 1949*, p. 4.

[104] *Ibid.,* p. 18.

[105] See Cheng, Bin, *op. cit*. 20, p. 322.

of civil procedure, but also in criminal procedure.[106] Therefore, it might be a precedent for drafters of rules of procedure and evidence of international criminal courts and tribunals, as well as for such courts and tribunals themselves where their own rules of evidence are silent on the matter.

The judgment is evidence of the fact that the ICJ conceives of general principles of law as being legal principles not exclusively belonging to national legal systems, but as common to all legal orders. In fact, although in this example the ICJ did not clarify how it arrived at the principle that evidence may be furnished by means of circumstantial evidence; it referred to its admission in 'all systems of law'. This might suggest that it looked at national legal systems and international arbitral procedure together.

2.3.4.6. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*

In this advisory opinion, the ICJ replied to the question whether the General Assembly has the right to refuse to give effect to an award of compensation made by the UN Administrative Tribunal.[107] In the ICJ's opinion, the General Assembly does not have such a right because the Statute of the UN Administrative Tribunal states that a judgment is final and unappealable. The ICJ also stated that in accordance with a 'well-established and generally recognized principle of law', a judgment passed by a judicial body is *res iudicata* and binding upon the parties to the dispute'.[108]

By invoking the *res iudicata principle* in this ruling, the ICJ did not fill any legal gaps, as the Statute of the UN Administrative Tribunal already covered the issue.[109] Rather, it applied the principle as an additional legal ground to reinforce the legal reasoning underlying the advisory opinion.

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[106] 'A condemnation, even to the death penalty, may be well founded on indirect evidence and may nevertheless have the same value as a judgment by a court which has founded its conviction on the evidence of witnesses'. *Corfu Channel, Merits, Judgment, ICJ Reports 1949*, p. 90.

[107] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1954*, p. 47.

[108] *Ibid.,* p. 53.

[109] See also Degan, Vladimir, 'General Principles of Law (A Source of General International Law)', *FYIL*, Vol. 3, 1992, p. 48.

Finally, it is worth noting that the determination of the existence of a general principle of law such as *res iudicata* did not create any problem for the ICJ, for the reason that international arbitral tribunals had often applied it and thus it was already part of international law.[110]

2.3.4.7. *Right of Passage over Indian Territory*

In this case, the ICJ dealt with a right of passage through Indian territory in favour of Portugal and India's obligation to allow Portugal through its territory.[111] Portugal had based its claim primarily on bilateral custom and on general custom, and subsidiarily on general principles of law (it presented comparative law research covering sixty-four national legal systems).[112]

The ICJ decided not to examine whether there were general customary rules or general principles of law regulating the right of passage over the territory of States, given that a bilateral custom regulated Portugal's right of passage over Indian territory.[113] This example is germane to this study for the following two reasons.

First, it is evidence of the subsidiary nature of general principles of law as a source of international law. In fact, it was unnecessary to have recourse to general custom or general principles of law in this case, because a relevant bilateral custom existed regulating the issue at stake. In other words, *lex specialis derogat legi generali*.

According to Thirlway, the ICJ was aware that the application of general principles of law on the right of passage might lead to a different result.[114] The reason is that, while the ICJ dismissed Portugal's claim to the passage of troops, armed police, and ammunition because it had

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[110] See, for example, the cases cited by Lauterpacht, Hersch, *op. cit*. 21, pp. 206–207.

[111] *Right of Passage over Indian Territory, Merits, Judgment, ICJ Reports 1960*, p. 6.

[112] See Thirlway, Hugh, "The Law and Procedure of the International Court of Justice", *BYIL*, 1990, Vol. 61, p. 120.

[113] 'Portugal also invokes general international custom, as well as the general principles of law recognized by civilized nations, in support of its claim of a right of passage as formulated by it. Having arrived at the conclusion that the course of dealings between the British and Indian authorities on the one hand and the Portuguese on the other established a practice, well understood between the Parties, by virtue of which Portugal had acquired a right of passage in respect of private persons, civil officials and goods in general, the Court does not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result'. *Right of Passage over Indian Territory, Merits, Judgment, ICJ Reports 1960*, pp. 43–44.

[114] See Thirlway, Hugh, *op. cit*. 112, p. 120.

found that such passage was subject to prior authorization by India, the right of passage under general principles of law was not so limited.[115]

Secondly, the decision reveals that there may be some difficulties in transposing general principles of law into international law. With respect to the right of passage, India had submitted that relationships between the subjects of national law were unlike those between sovereign States, since sovereignty does not consist just in the ownership of territory. Thus, even if national legal systems recognize a right of passage over adjacent land in certain circumstances, the exercise of that right will not have the same impact on the rights of the owner of the land as would the passage of armed troops or sovereignty over the territory of a State.[116] The Indian *ad hoc* judge held a similar view.[117] Although the ICJ did not deal with that issue, a member of the ICJ, in a separate opinion, did consider it and saw no difficulty in transposing the principle into international law.[118]

2.3.4.8. *South West Africa*

The South West Africa case gives us another example pertinent to this study.[119] The judgment in this case shows that general principles

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[115] The ICJ declared that it was 'unnecessary to determine whether or not, in the absence of the practice that actually prevailed, general interntional custom or the general principles of law recognized by civilized nations coud have been relied on by Portugal in support of its claims to a right of passage in respect of these categories'. *Right of Passage over Indian Territory, Merits, Judgment, ICJ Reports 1960*, p. 43.

[116] See reference in Thirlway, Hugh, *op. cit*. 112, p. 121.

[117] *Right of Passage over Indian Territory, Merits, Judgment, Dissenting Opinion of Judge Chagla, ICJ Reports 1960*, pp. 177–178.

[118] 'The existence of two conflicting rights, however, is not an uncommon phenomenon in international law. In the complexities of intercourse between nations such a situation is unavoidable. It is, however, not an intractable problem; its solution only calls for mutual adaptation and adjustment. By reference to, and application of, the general principles of law as stipulated in Article 38, paragraph 1(c), of the Statute, as well as to customary international law, similar situations have found solutions in the past. In municipal law, as disclosed by a comparative study by Professor Max Rheinstein, the right to access to enclaved property is always sanctioned. Admittedly, there are important distinctions between a right of passage of an international enclave and that of an enclaved land owned by a private individual. But in whatever mould municipal law may be cast, in whatever technical framework it may be installed, in harmony with national tradition or out of preference for a particular legal fiction, the underlying principle of recognition of such a right, in its essence, is the same. It is the principle of justice founded on reason'. *Right of Passage over Indian Territory, Merits, Judgment, Separate Opinion of Judge Wellington Koo, ICJ Reports 1960*, p. 66.

[119] *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p. 6.

of law may consist of legal principles generally accepted in national law. In this case, the legal principle at stake was the Roman law principle of *actio popularis*.[120]

The ICJ examined the argument that it was essential as a safeguard for the performance of the mandates given by the League of Nations that each Member State could have a legal right in that matter and, ultimately, be able to take action with regard to the mandates.[121] The ICJ rejected the argument.[122]

At first glance, the ICJ's opinion makes it clear that a national legal principle should be generally recognized in national law in order to be considered a general principle of law. In other words, recognition by a limited number of national legal systems or by a particular legal family of the world is insufficient; it is necessary for the principle to be recognized by the generality of national legal systems.

In Thirlway's opinion, the ICJ would not have applied the *actio popularis* as a general principle of law even if all national legal systems had recognized such action.[123] The reason is the 'radically different nature of judicial jurisdiction in the international and national procedures' and the doubtful 'transferable' nature of the *actio popularis* in international law.[124] Unfortunately, Thirlway did not explain his argument in more detail, so that the reasons for finding the transferable nature of the *actio popularis* 'doubtful' became apparent.

2.3.5. *An Analysis of the Judgments and Advisory Opinions*

The judgments and advisory opinions referred to above indicate that the PCIJ and the ICJ have resorted to general principles of law. They are

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[120] In Roman law the *actio popularis* was 'An action that a male member of the general public could bring in the interest of the public welfare'. See Garner, Bryan (ed.), *op. cit*. 35, pp. 29–30.

[121] *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p. 46, § 85.

[122] 'Look at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an *'actio popularis',* or right resident in any member of a community to take legal action in vindication of a legal interest. But although a right of this kind may be known to certain municipals systems of law, it is not known to international law at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1(c) of its Statute'. *Ibid.,* p. 47, § 88.

[123] Thirlway, Hugh, *op. cit*. 112, p. 113.

[124] *Ibid.,* p. 129, footnote 405.

part of the larger practice of the PCIJ[125] and ICJ[126] of having recourse to these principles.

However, in the ICJ's judgments and advisory opinions of recent decades it is difficult to come across examples of the application of general principles of law.[127] It is rather in the context of declarations, and separate and dissenting opinions of members of the ICJ and *ad hoc* judges that the issue of the applicability of general principles of law emerges more often.[128] Furthermore, the judgments and advisory opinions of the PCIJ and the ICJ provide examples of the application of general principles of law to fill legal gaps just in very rare occasions.[129] This is a remarkable difference between the practice of the PCIJ and the ICJ, on the one hand, and that of early international arbitral tribunals, on the other. One reason the PCIJ and the ICJ do not resort to general principles of law for filling legal gaps may be that the ever-expanding body of conventional and customary rules reduces the chances of encountering legal gaps, and thus of turning to general principles of law for that purpose. Another reason may be that the PCIJ and the ICJ have been rather reluctant to rely upon legal principles that are not reflected in conventional and customary rules of international law. In any event, the fact is that the PCIJ and the ICJ have considered general

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[125] According to Blondel and Degan, this practice was relatively frequent, in particular, in the practice of the PCIJ. See Blondel, André, 'Les principes généraux de droit devant la Cour permanente de Justice internationale et la Cour Internationale de Justice', in Battelli, Maurice *et al*., *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève, Tribune, 1968, pp. 201–236 ; Degan, Vladimir, *op. cit*. 109, pp. 41–54.

[126] For other examples in the practice of the ICJ see Charney, Jonathan, *op. cit*. 22, pp. 190–191, footnote 291.

[127] See, e.g., *Elettronica Sicula S.p.A. (ELSI), Judgment, ICJ Reports 1989*, p. 44, § 54 (estoppel); *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, ICJ Reports 1992*, pp. 409, 575, 579, §§ 81, 364, 367 (aquiescense); *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p. 67, § 110 (clean hands).

[128] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, Separate Opinion of Judge Shahabuddeen, ICJ Reports 1992*, pp. 286–287; *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter Claim, Order of 10 March 1998, Dissenting Opinion of Judge Rigaux, ICJ Reports 1998*, p. 190; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Declaration of Judge Herczegh, ICJ Reports 1996*, p. 226; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Declaration of Judge Fleischhauer, ICJ Reports 1996*, pp. 308–309; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, Merits, Separate Opinion of Judge Simma, ICJ Reports 2003*, §§ 66–74.

[129] See *Corfu Channel* in subsection 2.3.4.5 above.

principles of law more in order to confirm the validity of a decision that was taken primarily on the basis of a different legal ground (such as in order to reinforce the legal reasoning leading to a given decision),[130] or to interpret legal rules.[131]

Furthermore, it should be noted that the distinction between the gap-filling, interpretative, and confirmative functions of the application of general principles of law referred to above is not always clear in practice. What is more, they sometimes seem to overlap each other. This is so because such application usually takes place in the context of a broader legal issue. For example, in the *Interpretation of the Graeco-Turkish Agreement of 1 December 1926 (Final Protocol, Article 4)* advisory opinion, the confirmative function played by the *compétence de la compétence* principle occurred in the broader context of the interpretation of a conventional rule.

As far as the determination of general principles of law is concerned, the PCIJ and the ICJ have in the main not made clear how they identified the principles they invoked. As Charney has pointed out, these courts have been particularly reluctant to explain how they ascertain general principles of law.[132] Often, they have invoked general principles of law under different titles: (i) 'traditional principle';[133] (ii) 'principles generally accepted';[134] (iii) 'well-known rule';[135] (iv) 'well-established and generally recognized principle of law';[136] (v) 'general principles of law recognized by civilized nations';[137] and (vi) 'general principles of law'.[138]

Like early international arbitral tribunals, the PCIJ dealt and the ICJ has frequently dealt with Roman law principles, such as: (i) *eius est interpretare legem cuius condere*;[139] (ii) *nemo iudex in re sua*;[140]

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[130] See subsections 2.3.4.3, 2.3.4.4, and 2.3.4.6, above.
[131] See subsections 2.3.4.1, 2.3.4.2, and 2.3.4.4, above.
[132] Charney, Jonathan, *op. cit*. 22, p. 190.
[133] *Jaworzina, Advisory Opinion, 1923, PCIJ, Series B, No. 8*.
[134] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No. 9*.
[135] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, PCIJ, Series B, No. 12*.
[136] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1954*, p. 47.
[137] *Right of Passage over Indian Territory, Merits, Judgment, ICJ Reports 1960*, p. 6.
[138] *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p. 6.
[139] *Jaworzina, Advisory Opinion, 1923, PCIJ, Series B*, No. 8.
[140] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, PCIJ, Series B, No. 12*.

(iii) *nullus commodum capere de sua iniuria propria*;[141] and (iv) *res iudicata*.[142] It should be noted that the consideration or application of Roman law principles as general principles of law does not mean that the PCIJ and the ICJ saw Roman law as a source of international law. It does show, however, that these international courts were willing to follow existing international jurisprudence in which general principles of Roman law had been applied. Such a method of proceeding is consistent with Article 38, paragraph 4 of the PCIJ Statute and with Article 38, paragraph 1(d) of the ICJ Statute, which stipulate that judicial decisions are a subsidiary means of determination of rules of law. In short, most of the general principles of law considered by the PCIJ and ICJ were already part of international law.

Of course, the two Courts did not apply a given general principle of law when the conditions for its application were not met.[143] Moreover, they refused to apply legal principles that were not generally recognized in national law and were thus not general principles of law.[144]

Finally, in general the Courts did not need to transpose general principles of law into the international realm because the principles typically applied by them were already part of international law. International arbitral tribunals had usually ascertained the existence, contents, and scope of application of such principles. As for 'new' general principles of law, the above overview of the Courts' judgments and advisory opinions shows that from time to time the issue may arise whether there are limits or obstacles to their transposition into international law. As mentioned above, in *Right of Passage over Indian Territory*, India (the respondent State) argued that the doctrine of servitude was inapplicable in international law due to the fact that relations between individuals were not like relations between States because the latter were sovereign entities whereas the former were not. The issue of the transposition of general principles of law into international law is extensively examined in section 2.7 below.

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[141] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No. 9*.

[142] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1954*, p. 47.

[143] For example, *eius est interpretare legem cuius condere* in *Jaworzina, Advisory Opinion, 1923, PCIJ, Series B, No. 8*.

[144] For instance, *actio popularis* in *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p. 6.

2.4. The Autonomy of General Principles of Law as a Source of International Law

In spite of the practice of international arbitral tribunals and of the PCIJ and the ICJ of applying general principles of law in their decisions, there are scholars who have denied the autonomy of such principles as a source of international law.[145] For long, however, most scholars have accepted that such principles are a source of international law like treaties and custom.[146]

2.4.1. *Scholarly Views on General Principles as a Formal Source of International Law*

Strictly speaking, international courts and tribunals do not apply sources of international law, but the rules and principles derived therefrom. These rules and principles come into existence in different ways. These ways are the so-called 'formal sources' of international law, notwithstanding that the formation of international law is rather deformalized. This is the case in particular for custom and general principles of law, unless one considers their application by an international court or tribunal to be the act of their creation. Despite their deformalized creation, general principles of law (and custom) are usually studied in the context of the formal sources of international law. This is so because the rules and principles derived therefrom fulfil normative functions in international law.[147]

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[145] See generally Vitányi, Bela, 'Les positions doctrinales concernant le sens de la notion de "principes généraux de droit reconnus par les nations civilisées"', *RGDIP*, T. 86, 1982, pp. 56–85.

[146] As eloquently stated by a former member of the ICJ, '[…] Whatever view may be held in regard to these principles, whether they are considered to be emanations of natural law or to be rules of custom, or constitutional principles of the international legal community, or principles directly deduced from the concept of law, or principles agreed to by States because they are members of a legal family, whatever, I say, may be the attitude of each towards the origin and basis of these principles, all are agreed in accepting their existence and their application as a source of positive law'. *Right of Passage over Indian Territory, Merits, Judgment, Dissenting Opinion of Judge Fernandes, ICJ Reports 1960*, pp. 136–137, § 35.

[147] See Ascensio, Hervé, 'La banalité des sources du droit international pénal par rapport aux sources du droit international général', in Delmas-Marty, Mireille *et al.* (eds.), *Les sources du droit international pénal*, Paris, Société de législation comparée, 2004, p. 404.

Yet, in the opinion of Marek, Furrer, and Martin, the distinction between law-making processes and already created legal rules is impossible to draw with respect to general principles of law. The reason is that their creation takes place at the national level.[148]

Other international legal scholars have also denied that general principles of law are a formal source of international law. Among those scholars are Anzilotti, Strupp, Virally, and Weil. Their arguments are considered below, together with the arguments originating from Soviet doctrine, especially from Tunkin.

In Anzilotti's opinion, general principles of law derived from national legal systems are a material source of international law,[149] but not a formal one. In his view, an international judge may find in national legal systems the necessary elements for formulating the legal rule to be applied in a particular case. However, that legal rule would not become part of international law; the international judge would create it only in order to solve a particular case.[150]

According to Strupp, the arbitral practice that preceded the adoption of the PCIJ Statute is irrelevant to the point at issue, because the arbitral tribunals used to decide cases on the basis of Roman law but not of

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[148] '[L]a distinction entre le processus de création des normes et les normes crées … ne saurait jouer à l'égard des principes généraux de droit. La création des ces principes se situe dans les droits internes des Etats; c'est pourquoi seul l'aspect statique de la norme déjà existante –reconnue transposable sur le plan du droit international- intéresse ce dernier'. Marek, Krystina *et al*., *'Les sources du droit international',* in Guggenheim, Paul (Dir.), *Répertoire des décisions et des documents de la procédure écrite et orale de la Cour permanente de Justice internationale et de la Court internationale de Justice,* Vol. II, Geneva, Institut Universitaire de Hautes Études Internationales, 1967, p. 9.

[149] 'Les sources *formelles* du droit sont les *procédés* d'élaboration du droit, les diverses techniques qui autorisent à considérer qu'une règle appartient au droit positif. Les sources *matérielles* constituent les fondements sociologiques des normes internationales, leur base politique, morale ou économique plus ou moins explicités par la doctrine ou les sujets de droit'. See Daillier, Patrick and Pellet, Alain, *op. cit*. 19, p. 112, § 58.

[150] 'Chè se invece accada che si tratti di principi propri esclusivamente degli ordenamenti giuridici interni, è forza ammetere che in tal modo il giudice viene rinviato ad una fonte diversa dall'ordinamento giuridico internazionale, e propriamente ad una fonte in senso materiale, che può soltanto fornirgli gli elementi per la formulazione della norma, che applicherà nel caso concreto come norma di diritto internazionale: questa norma non esiste nell'ordinamento internazionale; è il giudice che la crea per il caso speciale e per esso soltanto'. Anzilotti, Dionisio, *Corso di Diritto Internazionale*, 3ª ed., Rome, Atheneum, 1928, p. 107.

international law.[151] General principles of law are not an autonomous source of international law because their existence has to be attested to by State practice.[152] Clearly, Strupp's opinion reflects the then prevalent voluntaristic conception of international law, according to which no international legal rule or principle is created without State consent. This view explains why Anzilotti, as well as Strupp later, affirmed that Article 38, paragraph 3 of the PCIJ Statute did not reflect general international law, but rather the particular international law applicable by the PCIJ.[153]

Similar opinions were held by Virally and Weil. For Virally, general principles of law are neither legal principles peculiar to international law, nor a particular law-making process, but a material source of international law.[154] In Weil's view, in spite of the rule laid down in Article 38, paragraph 1(c), of the ICJ Statute, general principles of law are not a formal source of international law. They are important for avoiding a *non liquet* and as a means of developing international law. Yet, this role is temporary and limited, given that the creation of international legal rules aims to regulate issues that have hitherto been unregulated. The creation of new rules of international law decreases the chances of having recourse to general principles of law for avoiding *non liquets*, as far as the issues regulated by the new rules are concerned.[155]

The Soviet doctrine of international law also rejected the idea that general principles of law could be a formal source of international law.[156] Tunkin, one of the best-known supporters of that doctrine, submitted

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[151] '[Les sentences des tribunaux arbitraux] ont bien souvent été rendues en méconnaissance absolue du droit de gens, en partant du droit privé d'un Etat déterminé ou même du droit romain qui – pour estimable qu'il soit- ne constitue pas néanmoins du droit international public'. Strupp, Karl, 'Les règles générales du droit de la paix', *RCADI*, Vol. 47 (1934-I), pp. 335–336.

[152] 'Cette norme [principe général de droit] devrait, en effet, être prouvée par la conduite des Etats, seuls créateurs du droit international public'. *Ibid.,* pp. 335, 337–338.

[153] Anzilotti, Dionisio, *op. cit*. 150, p. 335.

[154] 'Par définition, ce ne sont donc pas des principes propres au droit international. On ne saurait, dès lors, voir en eux un mode de formation spécifique de ce droit. Ils se présentent plutôt comme une *source matérielle,* un réservoir, où on peut puiser en cas de nécessité, c'est-à-dire en l'absence d'autres règles juridiques applicables appartenant en propre à l'ordre juridique international'. Virally, Michel, 'Panorama du droit international', *RCADI*, 1983-V, T. 183, p 171.

[155] Weil, Prosper, 'Le droit international en quête de son identité. Cours général de droit international public', *RCADI*, Vol. 237 (1992-VI), pp. 148–149.

[156] For instance, see Tunkin, Grigory, '"General Principles" of Law in International Law', in René Marcic et al. (eds.), *Internationale Festchrift für Alfred Verdross zum 80. Geburstag*, München/Salzburg, Wilhelm Fink Verlag, 1971, pp. 523–532; Tunkin, Grigory, 'International Law in the International System', *RCADI*, Vol. 147 (1975-IV), pp. 1–218.

that the travaux préparatoires to the PCIJ Statute are an inappropriate means of interpreting the provisions of the ICJ Statute, given that these Statutes are different legal instruments. In his view, the preparatory work to the former is of merely historical interest with regard to the latter.[157]

He argued that the general principles of law referred to in Article 38, paragraph 1(c), of the ICJ Statute are no different from the principles of international law, as the *chapeau* of Article 38 declares that the ICJ shall decide legal disputes in accordance with international law.[158] Moreover, the existence of similar principles in national legal systems does not mean that they are *ipso facto* general principles of law in the sense of Article 38, paragraph 1(c) of the ICJ Statute. To be applied in international law, general principles of law originating in national legal systems need to be incorporated into conventional or customary rules. Given that Article 38, paragraph 1(c) of the ICJ Statute does not refer to 'general principles of international law' but to 'general principles of law', general principles of law would be legal principles in general, common to national legal systems and international law.[159] However, there are no legal principles common to all nations because there can exist neither principles common to two opposing legal systems, namely the socialist and the capitalist,[160] nor legal principles common to national legal systems and international law.[161]

The arguments advanced by Tunkin with regard to the status of general principles of law in international law were original. However, Tunkin's argument has no major impact on current scholarship, probably because the Soviet doctrine of international law collapsed with the Soviet Union.

2.4.2. *General Principles as a Formal and Material Source of International Law*

Curiously, one has the impression that, in general, scholars contend that general principles of law are *either* a formal source of international law, *or* a material source of international law. In fact, general principles of law are a formal source of international law, and they are often a material source too.

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[157] Tunkin, Grigory, *ibid.* pp. 523–532, and 98–99, respectively.

[158] Tunkin, Grigory, 'International Law in the International System', *RCADI*, Vol. 147 (1975-IV), p. 100.

[159] *Ibid.,* p. 101.

[160] *Ibid.,* p. 102.

[161] *Ibid.,* p. 103.

General principles of law are a material source of international law in the sense that States and international organizations may lay down international legal rules that are the expression of general principles of law. For instance, several general principles of law applied by early international arbitral tribunals have later been transformed into customary and conventional rules.[162] Consider, for example, the transformation of the following five general principles: (i) the principle of good faith in the interpretation of treaties is part of the rule laid down in Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties;[163] (ii) the principle of textual interpretation of treaties is part of the rule laid down in Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties; (iii) the principle of contextual interpretation of treaties is part of the rule laid down in Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties; (iv) Article 36, paragraph 6, of the ICJ Statute sets out the *compétence de la competence* principle; and (v) Article 60 of the ICJ Statute reflects the *res iudicata* principle.

Notwithstanding that conventional and customary rules may reflect general principles of law, international courts and tribunals seem to apply them as conventional or customary rules as appropriate, but not as general principles of law. This way of proceeding is correct, in light of the principles of (i) *lex posterior derogat legi priori*, (ii) *lex specialis derogat legi generali*, and (iii) *lex posterior generalis non derogat legi priori speciali*. These principles are 'the three general principles which in all legal orders regulate the relations between rules or principles deriving from the *same* source'.[164] In international law, they regulate relations between rules deriving from all sources, namely conventions, custom, and general principles of law. It is true, as Cassese observed, that those three general principles do not apply if a rule of *ius cogens* is at stake, as this is 'hierarchically superior to all the other rules of international law'.[165]

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[162] See Cheng, Bin, *op. cit*. 20, p. 390 ; Bartoš, Milan, 'Transformation des principes généraux en règles positives du droit international', *Mélanges offerts à Juraj Andrassy*, Ibler, Vladimir (ed.), La Haye, Martinus Nijhoff, 1968, pp.1–12.

[163] See extensively Kolb, Robert, *La bonne foi en droit international public: contribution à l'étude des principes généraux du droit*, Paris, Presses Universitaires de France, 2000, 756 pp.

[164] Cassese, Antonio, *International Law*, Oxford, Oxford University Press, 2nd edition, 2005 (1st edition, 2001), p. 154.

[165] *Ibid.,* p. 155.

2.4.3. *A Subtle Difference between General Principles of Law and General Principles of International Law*

Now the question arises whether the terms general principles of law and general principles of international law are synonymous or, in contrast, refer to two different sets of legal principles. According to the majority of scholars, those terms have different meanings. While the expression general principles of law refers to legal principles derived from national legal systems, the term general principles of international law encompasses legal principles entirely derived from international conventional and customary rules, and they typically possess customary status.[166] Accordingly, it would follow that general principles of international law, in the context of the sources of international law as set out in the ICJ Statute, should be applied as customary international law in accordance with Article 38, paragaph 1(b) of the Statute. I support this distinction between general principles of law and general principles of international law.

However, there are scholars who have argued that the legal basis for the application of general principles of international law by the ICJ is Article 38, paragraph 1(c) of its Statute. Their argument is that the word 'law' in that paragraph is not qualified and, hence, the general principles of law referred therein may be general principles of national or international law.[167]

Moreover, there are international legal scholars that have a larger concept of the general principles of international law. One of these scholars is Brownlie. According to him, general principles of international law may be customary rules, general principles of law in the sense

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[166] Among others see Lachs, Manfred, 'The Development and General Trends of International Law in Our Time. General Course in Public International Law', *RCADI,* Vol. 169 (1980-IV), p. 196; Virally, Michel, *op. cit*. 154, p. 171; Podestá Costa, Luis and Ruda, José, *op. cit*. 67, p. 18; Thierry, Hubert, 'L'évolution du droit international. Cours général de droit international public', in *RCADI,* Vol. 222 (1990-III), pp. 39–40; Weil, Prosper, *op. cit*. 155, pp. 149–151; Barberis, Julio, *op. cit*. 10, p. 235; Rosenne, Shabtai, 'The Perplexities of Modern International Law. General Course on Public International Law', *RCADI*, Vol. 291 (2001), p. 63; Dupuy, Pierre-Marie, 'L'unité de l'ordre juridique international. Cours général de droit international public', *RCADI*, Vol. 297 (2002), p. 182; Cassese, Antonio, *op. cit*. 164, p. 188.

[167] See, for example, Lammers, Johan, 'General Principles of Law Recognized by Civilized Nations', in Kalshoven, Frits *et al*. (eds.), *Essays in the Development of the International Legal Order: In Memory of Haro F. Van Panhuys*, Alphen aan den Rijn, The Netherlands, Rockville, Maryland, USA, 1980, pp. 66–70; Zemanek, Karl, 'The Legal Foundations of the International System. General Course on Public International Law', *RCADI*, Vol. 266 (1997), pp. 135–136.

of Article 38, paragraph 1)(c) of the ICJ Statute, and logical propositions derived from legal reasoning that are based on existing international law and national analogies.[168] Yet, Barberis has resisted the idea of including the logical propositions in the category of general principles of law, because they are not legal norms strictly speaking, but rules of logic.[169]

One has the impression that the controversy about the differences between general principles of law and general principles of international law is merely apparent; it is more a matter of terminology than of substance. In fact, if a given legal principle is encapsulated in a conventional and/or customary rule, then in the context of the ICJ it should be applied pursuant to paragraph 1(a) or 1(b) of Article 38 of the ICJ Statute, as appropriate, because these direct the ICJ to apply conventional and customary law, respectively.[170] In contrast, if the principle is not covered by any conventional and/or customary rule, then it should be applied pursuant to paragraph 1(c) of that provision, regardless of whether the principle is one derived from national laws or one of legal logic.

2.5. The Subsidiary Nature of General Principles of Law

Traditionally, general principles of law have been considered a subsidiary source of international law; subsidiary in the sense that international courts and tribunals turn to it when a given legal issue is unregulated by conventional or customary legal rules.[171] Thus, recourse to general principles of law should not take place if the settlement of a given legal issue can be achieved without difficulty in individual cases by filling the gap with 'logical deductions from existing rules of international law or of analogy to them'.[172]

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[168] Brownlie, Ian, *Principles of Public International Law*, Oxford, Clarendon Press, 5th edition, 1998, pp. 18–19.

[169] Barberis, Julio, *op. cit*. 10, p. 238.

[170] Consider, for instance, the prohibition of the use of armed force. This principle is laid down not only in a conventional rule of international law (Article 2(4) of the UN Charter), but also in customary law (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986,* §§ 188–190.

[171] Article 5 of the *Projet de Déclaration* of the *Institut de Droit International* on general principles of law as a source of international law reads as follows: 'Les principes généraux de droit … n'ont qu'un caractère subsidiaire. S'il existe donc des règles de droit conventionnel ou coutumier applicable en la matière, ces sources doivent prévaloir'. See Verdross, Alfred (rapporteur), *op. cit*. 66, pp. 324–325, 328.

[172] Lauterpacht, Hersch, *op. cit*. 21, p. 85.

Put differently, international courts and tribunals must first look for applicable conventional or customary rules of international law before turning to general principles of law. While the former encompass the rules derived from the so-called 'secondary sources' (such as binding resolutions of international organizations),[173] the latter include relevant general principles relating to the particular branch of international law at stake (such as the general principles of international humanitarian law),[174] and the general principles of international law. It is only in their absence that international courts and tribunals should look to national legal systems as a source of general principles of law applicable in international legal relations. At least that is the case when general principles of law are the only law upon which a given legal issue is decided. In fact, it may also happen that international courts and tribunals apply general principles of law together with conventional or customary rules, as some of the awards, judgments, and advisory opinions analysed in sections 2.2 and 2.3 demonstrate.[175] In such situations, it is evident that international courts and tribunals turn to general principles of law in addition to specific conventional or customary rules of international law.

The subsidiary role of general principles of law as a source of international law does not mean that there is a formal hierarchy among the sources of international law. As mentioned above, the ACJ charged with the drafting of the PCIJ Statute rejected the idea of the existence of such a hierarchy. This opinion is still prevalent in scholarly writing.[176]

Given the absence of a formal hierarchical relationship among the sources of international law, the conflict of laws derived from these

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[173] The secondary sources 'are provided for by rules produced by primary sources (treaties)'. See Cassese, Antonio, *op. cit*. 164, p. 183.

[174] On the customary nature of the general principles of international humanitarian law see Raimondo, Fabián, 'The International Court of Justice as a Guardian of the Unity of Humanitarian Law', *Leiden Journal of International Law*, Vol. 20, No. 3, 2007, pp. 593–611.

[175] 'The priority given by Article 38 of the Statute of the Court to conventions and to custom in relation to the general principles of law in no way excludes a *simultaneous* application of those principles and of the first two sources of law'. See *Right of Passage over Indian Territory, Merits, Judgment, Dissenting Opinion of Judge Fernandes, ICJ Reports 1960*, pp. 139–140.

[176] See among others: Podestá Costa, Luis and Ruda, José, *op. cit*. 67, p. 13 ('A nuestro entender esta jerarquía surge en su aplicación lógica, no del texto o de la intención de las partes'.); Diez de Velasco, Manuel, *op. cit*. 19, T. I, pp. 117–118; Daillier, Patrick and Pellet, Alain, *op. cit*. 19, § 60, p. 114; Cassese, Antonio, *op. cit*. 164, pp. 153–155; Nollkaemper, André, *Kern van het internationaal publiekrecht*, tweede druk, Den Haag, Boom Juridische uitgevers, 2005, p. 84.

sources remains under the *aegis* of the principles of *lex posterior derogat legi priori*, *lex specialis derogat legi generali*, and *lex posterior generalis non derogat legi priori speciali*.[177]

Although scholars seem to confine the applicability of those three legal principles to relations between conventional and customary rules,[178] it appears that these principles also apply to relations between conventional or customary rules, on the one hand, and general principles of law, on the other. For example, a bilateral custom that differs from a general principle of law on the right of passage may regulate the right of passage of a State through the territory of another State, pursuant to the *lex specialis derogat legi generali* principle. As another example, a newly emerged general principle of law does not abrogate a conventional rule (*lex posterior generalis non derogat legi priori speciali*).

It should be recalled that these three general principles of law on conflicts of laws do not apply if a rule of *ius cogens* is at stake, as this is superior in rank to all other rules of international law.[179]

Therefore, it might be said that the subsidiary nature of general principles of law as a source of international law is manifested in three different functions: (i) filling legal gaps, (ii) interpreting legal rules,[180] and (iii) confirming a decision based on other legal rules, in order to reinforce the legal reasoning.[181]

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[177] Cassese, Antonio, *op. cit*. 164, p. 154. Daillier, Patrick and Pellet, Alain, hold a similar view; see *op. cit*. 19, p. 116, § 60.

[178] Podestá Costa, Luis and Ruda, José, *op. cit*. 67, pp. 16–17; Daillier, Patrick and Pellet, Alain, *op. cit*. 19, § 60, p. 116; Cassese, Antonio, *op. cit*. 164, p. 154.

[179] See Daillier, Patrick and Pellet, Alain, *op. cit*. 19, p. 116, § 60; Cassese, Antonio, *op. cit*. 164, p. 155. With regard to the law of treaties see Articles 53 and 64 of the Vienna Convention on the Law of Treaties on conflicts between treaties and *ius cogens*.

[180] Article 6 of the *Projet de Déclaration* of the *Institut de Droit International* on general principles of law as a source of international law reads as follows: 'Les principes généraux de droit … servent à interpreter les règles conventionnelles et coutumières, ainsi qu'à combler les lacunes de ces sources'. See Verdross, Alfred (rapporteur), *op. cit*. 66, pp. 325, 328.

[181] With regard to the judgments and advisory opinions of the PCIJ and the ICJ which provide examples of the application of general principles of law, Degan stated: 'In all these instances … the Court did not leave any proof that it applied these principles as the main source of international law, i.e., as rules only applicable in the case. It left in fact the impression that the invocation of some of these principles was a part of its judicial reasoning, corroborating its final decision based on other sources, or on procedural provisions from its Statute and Rules'. Degan, Vladimir, *op. cit*. 109, p. 46.

2.6. The Determination of General Principles of Law

Once an international court or tribunal has decided to draw upon general principles of law as a source of international law, the question arises how it will determine the existence, content, and scope of an applicable general principle of law. This section deals with such query.

It appears that international courts and tribunals have two chances of ascertaining general principles of law. First, they may have recourse to decisions of international courts and tribunals (including their own), as these are a means of determination of legal rules and principles.[182] As demonstrated above, the PCIJ and the ICJ have relied heavily upon international arbitral awards for that purpose.

Secondly, if relevant decisions of international courts and tribunals are not available or if the international court or tribunal concerned chooses not to rely on their decisions, the court or tribunal may decide itself to ascertain by means of comparative law whether a given legal principle is a general principle of law applicable in international law. It may also request an academic institution or a particular scholar to prepare and submit a comparative law study to that effect, if the law of the court or tribunal in question allows such a course of action.

The determination of general principles of law by comparative law consists of two operations. The first – the vertical move – consists of abstracting them from the legal rules of national legal systems. Subsection 2.6.1 explains that move in more detail. Subsection 2.6.1.1 sets out which national laws are relevant. Subsection 2.6.1.2 then examines more closely the process of extracting a general principle of law and observes that there will be a difference in content between the general principle arrived at and the underlying legal rules.

The second operation in determining the existence of a general principle of law is the horizontal move, as described in subsection 2.6.2. The move consists of verifying that the generality of nations recognizes the legal principle thus obtained. The question is which nations should recognize the principle. Should these be the so-called 'civilized nations' (subsection 2.6.2.1) or should another test prevail (subsection 2.6.2.2)? A second issue relates to the different conceptions of law that

[182] See references in footnote 19, above.

are relevant in determining whether recognition is general (subsection 2.6.2.3), and a related question is which nations are most representative of these conceptions of law (subsection 2.6.2.4). Although the determination of the existence, content, and scope of general principles of law may require the undertaking of comparative law research, it is noteworthy that there is no trace of such research in the judgments and advisory opinions of the PCIJ and the ICJ (section 2.6.3).

2.6.1. *The 'Vertical Move'*

As explained in subsection 2.3.1, the travaux préparatoires to the PCIJ Statute reveal that its drafters conceived of general principles of law as legal principles recognized by States *in foro domestico*, that is, in their national legal systems. Scholars in general share that concept of general principles of law.[183]

Yet, in the judgments and advisory opinions of the PCIJ and the ICJ it is not self-evident that general principles of law derive from national laws. In fact, there is no trace in them of any comparative law research.

For this reason, some scholars suggest that those international Courts may have applied general principles of law as general tenets imported from international legal rules or deduced from legal logic, rather than as legal principles derived from national legal systems.[184] Even if that were correct, its underlying proposition does not invalidate the fact that those very same general principles of law are legal principles generally recognized in national law. For instance, members of the PCIJ and the ICJ have pointed out that general tenets such as 'jurisdiction' and 'good faith' originated in national law and were subsequently transposed into international law.[185]

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[183] Sorensen, Max, *op. cit*. 23, p. 18 *et seq*. Lachs, Manfred, *op. cit*. 166, p. 196; Virally, Michel, *op. cit*. 154 p. 171; Podestá Costa, Luis and Ruda, José, *op. cit*. 67, p. 18; Thierry, Hubert, *op. cit*. 166, pp. 39–40; Weil, Prosper, *op. cit*. 155, pp. 149–151; Barberis, Julio, *op. cit*. 10, p. 235; Rosenne, Shabtai, *op. cit*. 166, p. 63; Dupuy, Pierre-Marie, *op. cit*. 166, p. 182.

[184] Cassese, Antonio, *op. cit*. 164, p. 192.

[185] For example, with regard to the principle of jurisdiction, a member of the PCIJ stated: 'There are certain elementary conceptions common to all sytstems of jurisprudence, and one of these is the principle that a court of justice is never justified in hearing and adjudging the merits of a cause of which it has not jurisdiction. … The requirement of jurisdiction, which is universally recognized in the national sphere, is no less fundamental and peremptory in the international'. *Mavrommatis Palestine Concessions, Judgment No. 2, Opinion by M. Moore, 1924, PCIJ, Series A, No. 2,* pp. 57–59. A second example relates to the principle of good faith: 'Contracting parties are always

The arbitral awards and judgments and advisory opinions of the PCIJ and the ICJ examined above show to what extent arbitrators and judges drew upon their intuition in order to determine general principles of law, probably inspired by their own national legal systems. With regard to this particular point, Sorensen observed that international courts and tribunals do not normally reveal the methods they employ to determine general principles of law.[186] It even appears that such courts and tribunals hardly ever refer to comparative law research.[187]

This analysis leads us to a five-step construction. First, the general principles of law as applied by early international arbitral tribunals and the PCIJ and the ICJ are fundamental legal principles in all legal systems, national and international. Secondly, the majority of those legal principles derive indirectly from Roman law, as evidenced above.[188] Thirdly, Roman law was the basis of the codification process undertaken by States of the Romano-Germanic legal family and, but to a lesser degree, of the Common Law.[189] Fourthly, the existence of the general principles of law applied by early international arbitral tribunals and the PCIJ and the ICJ was plain and clear in the eyes of the members of these international courts and tribunals as a result of the first three considerations. Finally, the undertaking of comparative law research to prove the existence of general principles of law such as *res iudicata* or *nemo iudex in re sua* was therefore unnecessary.

The awards, judgments, and advisory opinions examined above show that early international arbitral tribunals, the PCIJ, and the ICJ applied general principles pertaining to different fields of national law. Thus, they have not confined themselves to applying general principles of private law.[190] Actually, as evidenced by subsections 2.2.2 and 2.3.4,

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assumed to be acting honestly and in good faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law'. *Lighthouses case between France and Greece, Judgment, Opinion by M. Séfériadès, 1934, PCIJ, Series A/B, No. 62*, p. 47.

[186] See Sorensen, Max, *op. cit*. 23, p. 18.

[187] Mosler, Hermann, '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 T.M.C. Asser Instituut (ed.), *International Law and the Grotian Heritage*, The Hague, T.M.C. Asser Instituut, 1985, pp. 179–180.

[188] See also Sorensen, Max, *op. cit*. 23, p. 23.

[189] See David, René et Jauffret-Spinosi, Camille, *op. cit*. 11, pp. 16, 225.

[190] As Judge Tanaka stated with regard to the meaning of Article 38, paragraph1(c) of the ICJ Statute, 'To restrict the meaning to private law principles or principles of

they have applied general principles of law pertaining to law in general, private law, procedural law, etc.[191]

2.6.1.1. *The Relevant National Law*

If an international court or tribunal decides to undertake comparative law research in order to ascertain the existence, contents, and scope of a general principle of law, the issue arises as to what the relevant national law to be scrutinized is.

For Barberis, such national law is law *lato sensu*, namely legislation, customary law, decrees, or resolutions of administrative organs; however, he does not mention judicial decisions.[192] In my opinion, one may include judicial decisions in the examinable law. There are no reasons for excluding judicial decisions, in particular, if the national legal system examined belongs to the Common Law legal family. In the Common Law tradition, a legal rule is a jurisprudential one; scholars and judges consider codes to be mere acts of consolidation.[193] All this is different from the Romano-Germanic legal tradition.

Certainly, international courts and tribunals must derive general principles of law from national law that is in force. Thus, general principles of law are not necessarily rigid and permanent. For Akehurst, they 'are always capable of undergoing a process of orderly change, as the national laws on which they are based are amended. … They do not have the immutable character which has sometimes been attributed to natural law'.[194]

Finally, it should be noted that in the case of federal States, the national law to be examined in comparative research may include both federal law and the law of each federated State.

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procedural law seems from the viewpoint of literal interpretation untenable. So far as the "general principles of law" are not qualified, the "law" must be understood to embrace all branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc'. In *South West Africa, Second Phase, Judgment, ICJ Reports 1966,* pp. 294–295.

[191] For a classification of the general principles of law applied by the PCIJ and the ICJ see Daillier, Patrick and Pellet, Alain, *op. cit*. 19, pp. 352–353, § 227.

[192] See Barberis, Julio, *op. cit*. 10, p. 242.

[193] See David, René et Jauffret-Spinosi, Camille, *op. cit*. 11, p. 343.

[194] Akehurst, Michael, *op. cit*. 31, p. 815.

2.6.1.2. *A Difference in Content*

The contents of a general principle of law are different from those of the legal rules from which it is derived, because these principles consist of abstractions of legal rules deprived of their particular elements.[195]

Small differences in the content of legal rules pertaining to different national legal systems do not impede the ascertainment of a general principle of law. What matters is the existence of a common legal principle underlying those legal rules.[196] The task of deriving general principles of law from national laws should not consist of looking mechanically for coincidences among legal rules, but of determining their common denominator. Hence, in ascertaining general principles of law it is crucial to identify the *ratio legis* and the fundamental principles that are common to a particular institution within different national legal systems.[197]

Since general principles of law consist of abstractions of legal rules from national legal systems, the question arises whether they are apt to play a normative role in international law. Below I first provide Akehurst's, Weil's, and Kolb's ideas on this matter, and then give my own opinion.

Akehurst observed that general principles of law frequently exist at a very high degree of abstraction and that, if the degree is excessively high, general principles of law may become vague and thus inapplicable by international courts and tribunals.[198]

Weil holds a similar opinion. He argued that as the process of abstraction and generalization preceding the derivation of a general principle of law aims at the essence of national legal systems, every parallel will depend on the level of abstraction of the legal rules that are the object of the comparison: the greater the abstraction, the greater the likeness. However, if the level of abstraction is too high, the legal principle thus arrived at will be of no use at the international level. For these reasons, Weil concluded that the process of abstraction and generalization that paves the way for the ascertainment of a general principle of law is self-destructive.[199]

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[195] See Sorensen, Max, *op. cit*. 23, p. 25.
[196] See Akehurst, Michael, *op. cit*. 31, p. 814.
[197] See Reuter, Paul, *Droit international public*, Paris, Presses Universitaires de France, 1958, p. 118.
[198] See Akehurst, Michael, *op. cit*. 31, p. 815.
[199] Weil, Prosper, *op. cit*. 155, pp. 146–147.

For Kolb, the contents of the general principles of law are broader than those of the legal rules because they are not as precisely defined as the contents of the latter; at the same time, they are not as vague as general political concepts. General principles of law possess 'that just degree of abstraction and concreteness, to be able to be dynamic and filled with some specific legal meaning at once'.[200] They are thus flexible enough to serve as legal arguments in a dynamic interpretation of legal rules, as well as a means of the development of the law. Notwithstanding the flexibility of their contents, general principles of law are anchored in the realm of legal phenomena, which guarantees that minimum level of legal certainty without which the law becomes arbitrary.[201]

Kolb's opinion is most convincing. In fact, general principles of law have played a significant normative function in international law by giving rise to the creation of customary and conventional rules. Put differently, they have played an important normative role as a material source of international law.[202] Moreover, they have fulfilled a meaningful function as a means of dynamic interpretation of conventional and customary rules. For instance, it is worth recalling the *nemo iudex in re sua* principle, which, in the opinion of the PCIJ, applies not only with regard to the judiciary but also to political organs.[203]

As Akehurst and Weil pointed out, general principles of law may be inappropriate for regulating certain legal issues because of their natural abstraction. Nevertheless, such principles have the notable feature of being able to adapt the content of legal rules to new developments and new ideas, in a way that precise legal rules cannot because of the rigidity of their content and scope.

2.6.2. *The 'Horizontal Move'*

The verification that the generality of nations in fact recognizes a given legal principle can be done by means of comparative law.[204] Thus, the question arises which national legal systems should be included in a comparative law study. The next four subsections analyse this issue.

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[200] Kolb, Robert, *op. cit*. 6, p. 9.
[201] *Ibid.*
[202] See subsection 2.4.2.
[203] See subsection 2.3.4.2.
[204] See Sorensen, Max, *op. cit*. 23, p. 23.

2.6.2.1. *The 'Civilized Nations'*

Under Article 38, paragraph 1(c), of the ICJ Statute, this international Court is to apply 'the general principles of law recognized by civilized nations'. If one were to interpret this provision in accordance with the ordinary meaning of its terms, the resulting interpretation would be that Article 38, paragraph 1(c) lays down the requirement of recognition by 'civilized nations'. Hence, any comparative law research aimed at ascertaining general principles of law should encompass the domestic legal systems of such nations. However, many have criticized the reference to 'civilized nations' in Article 38 of the PCIJ and the ICJ statutes, particularly in the past, and the reference may by now have become obsolete. There follows an overview of the discussion of the meaning of that term.

The first criticism came from the ACJ itself, that is, the organ charged with the drafting of the PCIJ Statute. De la Pradelle (one of its members) affirmed that the expression 'civilized nations' is superfluous in that context, because the concept of 'law' already implies civilization.[205]

Other scholars felt that the expression is inappropriate because it reflects *l'air du temps* of a past in which a distinction used to be made between the degrees of civilization of Christian European nations and others,[206] and because it is misleading.[207] Ammoun, a former member of the ICJ, pointed to the inconsistency of the expression 'civilized nations' with the provisions of the UN Charter on the sovereign equality of all Member-States.[208]

The expression has fallen into disuse in the practice of the ICJ, since it has very rarely referred to it in its judgments and advisory opinions.[209]

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[205] Permanent Court of International Justice/Advisory Committee of Jurists, *op. cit*. 52, p. 335.

[206] For instance, see Barberis, Julio, *op. cit*. 10, p. 244; Capotorti, Francesco, 'Cours général de droit international public', in *RCADI*, Vol. 248 (1994), p. 118; Tomuschat, Christian, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law', in *RCADI*, Vol. 281 (1999), p. 337; Dupuy, Pierre-Marie, *op. cit*. 166, pp. 179–180.

[207] As Dupuy mentioned with reference to the so-called civilized nations, 'Ces nations étaient tellement civilisées, au moment de l'adoption de cette expression, contemporaine du Traité de Versailles, qu'elles venaient de s'entre-tuer pendant quatre ans dans la boue des tranchées!' *Ibid.,* p. 180, footnote 301.

[208] *North Sea Continental Shelf, Judgment, Separate Opinion of Judge Ammoun, ICJ Reports 1969*, p. 132 et seq.

[209] See, for example, *Right of Passage over Indian Territory, Merits, Judgment, ICJ Reports 1960*, pp. 43–44. Insofar as the declarations and opinions of members of the ICJ are concerned, that expression is generally not used. There are just a few examples

Yet, there are scholars who have attempted to give a new meaning to the requirement of recognition by 'civilized nations'. Bassiouni, for instance, affirmed that despite the fact that in current UN era a presumption has existed and continues to exist that all its States members are civilized, 'This requirement has utility where a given nation, because of peculiar historical circumstances, no longer follows its previously "civilized" system of law, or that of the other "civilized nations." '[210]

Tomuschat's view follows the same line of reasoning. For him the requirement of recognition by 'civilized nations' might be useful for preventing common standards of civilization being lowered by legal principles found in the legal systems of nations which 'fell back into barbarism and crime'.[211]

One of the merits of giving new meaning to the requirement of recognition by 'civilized nations' is to give *effet utile* to these words,[212] which seem to have fallen into disuse not merely in the practice of the ICJ, but also in international practice in general.

The requirement of recognition by 'civilized nations' may nevertheless provide international courts and tribunals with an appropriate test for determining whether certain national laws should be examined to derive general principles of law pertaining to fields of law such as criminal law, family law, or procedural law, where internationally recognized human rights might be in jeopardy. In these situations, international courts and tribunals could omit from the comparative research all national legal rules that were inconsistent with those rights,

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to the contrary. See *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, Dissenting Opinion of Judge Levi Carneiro, ICJ Reports 1952*, p. 161; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, Separate Opinion of Judge Lauterpacht, ICJ Reports 1955,* pp. 104–105.

[210] Bassiouni, Cherif, 'A Functional Approach to "General Principles of International Law" ', *MJIL*, Vol. 11, No. 3, 1990, p. 768, footnote 4.

[211] 'Originally, "civilized nations" may indeed have had overtones of European arrogance, given the fact, in particular, that the text originated in 1920. But the phrase has acquired an entirely new meaning over the last decades. Already, the traumatic experience of Nazi Germany had shown the world that, unfortunately, even a nation which may have had an enviable record in the past may fall back into barbarism and crime. It must be ensured that the principles of such nations have no impact on the common standard of civilization'. Tomuschat, Christian, *op. cit*. 206, pp. 337–338.

[212] On the *règle de l'effet utile* as a principle of treaty interpretation, see Gutiérrez Posse, Hortensia, 'La maxime *ut res magis valeat quam pereat* (interpretation en fonction de l'effet utile): les interprétations "extensives" et "restrictives" ', *ÖZOR*, Vol. 23, 1972, pp. 229, 254.

on the ground that laws contrary to internationally recognized human rights are not laws of 'civilized nations'.

Yet, it does not seem that redefining the term 'civilized nations' (as denoting the States complying with human rights) is the most suitable means of deciding which national legal systems should be examined in order to derive a general principle of law. This is due to the traditional negative feelings that the term brings with it. Hence, the test for determining which national legal systems will be part of a comparative law study should be found elsewhere.

2.6.2.2. *Other Tests for Establishing General Recognition*

Scholars have submitted that a general principle of law applicable at the international level is a legal principle recognized by the following entities: 'the community of nations',[213] 'States',[214] 'States most representative of different conceptions of law',[215] 'the Member-States of the United Nations'.[216] Other descriptions are of course also possible.

While those expressions are better than the anachronic 'civilized nations' as they do not have any negative connotations, most of them are as vague as the latter. In fact, those alternative expressions do not provide the international judge with a precise test for determining which national legal systems should be included in comparative law research, or, where they do, the test seems to be overly demanding.

Hence the question remains: what is the appropriate test for proving that 'the community of nations' recognizes a given general principle of law? The reference to recognition 'by States' is no better than the reference to the 'community of nations', since it does not make it clear whether there is a specific number or any other parameter for establishing whether a legal principle is a general principle of law applicable in the international sphere. If currently existing States number around 200, does it make a difference if fifty rather than five national legal systems are researched?

The reference to recognition by 'the Member-States of the United Nations', in contrast, offers a concrete test, which examines the legal

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[213] Cassese, Antonio, *op. cit*. 164, p. 188.

[214] Weil, Prosper, *op. cit*. 155, p. 144; Mosler, Hermann, *op. cit*. 1, p. 517.

[215] 'Mais il est facile de considérer la formule en question comme un renvoi aux ordres juridiques de ces Etats qui sont plus représentatifs des conceptions différentes du droit'. Capotorti, Francesco, *op. cit*. 206, p. 118.

[216] Bassiouni, Cherif, *op. cit*. 210, p. 768.

systems of the UN members. However, it is evident that the test is unworkable, as it would require the examination of 192 national legal systems.[217]

Examining the national legal systems of the 'States most representative of different conceptions of law' seems to be a better test, for two reasons. First, it makes it clear that the survey should be pluralist, that is, it should not be limited to national legal systems of one legal family. Secondly, it articulates that the survey must not necessarily encompass all the national legal systems belonging to each legal family, but that it can be limited to some of them –the most representative ones.

Now we face two questions: (i) what are the different conceptions of law? And (ii) how can an international court or tribunal correctly decide that a given national legal system is 'most representative' of a particular concept of law? The next two subsections deal with these questions.

2.6.2.3. *The Different Conceptions of Law*

With regard to the first question, it is worth noting that, while some comparative law scholars deal with 'legal families' and 'conceptions of law', others prefer to use the notion of 'legal traditions'. For instance, David and Spinozi considered the Romano-Germanic and the Common Law to be the major legal families of the world. They mentioned the Russian, Islamic, Hindu, Chinese, Japanese, and African as being important 'conceptions of law' (but not 'legal families' in themselves).[218] Another comparatist, Glenn, views the main legal traditions of the world as the Chthonic, Talmudic, Civil Law, Islamic, Common Law, Hindu, and Asian traditions.[219]

Whereas the term 'legal family' denotes a group of legal systems that share common legal techniques, reasoning, classifications, etc.,[220] the term 'legal tradition' emphasizes the temporal dimension of Law in a particular social context.[221] In any event, be they called 'legal families' or 'legal traditions', the Common Law and the Romano-Germanic

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[217] That is the number of States currently members of the UN. See http:// www.un .org/members/list.shtml (last visited on 27 June 2007).

[218] David, René et Jauffret-Spinosi, Camille, *op. cit*. 11, pp. 15–23.

[219] Glenn, Patrick, *Legal Traditions of the World*, Oxford, Oxford University Press, 2nd edition 2004 (first published 2000), 401 pp.

[220] See David, René et Jauffret-Spinosi, Camille, *op. cit*. 11, p. 15. See also Glenn, Patrick, *op. cit*. 219, p. 154, footnote 113.

[221] See Glenn, Patrick, *ibid.,* pp. 1–13.

legal families (the latter also known as 'Civil Law')[222] are generally considered the largest.[223] For this reason, if one were to adopt the test proposed by Capotorti, all comparative research aimed at determining the existence of a general principle of law applicable in international legal relations should at least encompass the legal systems most representative of the Romano-Germanic and Common Law legal families.

2.6.2.4. *Representative National Systems*

How can we determine that a specified national legal system is most representative of its legal family? One's first impulse is to look at the national legal systems that gave birth to a particular legal family or tradition, that is, to look at the 'historical titles' of the systems. For this reason, one may say that English law is most representative of the Common Law and that German, French, or Italian law is most representative of the Romano-Germanic legal family. However, while it is hard to disagree with this proposition, it is problematic, as ultimately it would limit comparative legal research to the same national legal systems taken into account by international courts and tribunals in times of classical international law, that is, a majority of national legal systems from Western Europe. What is more, the ascertainment of general principles of law would always be confined to an inquiry into the same few national legal systems, the 'most representative' ones.

As a corrective, I suggest the utilization of a test based on equitable geographic distribution, so as to make it clear that national legal systems from all over the world are worthy of consideration by international courts and tribunals searching for general principles of law. Comparative law research conducted on the basis of equitable geographic distribution will make it clear that not only are the solutions offered by the main legal families of the world taken into account, but also that the general principles of law thus derived are the expression of the community of

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[222] Even if it is no more explicit than the term 'Civil Law', the 'Romano-Germanic' label seems to be more appropriate because it pays tribute to the efforts made by the universities of Latin and German countries to develop legal studies after the 12th century. See David, René et Jauffret-Spinosi, Camille, *op. cit*. 11, p. 17.

[223] The Romano-Germanic legal family spread over continental Europe, Latin America, a large part of Africa, the Near East, Japan, Indonesia and China (the last two just with regard to particular branches of law), among other regions of the world. The Common Law family includes England, Ireland, the USA, Canada, Australia, some Caribbean States, and an important number of African States. *Ibid.*

nations rather than of an oligarchic international society. In my view, the use of this test will enhance the legitimacy of the general principles of law thus derived.

Further in that regard, it is crucial to include in the comparative law study those national legal systems that appear to be most developed or more complete in connection with the legal issue at hand.[224] It is pointless to examine national legal systems that do not regulate the kind of legal issue at stake. Therefore, if, for example, an international court or tribunal is looking for general principles of law on an issue pertaining to the participation of victims of crime in criminal proceedings, it may be fruitless to look for relevant legal principles in those national legal systems that do not allow for such participation.

Certainly, international courts and tribunals are not expected to examine national legal systems that are difficult to access or which are completely inaccessible, especially if their laws are not translated into the working languages of the international court or tribunal concerned. As matters stand now, there are no large obstacles to obtaining the texts of national legislation and case law of the various nations, thanks to the Internet and the improvement in international transport. This is why, international courts and tribunals are currently in a better position to undertake extensive comparative legal research than ever before.

Finally, it should be noted that the classification of national legal systems into legal families is not always useful for deriving general principles of law. The reason is that the notion of 'legal families' has been created for didactic purposes, in order to show the similarities and differences which exist between the various national legal systems. All classifications of national legal systems depend on the context in which we are placed and on the concerns of the authors of the classifications. Hence, the classification of national legal systems made by a sociologist will probably be different from that made by a jurist. Most importantly, one may make different classifications depending on whether we are dealing with public, private, or criminal law.[225] In short, the decision – if any – to adopt a particular classification of national legal

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[224] See Barberis, Julio, *op. cit*. 10, p. 246.

[225] See David, René et Jauffret-Spinosi, Camille, *op. cit*. 11, p. 16 : 'La notion de "famille de droits" ne correspond pas à une réalité biologique ; on y recourt seulement à une fin didactique, pour mettre en valeur les ressemblances et les différences qui existent entre les différents droits. Cela étant, toutes les classifications ont leur mérite et aucune n'est sans critique. Tout dépend du cadre dans lequel on se place et de la préoccupation

systems for ascertaining general principles of law should ultimately be based on the field of law the court or tribunal is dealing with in the case at hand.

2.6.3. *The Absence of Comparative Legal Research in PCIJ and ICJ Practice*

International law, by its very nature, must be generally applicable to all members of the international community. One of the problems relating to the evolution and identification of international law is the significance of the common denominator of the national legal systems suitable for application, directly or after some adaptation, in international relations.[226]

Article 9 of the ICJ Statute prescribes the representative composition of the principal judicial organ of the UN. For this reason, Barberis suggested that the composition of the ICJ facilitates any comparative law research aimed at determining a general principle of law.[227] As it is likely that international judges will retain some trace of their legal education and practice in their homeland,[228] the determination of a general principle of law may take place if judges coming from countries representing the main world legal families agree that their own national legal systems recognize the legal principle at stake.

Nevertheless, the reasons the judgments and advisory opinions of the PCIJ and the ICJ do not reveal any example of comparative legal research aimed at determining the existence of a general principle of law seem to lie elsewhere. I provide below two potential reasons.

First, as stated above, the PCIJ and the ICJ have often relied on general principles of law usually applied by international arbitral tribunals. It has thus been unnecessary to carry out comparative legal research in

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qui, pour les uns et pour les autres, est dominante. On ne proposera pas les mêmes classifications si l'on envisage les choses sur un plan mondial ou sun un plan simplement européen. On envisagera les choses autrement si l'on voit les choses en sociologue ou en juriste. D'autres groupements pourront être pareillement de mise, selon que l'on centrera son étude sur le droit public, le droit privé ou le droit criminel'.

[226] See Mosler, Hermann, *op. cit*. 187, p. 173.

[227] Barberis, Julio, *op. cit*. 10, p. 246.

[228] 'It is inevitable that everyone of us in this Court should retain some trace of his legal education and his former legal activities in his country of origin. This is inevitable, and even justified, because in its composition the Courrt is to be representative of "the main forms of civilization and of the principal legal systems of the world" (Statute, Article 9), and the Court is to apply "the general principles of law recognized by civilized nations"'. *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, Dissenting Opinion of Judge Levy Carneiro, ICJ Reports 1952*, p. 161.

order to ascertain general principles of law such as *res iudicata*, *nemos iudex in re sua*, or good faith.

Secondly, the absence of explicit reference to comparative law research in the judgments and advisory opinions of the PCIJ and the ICJ does not necessarily imply that they never took account of the comparative legal research offered by parties to the proceedings.[229] This absence does not mean that the ICJ ignores the significance of examining the common denominator of national legal systems.[230] It may denote, however, that the Court was afraid that the presence of comparative legal research would not accord with the style of a judgment, 'the reasoning of which must proceed in a continuous chain of thought and argument to the operative part'.[231]

Still, 'it would be welcomed not only by the parties but also by the international legal world if the reasoning of judgments and advisory opinions were to explain that the Court had examined, by comparative methods, the assertion – sometimes badly stated- that a general principle of law, having a specified meaning and significance, forms part of binding general international law'.[232]

2.7. The Transposition of General Principles of Law

As mentioned at the beginning of this book, one type of general principle of law is the legal principles generally recognized in national law. These principles may need to be transposed from national legal systems into international law, if they are not already a part of it, in order to be applied in the settlement of international legal disputes. International courts and tribunals apply general principles of law by analogy,[233] that is, to the extent that there is a relevant similarity between the national law institution from which the legal principle derives (the source of the analogy) and the corresponding international law institution in which the legal principle would apply (the target of the analogy).[234]

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[229] Such as in *Right of Passage over Indian Territory, Merits, Judgment, ICJ Reports 1960*, p. 6, and in *Continental Shelf (Tunisia/Lybian Arab Jamahiriya), Application for Permission to Intervene, Judgment, ICJ Reports 1981*, p. 3.

[230] See Mosler, Hermann, *op. cit*. 187, p. 180.

[231] *Ibid.*

[232] *Ibid.*

[233] See Lauterpacht, Hersch, *op. cit*. 21, pp. 81–87; Anzilotti, Dionisio, *op. cit*. 150, pp. 106–109.

[234] I borrow the terms 'source' and 'target' of the analogy from Weinreb, Lloyd, *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge, Cambridge University Press, 2005, pp. 20–21.

Once the existence of a relevant analogy is determined (subsection 2.7.1), the application of general principles of law by international courts and tribunals entails the prior transposition of those principles from national legal systems (their 'original habitat') into international law (their 'new habitat'). Like people changing their country of residence, during the transposition general principles of law may sometimes require 'adaptation' to their new environment, international law. Otherwise, however, they may be applied in international law without prior adaptation.

Yet, the adherents to the doctrine of sovereignty have resisted the applicability of general principles of law at the international level (subsection 2.7.2). In addition, other scholars rejected it because of the 'special character' of international law (subsection 2.7.3). While it is correct to say that there are structural differences between international law and national legal systems (subsection 2.7.4), there is no doubt that general principles of law have been transposed into the international level, in particular with respect to new branches of international law (subsection 2.7.5).

2.7.1. *Application by Analogy*

As mentioned above, international courts and tribunals apply general principles of law by analogy. This means that the argument of an international court or tribunal in support of the application of a general principle of law is an analogy. Weinreb defined an analogy as 'reasoning by example', i.e., 'finding the solution to a problem by reference to another similar problem and its solution'.[235]

There are no criteria specifying how much or what kind of similarity is sufficient to uphold analogies in general or a particular analogy.[236] Ultimately, the validity of a legal analogy is 'rooted in the experience of the lawyers and the judges who employ it'.[237] Accordingly, the relevance of a particular analogy will depend on the circumstances of the case and on the judges dealing with that case.

At the international level, international courts and tribunals have applied general principles of law taking for granted a basic similarity or

[235] *Ibid.,* p. 4.
[236] *Ibid.,* p. 5.
[237] *Ibid.,* p. 12. Although Weinreb's work deals with the use of analogies in the US courts, there is no apparent reason for considering that the validity of an analogy in international courts and tribunals is different.

analogy between natural persons and States and between interpersonal relations and international relations. These are applied so long as circumstances similar to those justifying their application at the national level also exist at the international level.[238]

The awards, judgments, and advisory opinions reviewed in sections 2.2 and 2.3 indicate that private law was the main source of national law analogies upon which international courts and tribunals used to draw.[239] According to Lauterpacht, the frequent recourse to general principles of law by international courts and tribunals demonstrates the existence of analogies between international and private law as involving two fields of law regulating the interests of coordinated natural or legal persons.[240] Consider, for instance, the following examples of mutual influence. There are analogies between contract law and the law of international treaties; succession law and the law of succession of States; civil and State responsibility; rules of property and possession and the acquisition of territorial sovereignty; acquisitive and extinctive prescription; servitudes; interest and the measures of damages, etc.[241]

However, private law was not the only source of analogies. General principles of public law have also been applied,[242] as the application of general principles of procedural law by arbitral tribunals, the PCIJ, and the ICJ demonstrates.[243] At present, recourse to public law analogies may be more frequent than it was in the past. This may be due to the fact that the development of branches of international law possessing 'public law' elements, such as international constitutional law,[244] international institutional law,[245] and international criminal law, facilitates

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[238] See Cheng, Bin, *op. cit*. 20, p. 391.

[239] Private law is 'The body of law dealing with private persons and their property and relationships'. See Garner, Bryan (ed.), *op. cit*. 35, p. 1234.

[240] Lauterpacht, Hersch, *op. cit*. 21, p. 83.

[241] Lauterpacht gives a plethora of examples. See *ibid., passim*.

[242] Public law is 'The body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself; constitutional law, criminal law, and administrative law taken together'. See Garner, Bryan (ed.), *op. cit*. 35, p. 1267.

[243] For instance, the principles of *lex fori*, *onus probandi actori incumbit*, and evidence may be given circumstantial. See subsections 2.2.2 and 2.3.4, above.

[244] On the emergence of an international constitutional law see De Wet, Erika, *The International Constitutional Order*, Amsterdam, Vossiuspers UvA, 2005, 34 pp; Fassbender, Bardo, 'The Meaning of International Constitutional Law', in St. John Macdonald, Ronald and Johnston, Douglas (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Leiden, Brill, 2005, pp. 837–851.

[245] See, e.g., Amerasinghe, Chattharanjan, *op. cit*. 25, *passim*.

the use of public law analogies by international courts and tribunals dealing, generally or occasionally, with such branches of law.

In fact, there are relevant analogies between national legal systems and international law, for instance, with respect to administrative and criminal law. With regard to administrative law, there are analogies between the employment relations involving national public administration and civil servants, on the one hand, and international organizations and international civil servants, on the other.[246] As regards criminal law, as explained in chapter 4 below, a case in point is the analogy between national and international criminal proceedings.

Certainly, not all analogies are relevant. Some may be misleading or inaccurate for a number of reasons. First, it is a mistake to look for analogies in a field of international law that has no counterpart in national law. For this reason, Lauterpacht considered it pointless to look for analogies pertaining to the law of armed conflict or to extradition, for instance.[247]

The second error consists in not paying sufficient attention to the lack of a 'universally compulsory judicial tribunal' to state what international law is, or to the absence of a central authority to enforce it. Accordingly, Lauterpacht explained, certain analogies are inappropriate to support the application of general principles of law. Nevertheless, Lauterpacht continued, 'caution on this account need not be pushed too far'. For Lauterpacht, certain analogies are inappropriate not because of the absence of a corresponding legal relationship between international law and private law. They are unsuitable because the international community has not yet reached the level of development of a legal organization, 'at which law is in all cases stronger than the individual will, or at which the rule of law is powerful enough to extend to all the essential aspects of the international relations'.[248] In short, Lauterpacht referred to the existence of structural differences between international law and national legal systems, differences that to some extent still exist, as we shall see in subsection 2.7.4 after examining the traditional arguments against the transposition and application of general principles of law at the international level.

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[246] *Ibid.,* pp. 18, 288–290.
[247] Lauterpacht, Hersch, *op. cit*. 21, p. 85.
[248] *Ibid.,* p. 86.

2.7.2. *Traditional Arguments against Transposition*

In Lauterpacht's opinion, the then negative attitude of international lawyers as regards the application of general principles of private law in international law was due to the then prevalent positivism which, in international law, was based on the doctrine of sovereignty. Positivists accepted only legal rules directly derived from the will of States as binding rules of international law. The doctrine of sovereignty rejected any recourse to private law as this, according to such doctrine, regulates economic interests of a lower order than the eternal and inalienable interests of States.[249]

The doctrine of sovereignty appeared in international law in two forms, namely, (i) as the doctrine of positivism and (ii) as the idea of the State as an entity with an absolute legal and moral value.[250] According to the doctrine of positivism, international conventions and custom are the only sources of international law because they are the only ones that create rules expressly recognized by States.[251] And in accordance with the idea of the State as an entity of an absolute legal and moral value, the only legitimate purpose of international law is to serve the preservation and development of States.[252]

The doctrine of positivism asserted that the will of States is the ultimate and exclusive source of national and international law, since nothing can be imposed on the State without its consent; in their relations, States do not accept any limitation of their sovereignty other than their own will.[253] According to early positivists scholars such as Vattel, Moser, and De Martens, the distinguishing traits of positive international law were sovereign equality among States, States' participation in international society, the structure of international society (which consisted of a juxtaposition of sovereign and equal States), the fact that international law exclusively regulated relations between States, and that international law was the outcome of State consent and thus only treaties and custom were its sources.[254] Moreover, the concept of the State as an entity of absolute legal and moral value considered States as legally and morally superior to any other form of human organization. The recognition of general principles of private law

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[249] *Ibid.,* 30, p. ix.
[250] *Ibid.,* p. 43.
[251] For a criticial examination of the teaching of positivst scholars, such as Hall, Oppenheim, and Liszt, see *ibid.,* pp. 51–54.
[252] For a critical examination of this concept see *ibid.,* pp. 44–50.
[253] See Dailler, Didier and Pellet, Alain, *op. cit*. 19, p. 52, § 21.
[254] *Ibid.,* pp. 57–59, §§ 26–27.

as a source of international law appeared dangerous and perplexing to the adherents to the doctrine of sovereignty. This was so because sovereign States can never be subject to rules to which they have not consented and that would ignore the everlasting and inalienable interests protected by States at the international level.[255]

Other scholars, while recognizing the special status of States as subjects of international law, were less restrained in their attitude towards the application of general principles of private law in international law. In Ripert's opinion, general principles of law derived from national legal systems could require some adjustment in order to be applied in international law, because the rules of national law aimed to regulate relations among private law persons and not among States as subjects of international law.[256] Ripert did not argue against the application of general principles of private law in international law, but he observed that these principles might require some transformation in order to be applied there.

The practice of the PCIJ and the ICJ illustrates that, from time to time, some of their members have raised arguments against the application of general principles of private law in the settlement of inter-State legal disputes, based on the doctrine of State sovereignty.[257]

However, the applicable law of early international arbitral tribunals as formulated by States in international treaties, as well as the awards of those tribunals,[258] weakens the persuasiveness of the main points made by the positivist doctrine. In fact, States empowered early international arbitral tribunals to apply not only conventional and customary law, but also

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[255] See Lauterpacht, Hersch, *op. cit*. 21, pp. 43–44.

[256] 'Il est pourtant certain que l'on ne peut appliquer en matière internationale des règles de droit interne sans que ces règles ne subissent une certaine transformation. Le droit international ne connaît que les rapports entre Etats […] Or, les règles du droit interne sont faites pour régir les rapports entre personnes de droit privé ; les principes généraux du droit ont été dégagés de l'analyse de ces rapportrs. Dans la mesure où la qualité de sujet de droit est essentielle, il faut prendre garde que les sujets ne sont pas les mêmes dans le droit international et dans le droit interne'. Ripert, Georges, 'Les règles du droit civil applicables aux rapports internationaux (Contribution à l'étude des principes généraux du droit visés au Statut de la Court permanente de Justice internationale', *RCADI*, Vol. 44, 1933-II, pp. 581–582.

[257] See, for example, *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, Opinion by Mr. Nylholm, PCIJ, Series A, No. 22,* pp. 26–27; *Right of Passage over Indian Territory, Preliminary Objections, Dissenting Opinion of Judge Chagla, ICJ Reports 1957*, pp. 177–178.

[258] See subsections 2.2.1 and 2.2.2, above.

other legal principles, such as the 'principles of justice'. As evidenced by the arbitral awards examined in subsection 2.2.2, such principles encompassed general principles of law. In addition, the PCIJ Statute empowered the Court to apply 'general principles of law recognized by civilized nations'; this also reduces the persuasiveness of the points made by the publicists for the doctrine of sovereignty, as far as the general principles of law are concerned. In short, international law consisted of conventional law, customary law, and general principles of law as early as in era of the early international arbitral tribunals.

2.7.3. *The 'Special Character' of International Law*

The doctrine of positivism and the idea of the State as an entity with an absolute legal and moral value were not the only arguments used to reject the applicability of general principles of private law in international legal relations. Another argument consisted of affirming that international law protects interests that are radically different from those that private law protects. The essence of this argument is the idea, mentioned above, of the State as an entity with an absolute legal and moral value.[259]

Furthermore, another positivst doctrine promoted the argument of the 'different protected interests' as an obstacle to the application of general principles of private law in international law, namely, the doctrine on the essential difference between subjects of international law and those of national law. According to this doctrine, States were the only subjects of international law. Natural and legal persons had rights and duties under national law but not under international law. A necessary outcome of the doctrine on the essential difference between subjects of international law and those of national law is the view that national law concepts (including general principles of law) are unsuitable for application in international law. This would be so because of the difference between legal subjects.[260]

Nonetheless, as Lauterpacht pointed out, the interests protected by States are not essentially different from those safeguarded by national legal systems in general and by private law in particular. According to Lauterpacht, the argument of the special character of international law was not persuasive because of its then increasing repudiation in favour of the view that States were not subject to duties and because it is not

[259] See Lauterpacht, Hersch, *op. cit*. 21, pp. 71–73.
[260] *Ibid.,* pp. 73–74.

just the interests of individuals that are primarily economic, but also those of States.[261] In addition, States were not the only subjects of international law then, as this conferred rights and imposed international obligations upon belligerents, war criminals, and the League of Nations, among other legal subjects.[262] Plainly, Lauterpacht's observation holds good at present more than ever, for the reason that even if international legal scholars generally agree that States are the main subject of international law, they also agree that they are not its exclusive subjects.[263] Consequently, the doctrine on the essential difference of subjects of international law and national law was not in the past a persuasive argument for upholdig the inapplicability of general principles of law at the international level, and it is not currently either.

2.7.4. *Structural Differences between International Law and National Legal Systems*

Most – if not all – international legal scholars agree that one of the main formal characteristics of international law is its still essentially decentralized structure. The structure is decentralized due to the lack of an international sovereign power.[264] Such lack in the international system means that there is no superior authority with the power to issue orders binding on every member of international society.[265] The principle of sovereignty largely determines the decentralized structure of international society. This is one of the fundamental principles of the UN, in accordance with Article 2, paragraph 1 of its Charter.[266]

In contrast, the structure of national legal systems is vertical. It is well known that typically in these systems there is a central government with the power to issue orders binding on every inhabitant of the State concerned.

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[261] *Ibid.,* pp. 71–73.

[262] *Ibid.,* pp. 74–55.

[263] See, e.g., Diez de Velasco, Manuel, *op. cit*. 19, pp. 247–249, 327 *et seq*.; Cassese, Antonio, *op. cit*. 164, pp. 71–72; Warbrick, Colin, 'States and Recognition in International Law', in Evans, Malcolm (ed.), *International Law*, 2nd edition, New York, Oxford Univeristy Press, 2006, p. 218.

[264] See, e.g., Zemanek, Karl, *op. cit*. 167, pp. 38–39; Capotorti, Francesco, *op. cit*. 206, pp. 27–30; Tomuschat, Christian, *op. cit*. 206, pp. 43–44.

[265] Tomuschat, Christian, *ibid.,* pp. 43.

[266] *Ibid.* On Article 2, paragraph 1 of the UN Charter, see Mbaye, Kéba, 'Article 2, paragraphe 1', in Cot, Jean-Pierre and Pellet, Alain (eds.), *La Charte des Nations Unies, Commentaire article par article*, 2nd edition, Economica, Paris, 1991, pp. 79–96.

There are international legal scholars who point to the largely decentralized structure of international law as an important obstacle to the application of general principles of law in international law. Among these scholars we find Dailler, Pellet, Nollkaemper, Weil, and Rosenne, among others. For example, Daillier and Pellet assert that only those general principles of law that are compatible with the fundamental features of the international order can be transposed into international law, and that the application of general principles of law in international law should not be based on automatic analogies (*il ne s'agit pas d'une analogie aveugle'*).[267]

Nollkaemper thinks the same way. In his opinion, legal principles originating in national legal systems cannot apply as such in international law because, while the structure of the former is essentially vertical, that of international law is essentially horizontal. For Nollkaemper, general principles of law may require adaptation to the special features of international law before they can be applied in it.[268]

According to Weil, the transposition of general principles of law into international law is practicable only to the extent that the structure and purposes of international law are compatible with those of national legal systems; and even though the transposition of a given national legal principle is viable, this principle will require adaptation to the specifics of international law. For Weil, such adaptation may completely transform the content and scope of a general principle of law. Therefore, he said, principles such as *force majeure*, *pacta sunt servanda, rebus sic stantibus, res iudicata* and others apply in international law differently from the way in which they apply in national legal systems. However, Weil asserts, it may well happen that the transposition of a national legal principle into international law is unworkable due to the inadequacy of the principle for the international law arena.[269]

In Rosenne's opinion, the application of general principles of law in international law is limited to a fallback function, given the different structures of national legal systems and international law. For Rosenne, a significant structural difference is that, whereas national law is a law of subordination, international law is a law of coordination.[270] Yet, this may be an over-simplification, as neither are all branches of national law

[267] Daillier, Patrick and Pellet, Alain, *op. cit*. 19, pp. 351–352, § 226.
[268] Nollkaemper, André, *op. cit*. 176, p. 77.
[269] Weil, Prosper, *op. cit*. 155, p. 147.
[270] Rosenne, Shabtai, *op. cit*. 166, p. 63.

laws of subordination (such as private law), nor are all branches of international law laws of coordination. International law no longer exclusively regulates relations between States. At present, international society does not just consist of States, and consequently there are new branches of international law regulating relations between States and other subjects of international law. Because of the transformation of international society, new fields of international law have emerged, such as international criminal, international institutional, and international constitutional law. Therefore, it is clear that international law has its own 'public law' and, consequently, its own law of subordination.

Furthermore, there is another important formal difference between international law and national legal systems: international law is a law created by its main legal subjects, namely the States.[271] That is, in international law States are the principal lawmakers and the usual addressees of the international legal rules and principles.[272] On the other hand, in national legal systems the legislative organ enacts legislation that is binding upon all the inhabitants of the State. Therefore, in national legal systems the lawmaker is generally not the addressee of the legal rules and principles.[273]

As far as the legal sources are concerned, there is no formal hierarchy between the sources of international law although there is between international legal rules and principles (rules of *ius cogens* and rules of *ius dispositivum*).[274] While a rule of *ius dispositivum* 'is created by the consent of participating nations, as by an international agreement, and is binding only on the nations that agree to be bound by it',[275] a rule of *ius cogens* is a 'Mandatory or peremptory norm of general international law accepted and recognized by the international community as a rule from which no derogation is permitted'.[276] On the

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[271] Tomuschat, Christian, *op. cit*. 206, pp. 44.

[272] I said 'usual' because it may happen that the addressee of the international legal norms is a different subject of international law, such as the individual. Think for example of the large majority of the norms of international criminal law.

[273] Yet, at the level of national legal systems there are instances in which the State is the addressee of the legal norms that it creates. The laws imposing limits on the exercise of governmental power –usually found in national constitutions- constitute relevant examples, e.g., the legal rules prohibiting torture and other inhuman and cruel treatments. The rules of administrative law are another relevant instance.

[274] See Dupuy, René-Jean, 'Communauté internationale et disparités de développement. Cours général de droit international public', in *RCADI*., Vol. 165 (1979-IV), pp. 196–200, 205–208; Diez de Velasco, Manuel, *op. cit*. 19, p. 77.

[275] See Garner, Bryan, *op. cit*. 35, p. 876.

[276] *Ibid.,* p. 877.

other hand, the sources of national legal systems are hierarchically structured, usually in the form of constitution, and primary and secondary legislation.[277]

With regard to enforcement mechanisms, it is worth noting that a basic similarity between international law and national legal systems is that compliance with legal rules and principles habitually occurs without the need to have recourse to enforcement mechanisms. Nevertheless, in the context of international law compliance with the rules and principles has great significance, for the reason that international society lacks an international judicial power exercising full compulsory jurisdiction over States.[278]

Notwithstanding that basic similarity, there is a crucial difference between international law and national legal systems as regards the issue of the adjudication of legal disputes: while national legal systems lay down rules giving courts and tribunals the power to adjudicate legal disputes arising in their jurisdictions, and pursuant to such rules the legal subjects can be brought to court even against their will, international law provides for rules empowering courts and tribunals to decide legal disputes arising among States, but, pursuant to those rules, States cannot be brought to court against their will. This is so in international law because State consent is the basis of international jurisdiction.[279]

2.7.5. *Transposition to New Branches of International Law*

Despite the still significant influence of the principle of sovereignty in the structure of international society, international law is moving to change its essentially decentralized structure for one hierarchical intended to protect the public interest aims of the international community.[280]

In fact, the structure of international law has evolved: the individual has acquired (albeit in a limited way) legal subjectivity under international law;[281] the number of international organizations has drastically

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[277] See Shany, Yuval, *The Competing Jurisdictions of International Courts and Tribunals*, New York, Oxford University Press, 2003, pp. 94–95.

[278] See Diez de Velasco, Manuel, *op. cit*. 19, p. 780.

[279] See Dailler, Patrick and Pellet, Alain, *op. cit*. 19, p. 863, § 524; Diez de Velasco, *op. cit*. 19, p. 803.

[280] See Tomuschat, Christian, *op. cit*. 206, pp. 44–45.

[281] See McCorquodale, Robert, 'The Individual and the International Legal System', in Evans, Malcolm (ed.), *International Law*, 2nd edition, New York, Oxford University Press, 2006, pp. 307–332.

increased, as have their functional competences;[282] a hierarchy has emerged among the rules of international law;[283] the number of international courts and tribunals has risen dramatically,[284] etc. In brief, although the structure of international law is still largely decentralized, the structural differences between national legal systems and international law have diminished to some extent, and it is thus likely that this state of affairs facilitates the application of general principles of law in international law.

However, the risk of futility in looking for analogies in national law, if the legal relationship at stake is peculiar to international law and has no corresponding legal relationship in national legal systems, is ever-present. With respect to relatively new branches of international law such as international criminal law, it is not very difficult to find corresponding legal relations at the national level, given that international criminal law has been largely developed in the image and likeness of national criminal laws.[285]

The existence of relevant analogies in new fields of international law such as international criminal law and international constitutional law seems to result from the hybrid nature of these new disciplines. In effect, as their titles make clear, these new branches of international law borrow from national legal systems their rationale and some institutions of criminal and constitutional laws, respectively.[286]

Apparently, that was also Schachter's view. For him, general principles of law will frequently be appropriate for international application, as new fields of law have become the concern of international law. However, he went on to say, it does not signify that general principles of law are to be transposed into international law "lock, stock and barrel", paraphrasing Judge McNair in *International Status of South West Africa*, but that the national legal rules pertaining to new branches of law have

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[282] See generally Diez de Velasco, Manuel, *Las Organizaciones Internacionales*, 9ª edición, Madrid, Tecnos, 1995, 706 pp.; Akande, Dapo, 'International Organizations', in Evans, Malcolm (ed.), *International Law*, 2nd edition, New York, Oxford University Press, 2006, pp. 277–305.

[283] See Cassese, Antonio, *op. cit*. 164, p. 198 *et seq*.

[284] See Romano, Cesare, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', *NYJIL*, Vol. 31, No. 4, 1999, pp. 709–751.

[285] See subsection 4.4.1.

[286] Yet, not all analogies may be relevant. See Arangio-Ruiz, Gaetano, 'The "Federal Analogy" and UN Charter Interpretation: A Crucial Issue', *EJIL,* Vol. 8, No. 1, 1997, pp. 1–28.

become ripe for transposition.[287] Thus, even though he did not state it explicitly, legal principles generally recognized in national law may require adaptation to their new lodgings, i.e., international law.

Thus, analogy does not require that institutions be identical. Slight differences on a particular legal issue do not necessarily prevent the application of a general principle of law, if this can be adapted to the peculiarities of the international legal system. Such differences may require resolution, but need not lead to rejection.[288] International courts and tribunals will adapt the contents and scope of general principles of law to the specifics of international law during the process of transposition from national legal systems into international law. Even Judge McNair, who was concerned about automatic transpositions of private law notions to international law, eventually asserted that general principles of private law might shed light on the then new concept of mandate in international law.[289]

It is probable that in applying general principles of law international courts and tribunals have not paid much attention to the largely decentralized structure of international law because the way in which international law borrows from national private laws is not automatic. General principles of law derived from national legal systems are suitable for application in international law insofar as there is a relevant analogy between national and international law on a particular legal issue. Moreover, international courts and tribunals have the power to adapt the national legal principle to the structure of international law, so that it becomes apt for application in the international realm.

2.8. Concluding Remarks

Tu summarize, there has for long been a practice of applying general principles of law in inter-State legal disputes. Early international arbitral

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[287] Schachter, Oscar, 'International Law in Theory and Practice. General Course on Public International Law', in *RCADI,* Vol. 178 (1982-V), p. 79.

[288] See Shahabuddeen, Mohamed, 'Municipal Law Reasoning in International Law', in Lowe, V. and Fitzmaurice, M. (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings,* Cambridge, Cambridge University Press, 1996, pp. 99–100. See also De Wet, Erika, *The Chapter VII Powers of the United Nations Security Council*, Oxford, Hart, 2004, pp. 84–87.

[289] *International Status of South West Africa, Advisory Opinion, Separate Opinion of Judge McNair, ICJ Reports 1950*, p. 149.

tribunals began this practice, and the PCIJ and the ICJ – though less frequently- continued it.

Despite the lack of a formal hierarchy among the sources of international law (namely international conventions, custom, and general principles of law), it is usually said that general principles of law are a subsidiary source of international law because they are applied in the absence of relevant conventional and customary rules of international law, or in addition to these rules. In the absence of relevant conventional and customary rules, the application of general principles of law purports to fill gaps or to interpret legal rules. The application of general principles of law in addition to conventional and/or customary rules aims to reinforce a decision primarily based on such rules.

While the application of general principles of law to fill legal gaps was relatively common in early international arbitral practice, this has not been the case in the practice of the PCIJ and the ICJ. Two hypotheses may explain this. The first is the normative expansion of the traditional fields of international law, that is, the multiplication of the conventional and customary rules regulating those fields; such expansion would not leave gaps to be filled by general principles of law. The second reason could be a certain reluctance by the PCIJ and the ICJ to apply in the settlement of inter-State legal disputes legal principles that do not derive directly from the will of States. However, as demonstrated in chapter 3 and for the reasons set out there, the emergence of new fields of international law, such as international criminal law, has put general principles of law centre-stage again.

One may trace most of general principles of law applied by early international arbitral tribunals, the PCIJ, and the ICJ in Roman law. The fact that several of these principles are formulated in maxims (such as *res iudicata pro veritate accipitur* and *eius est interpretare legem cuius condere*) is evidence of this. However, this does not mean that the PCIJ and the ICJ have applied Roman law directly (even if, as demonstrated above, in early arbitral awards there are examples of the direct application of Roman law), but that they may have relied on national legal systems that had incorporated Roman law institutions in their private and/or public law. In any event, neither the PCIJ nor the ICJ makes it clear how it has determined the existence of general principles of law, with the exception of some occasional reference to their acceptance in the jurisprudence of international arbitration and national courts.

Furthemore, it is worth noting that the majority of the general principles of law applied by the PCIJ and the ICJ did not require their transposition from national legal systems into international law. The reason is evident: these principles were already part of international law, given that early international arbitral tribunals had already applied them. Consider, for instance, the general principles of law *nullus commodum capere de sua iniuria propria* and *res iudicata*. Yet, one may find in separate and dissenting opinions of members of the PCIJ and the ICJ and of *ad hoc* judges occasional controversies about the suitability of the transposition of certain general principles of law into international law, as for example with respect to the right of passage over the territory of other States. In these examples, the usual argument against transposition is the inconsistency of the general principle of law at stake with the principle of State sovereignty.

Given that international society is still largely decentralized, it may be that a particular general principle of law is unsuitable for regulating inter-State legal disputes. It may also be that the analogy in which the applicability of that general principle of law is based is inappropriate or, what is more, it may be that there is no analogy on which to base the applicability of the general principle of law at all. Nevertheless, as demonstrated in chapter 3 below, that will not often be the case with respect to international criminal law; in such new fields of international law, relations between the legal subjects are usually analgous to those between the legal subjects of national legal systems.

Chapter Three

GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

3.1. Preliminary Remarks

International criminal law is a branch of international law. Therefore, it draws upon the same sources, namely conventions, custom, and general principles of law.[290]

By analogy with the awards of early international arbitral tribunals, the decisions of international criminal courts or tribunals provide many examples of resort to general principles of law. Why have international criminal courts and tribunals so far had frequent recourse to such principles? The following four reasons may explain this.

First, international criminal law is a relatively new branch of international law. It is relatively new because the list of international crimes has gradually emerged and the rules of international criminal procedure are scarce and belong only to the criminal court or tribunal for which they were adopted.[291]

Secondly, international criminal law is somewhat rudimentary. This is because the elements of international crimes (the objective element or *actus reus*, and the subjective element or *mens rea*) have not been immediately obvious, and because international law does not lay down any scale of penalties.[292] These two reasons lead international criminal courts and tribunals to turn to general principles of law in order to fill the legal gaps and to interpret imprecise legal rules.

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[290] 'En général, les sources du droit international pénal sont identiques à celles du droit international général.' See Simma, Bruno et Paulus, Andreas, *op. cit*. 12, p. 55. See Cassese, Antonio, *op. cit*. 12, p. 27; Ascensio, Hervé, *op. cit*. 147, pp. 403–409, *passim*; Degan, Vladimir, *op. cit*. 13, p. 26, p. 50; Werle, Gerhard, *Principles of International Criminal Law*, The Hague, TMC Asser Press, 2005, p. 44, § 123.

[291] See Cassese, Antonio, *op. cit*. 12, p. 16. See also Safferling, Christoph, *Towards an International Criminal Procedure,* Oxford, Oxford University Press, 2003 (first published in 2001), preface.

[292] Cassese, Antonio, *op. cit*. 12, p. 17.

Thirdly, international criminal courts and tribunals need to take decisions based on compelling legal arguments. Recourse to general principles of law is an effective means of reinforcing legal reasoning.

Finally, international criminal law has primarily developed by importing domestic criminal law concepts and institutions into the international realm.[293] Thus, given the analogies between many concepts and institutions of domestic criminal law and international criminal law, international criminal courts and tribunals have transposed into the international arena some of those concepts and institutions by means of general principles of law.

To sum up, the undeveloped nature of international criminal law, the imprecision of many of its legal rules, the need to make compelling legal arguments, and the existence of relevant domestic criminal law analogies have facilitated resort to and the subsequent application of general principles of law by international criminal courts and tribunals.

3.2. Early International Criminal Tribunals

This section investigates the role of general principles of law in the judgments of the early international criminal tribunals, namely the IMT and the IMTFE. Subsection 3.2.1 deals with the judgment of the IMT,[294] and subsection 3.2.2 with that of the IMTFE.[295]

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[293] *Ibid*., p. 18.

[294] The literature dealing with the IMT is wide and includes the following works among others: Calvocoressi, Peter, *Nuremberg: The Facts, the Law and the Consequences*, London, Chatto and Windus, 1947, 176 pp.; Janeczek, Edward, *Nuremberg Judgment in the Light of International Law,* Thèse No. 67, Université de Genève, Geneva, Imprimeries Populaires, 1949, 142 pp.; Woetzel, Robert, *The Nuremberg Trials in International Law,* London/New York, Stevens & Sons Limited/Frederic Praeger Inc., 1960, 287 pp.; Wright, Quincy, 'The Law of the Nuremberg Trial', in Mueller, Gerhard and Wise, Edward (eds.), *International Criminal Law*, South Hackensack/London, Fred Rothman & Co./Sweet & Maxwell Limited, 1965, pp. 239–278; Klafkowski, Alfons, *The Nuremberg Principles and the Development of International Law*, Warsaw, Western Press Agency, 1966, 56 pp.; Röling, Bert, 'The Nuremberg and the Tokyo Trials in Retrospect', in Bassiouni, Cherif and Nanda, Ved (eds.), *A Treatise in International Criminal Law*, Springfield, Illinois, Charles Thomas Publisher, 1973, Vol. I, Crimes and Punishment, pp. 591–608; Smith, Bradley, *Reaching Judgment at Nuremberg*, New York, Basic Books Inc. Publishers, 1977, 349 pp.; Tusa, Ann and Tusa, John, *The Nuremberg Trial,* London, Macmillan, 1983, 519 pp.; Ginsburgs, George and Kudriavtsev, Vladimir (eds.), *The Nuremberg Trial and International Law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1990, 288 pp.

[295] On the IMTFE see Minear, Richard, *Victors' Justice: The Tokyo War Crimes Trial*, Princeton, Princeton University Press, 1971, 229 pp.; Röling, Bert, *op. cit*. 294; Röling, Bert and Rüter, Christiaan (eds.), *The Tokyo Judgment: The International*

3.2.1. *The IMT*

This subsection provides an overview of the applicable law of the IMT (3.2.1.1) and gives three examples relating to the applicability of general principles of law in the judgment of the IMT (3.2.1.2).

3.2.1.1. *The Applicable Law*

The Agreement for the Establishment of an International Military Tribunal, concluded in London on 8 August 1945, established the IMT to try the major war criminals of the European Axis. The IMT had to try them in accordance with its Statute and RP.[296]

The IMT was the first international criminal tribunal in modern history.[297] For this reason, the drafters of the Statute and the RP were not able to draw upon the experience of a previous international criminal court or tribunal in order to draft those legal instruments. As a result, they looked to their own legal systems or cultures for the answers to questions such as who were to be prosecuted, what charges were to be brought, and what procedures were to be followed.[298]

The drafting of the Charter and the RP was thus a complex process. While the legal systems of the USA and the United Kingdom were and still are part of the Common Law legal family, France's legal system

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Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948, Amsterdam, University Press Amsterdam, 1977, Vol. I, 515 pp.; Piccigallo, Philip, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951*, Austin and London, University of Texas Press, 1979, 292 pp.; Hosoya, Chihiro *et al*. (eds.), *The Tokyo War Crimes Trial: An International Symposium*, Tokyo, Kodansha Ltd., 1986, 226 pp.; Brackman, Arnold, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, New York, William Morrow and Company Inc., 1987, 432 pp; Röling, Bert and Cassese, Antonio, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, Cambridge, Polity Press, 1993, 143 pp.

[296] The text of the Agreement and the Charter are in International Law Commission, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (memorandum, submitted by the Secretary-General)*, New York, United Nations, 1949, pp. 89–99. The text of the RP is available at http://www.yale.edu/lawweb/avalon/avalon.htm.

[297] 'The first genuinely international trial for the perpetration of atrocities was probably that of Peter von Hagenbach, who was tried in 1474 for atrocities committed during the occupation of Breisach. When the town was retaken, von Hagenbach was charged with war crimes, convicted and beheaded.' Schabas, William, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2001, p. 1, and the reference given therein.

[298] See Murphy, John, 'Norms of Criminal Procedure at the International Military Tribunal', in Ginsburgs, George and Kudriavtsev, Vladimir (eds.), *The Nuremberg Trial and International Law*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1990, p. 61.

was and still is part of the Romano-Germanic legal family, and the Soviet Union's was part of the then existing Socialist legal family. Hence, whereas the USA and the United Kingdom had a criminal procedure based on the adversarial model, France's and the Soviet Union's were based on the inquisitorial model.[299]

The Charter provided for the 'just and prompt' trial and punishment of the major war criminals of the European Axis (Article 1). The crimes within the jurisdiction of the IMT were crimes against peace, war crimes, and crimes against humanity, as defined in the Charter. As far as the forms of criminal participation are concerned, leadership, organization, instigation, and complicity in the formulation or execution of a common plan or conspiracy to commit any of those crimes entailed individual criminal responsibility 'for all acts performed by any persons in execution of such plan' (Article 6).

The official position of the accused was recognized neither as a ground for excluding criminal responsibility nor as a mitigating circumstance for sentencing purposes (Article 7). The IMT could consider the excuse of superior orders as a mitigating factor to be taken into account in sentencing, but the Statute ruled that out as a ground for excluding criminal responsibility (Articles 8).

The IMT had the power to try people *in absentia* (Article 12). In effect, it tried and convicted one of the accused this way.[300] It should be noted that whereas the adversarial criminal procedure is based on the effective presence of both parties to the proceedings, the inquisitorial procedure allows trials *in absentia* under certain circumstances.[301] Therefore, in this respect, the drafters of the IMT Charter adopted an inquisitorial stance.

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[299] *Ibid*., p. 67.

[300] The accused was Martin Bormann. See *Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the Dissenting Opinion of the Soviet Member), Nuremberg, 30th September and 1st October 1946*, London, HMSO, 1946, p. 2.

[301] Article 14, paragraph 3(d) of the ICCPR stipulates that in the adjudication of any criminal charge against him or her, everyone is entitled to be tried in his or her presence. In this respect, the Human Rights Committee held in *Mbenge v. Zaire (16/77)* that 'proceedings *in absentia* are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice. Nevertheless, the effective exercise of the rights under article 14 presuppose that the necessary steps should be taken to inform the accused beforehand about the proceedings against him … Judgments *in absentia* require that, notwithstanding the absence of the

Pursuant to the IMT Charter's provisions on fair trial, the indictment included full particulars of the charges (Article 16), as is the case in the inquisitorial criminal procedure model. The question of the content of the indictment was controversial. The reason was that the supporters of the adversarial model, on the one hand, proposed to provide the accused with only a concise statement of the charges and to conceal evidence from him until they were in court, and the supporters of the inquisitorial model, on the other hand, deemed the proposal unfair. Ultimately, the content of the indictments was more detailed than in the adversarial but less than in the inquisitorial model.[302]

Given that the Allies did not propose the adoption of jury trials, the Statute and the RP did not lay down detailed exclusionary rules of evidence, as is the case with such trials.[303] The inquisitorial approach prevailed and, as a result, the IMT Charter stipulated that any evidence submitted to the IMT was admissible insofar as the IMT deemed it to have probative value (Article 19). Furthermore, the Charter did not require the IMT to prove facts in common knowledge (Article 21); the power of a tribunal to take judicial notice of such facts is a general principle of law.[304]

3.2.1.2. *Three Examples*

I identified three examples of recourse to general principles of law in the IMT's judgment. I give the examples in the same order in which they appear in the judgment.

3.2.1.2.1. *Nullum Crimen Nulla Poena Sine Lege*

As stated above, the IMT Charter criminalized the planning or waging of a war of aggression or a war in violation of an international treaty. At trial, counsel for the accused contended, 'a fundamental principle of

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accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance'. Quoted by Joseph, Sarah *et al*., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd edition, Oxford, Oxford University Press, 2005, p. 437.

[302] See Murphy, John, *op. cit*. 298, p. 71; Larin, Aleksandr, 'The Verdict of the International Military Tribunal', in Ginsburgs, George and Kudriavtsev, Vladimir (eds.), *The Nuremberg Trial and International Law*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1990, pp. 80–81.

[303] The IMT 'did not apply common law rules of evidence'. Wright, Quincy, *op. cit*. 294, p. 256.

[304] See Cheng, Bin, *op. cit*. 20, pp. 302–304.

all law – international and domestic- is that there can be no punishment of crime without a pre-existing law'.[305] Counsel submitted that as national legal systems had not criminalized aggressive war or fixed penalties in this regard, the criminalization of aggressive war by the Charter constituted *ex post facto* retribution contrary to the 'law of all civilized nations',[306] i.e., to the general principles of law.

According to some scholars,[307] the Defence's argument was correct. However, this was not the IMT's view. For this tribunal, given the 'decisive' and 'binding' character of the Charter, it was unnecessary to consider whether aggressive war was a crime under international law before the execution of the Agreement.[308] The IMT also held that the principle *nullum crimen nulla poena sine lege* 'is not a limitation of sovereignty, but is in general a principle of justice.'[309] It also stated that it would be unjust to leave unpunished 'those who in defiance of treaties and assurances have attacked neighbouring states without warning'.[310] For these reasons, it rejected the application of the principle to the case.[311] *Ad abundantiam* the IMT affirmed that aggressive war was already a crime under international law.[312]

The question arises what exactly the IMT meant by saying that the principle was one of justice rather than 'a limitation to sovereignty'. In my opinion, it meant that the principle was not part of general international law; otherwise, it should have limited the sovereignty of the States parties to the Agreement and Charter, just as any other legal rule or principle laying down an international obligation limits the sovereignty of any State. In contrast, by holding that the principle in question was a principle of justice, i.e., a non-binding principle, the IMT created for itself the ability to choose between applying the principle and exercising retribution against the accused. Eventually it chose the latter option because it deemed it 'more just' than the other option.

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[305] *Judgment of the International Military Tribunal for the Trial of German Major War Criminals (With the dissenting opinion of the Soviet Member), Nuremberg, 30th September and 1st October, 1946*, London, HMSO, 1946, p. 38.

[306] *Ibid*.

[307] See the literature cited by Werle, Gerhard, *op. cit*. 290, p. 10, footnote 47.

[308] *Judgment of the International Military Tribunal for the Trial of German Major War Criminals (With the dissenting opinion of the Soviet Member), Nuremberg, 30th September and 1st October, 1946*, London, HMSO, 1946, p. 38.

[309] *Ibid*., p. 39.

[310] *Ibid*.

[311] *Ibid*.

[312] *Ibid*., pp. 39–41.

3.2.1.2.2. *There is no Criminal Responsibility without Moral Choice*

The second example concerns the principle that there is no criminal responsibility without moral choice.

With regard to Article 8 of the Charter, the IMT stated:

> The provisions of this Article are in conformity with the law of nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.[313]

Contrary to the IMT's view, whether Article 8 of the IMT Charter conformed with the then existing general international law is doubtful. Actually, until the Second World War superior orders always excluded the criminal responsibility of the subordinate who acted under those orders; only the superior was criminally responsible.[314] Thus, the rule laid down in Article 8 of the Statute and the confirmation by the IMT that that rule was valid constituted an innovation with regard to the existing international criminal law.

What matters for the purpose of this study is the fact that the IMT resorted to a general principle of law in order to reach that conclusion. In the IMT's view, Article 8 of the Charter was in conformity with international law because, according to 'the criminal law of most nations' (i.e., the general principles of law), there is no criminal responsibility without moral choice. Put differently, the orders alone do not amount to a ground for excluding criminal responsibility. The fact that he has obeyed superior orders does not automatically exclude the responsibility of the perpetrator but may be of importance in the evaluation of the subjective element of the crime, such as the issue of whether the perpetrator acted as a free agent.[315] Therefore, obeying orders can play a role only within the context of the general grounds for excluding responsibility, in particular, duress and mistake of law.[316]

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[313] *Ibid*., p. 42.

[314] See Werle, Gerhard, *op. cit*. 290, p. 153, §§ 450–451.

[315] International Law Commission, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (Memorandum, Submitted by the Secretary-General)*, New York, United Nations, 1949, p. 42.

[316] See Ambos, Kai, *op. cit*. 14, p. 461 and the authors cited in footnote 46; Werle, Gerhard, *op. cit*. 290, p. 154, § 454.

To sum up, the IMT relied upon the general principle of law that there is no criminal responsibility without moral choice. It determined the existence of the principle by referring to its recognition by national legal systems, and employed it in order to demonstrate the consistency of Article 8 of the Charter with international law.

3.2.1.2.3. *Personal Culpability*

The final example concerns the principle of personal culpability or *nullum poena sine culpa*, as well as its derivative that prohibits the imposition of collective punishments. The IMT resorted to this principle when it dealt with the issue of the designation of criminal organizations. According to the IMT,

> Article 9, it should be noted, uses the words 'The Tribunal may declare' so that the Tribunal is vested with discretion as to whether it will declare any organization criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. … [T]he Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.[317]

The IMT thus applied the principle of culpability as a means of interpretation of Article 9 of the Charter. Clearly, by applying the principle of culpability the IMT restricted the scope of that legal provision. In effect, the IMT held that 'Membership alone is not enough to come within the scope of these declarations'.[318]

The IMT was right in so contending, as the principle of personal culpability is indeed a 'well-settled' principle of criminal law. This principle prescribes that no one may be held responsible for an act he has not performed, or in the commission of which he has not participated, or for an omission that cannot be attributed to him.[319] The principle entails two legal consequences. First, no one may be held responsible for crimes committed by others. Secondly, an individual may be held criminally responsible only if he or she is in one way or another culpable of any violation of criminal rules.[320]

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[317] *Judgment of the International Military Tribunal for the Trial of German Major War Criminals (With the dissenting opinion of the Soviet Member), Nuremberg, 30th September and 1st October, 1946*, London, HMSO, 1946, pp. 66–67.

[318] *Ibid*., p. 67.

[319] Cassese, Antonio, *op. cit*. 12, p. 136.

[320] *Ibid*., pp. 136–137.

The IMT did not face major problems in determining the existence and contents of the principle of personal culpability, because, as the IMT stated, the principle was a 'well-settled' principle of criminal law. In fact, one may trace the origins of the principle back to the end of the 18th and beginning of the 19th centuries, the times of the Liberal reaction to the Inquisition.[321]

Finally, it is worth noting that the affirmation by the IMT of the principle of personal culpability at the international level is of great significance at present, as modern international criminal law is grounded in this principle.[322] Nowadays, international criminal law conceives of personal culpability or guilt as meaning that the author of an alleged crime must be individually responsible for the acts constituting the offence, provided that there is no ground for excluding his or her responsibility.[323]

3.2.2. *The IMTFE*

This subsection summarizes the applicable law of the IMTFE (3.2.2.1) and comments on the role of the general principles of law in the IMTFE's judgment (3.2.2.2).

3.2.2.1. *The Applicable Law*

On 19 January 1946, General MacArthur, the Supreme Allied Commander, established the IMTFE by Special Proclamation. He acted on the authority conferred upon him by the Moscow Conference, as agreed between the governments of the USA, the United Kingdom, and the Soviet Union with the concurrence of China.[324] A Charter regulated the IMTFE's constitution, jurisdiction, and functions.[325]

The IMT Charter was the source of inspiration of the IMTFE Charter. As a result, there are few material differences between the two legal

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[321] See, e.g., Binder, Alberto, *Introducción al Derecho Penal*, Buenos Aires, Ad Hoc, 2004, pp. 241–243. For a thorough examination of the principle of personal culpability, see Roxin, Claus, *Derecho Penal: Parte General*, Vol. I (Fundamentos). La estructura de la Teoría del Delito), traducción de la 2° edición alemana y notas por D. Luzón Peña *et al*., Madrid, Civitas, reimpresión 2003 (1ª edición en Civitas, 1997), p. 788 *et seq*.

[322] See Article 7, paragraph 1 of the ICTY Statute, Article 6, paragraph 1 of the ICTR Statute, Article 6, paragraph 1 of the SCSL Statute, and Article 25, paragraphs 2 and 3 of the ICC Statute.

[323] See Ambos, Kai, *op. cit*. 14, p. 74.

[324] See *Judgment of the International Military Tribunal for the Far East*, in Röling, Bert and Rüter, Christiaan (eds.), *op. cit*. 295, pp. 19–20.

[325] Text in www.yale.edu/lawweb/avalon/avalon.htm.

instruments. The jurisdiction of the IMTFE covered crimes against peace, war crimes, and crimes against humanity (Article 5, paragraphs a-c), as did that of the IMT. Yet, the definition of the crimes against humanity is somewhat different, as it encompasses acts perpetrated in the context of a *declared or undeclared* war of aggression. This difference in the definitions of crimes against humanity allowed the IMTFE to consider in the judgment hostilities committed without any prior declaration of war.[326]

The Charter recognized the following forms of criminal participation: leadership, organization, instigation, and complicity in the formulation or execution of a common plan or conspiracy for the accomplishment of the criminal subject-matter jurisdiction of the IMTFE (Article 5). Thus, the forms of criminal participation recognized by both Charters are the same.

The Charter ruled out superior orders as a ground for excluding criminal responsibility, but not as a mitigating factor in sentencing (Article 6). In this respect, both Charters are alike too.

Although the Japanese Army could have been considered a 'criminal organization' based on an analogy with the Nuremberg precedent, the Charter did not authorize the designation of an organization as criminal.[327] Therefore, this is one of the differences between the two Charters.

The trial was structured on the basis of the adversarial model of criminal procedure.[328] For example, the form of the indictment had to consist of 'a plain, concise, and adequate statement of each offense charged' (Article 9, paragraph a). This is a second difference between the two Charters, because, as mentioned above, in the context of the IMT the indictment had to specify the charges in detail.

The accused had the right to counsel of their own choice and the right to represent themselves (Article 9, paragraph b). The powers of the

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[326] See International Law Commission, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (Memorandum, Submitted by the Secretary-General)*, New York, United Nations, 1949, p. 81.

[327] According to a former judge of the IMTFE, 'The Japanese military, specially the Army, ha[d] indeed an enormous responsibility. They set the conditions for the fateful development [of the Pacific War]'. Röling, Bert, *op. cit*. 295, p. 597.

[328] Moreover, the proceedings assumed an adversarial character because the President of the IMTFE and the other six judges were used to it. See Röling, Bert and Rüter, Christiaan (eds.), *op. cit*. 295, p. XI.

IMTFE (Article 11) were identical to those of the IMT. This is also the case as far as the role of the IMTFE in conducting the trial is concerned (Article 12).

Finally, the rules of evidence applied by the IMTFE were similar in scope to those applied by the IMT. Yet, they were more detailed (Article 13),[329] as they were the rules dealing with the course of the trial proceedings (Article 15). In contrast, there is one difference with regard to the IMT proceedings: The accused were guaranteed certain rights only if represented; these were rights such as the making of an opening statement, examining witnesses, and addressing the IMTFE (Article 15, paragraphs c, e, and f respectively).

3.2.2.2. *The Principle Nullum Crimen Nulla Poena Sine Lege*

Given the small number of substantive differences between the applicable law of the IMTFE and that of the IMT, it is natural that the judgment of the former is consistent with, and confirmative of, that of the latter.[330] This applies *mutatis mutandis* to the findings where the applicability of certain national legal principles as general principles of law is at stake.

However, given that the issues of superior orders and designation of criminal organizations were not at stake in the trial before the IMTFE, this tribunal did not discuss the principles that there is no criminal responsibility without moral choice and of personal culpability.

The IMTFE discussed only the applicability of the principle *nullum crimen nulla poena sine lege*. In this respect the IMTFE relied on the finding of the IMT, that is that the principle in question was not a limitation of sovereignty.[331]

In brief, the IMTFE did not contribute to the determination and application of general principles of law in international criminal law, unlike the IMT and, especially, the contemporary international criminal courts and tribunals. The contributions of the latter are shown below.

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[329] For an insight into evidentiary issues that have arisen at trial see Minear, Richard, *op. cit*. 295, pp. 118–124.

[330] See International Law Commission, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (Memorandum, Submitted by the Secretary-General)*, New York, United Nations, 1949, p. 83–86; Werle, Gerhard, *op. cit.* 290, p. 11.

[331] See the IMTFE's judgment, in Röling, Bert and Rüter, Christiaan (eds.), *op. cit*. 295, p. 28.

3.3. Contemporary International Criminal Courts and Tribunals

This section consists of four subsections. Subsection 3.3.1 focuses on the ICTY, subsection 3.3.2 on the ICTR, subsection 3.3.3 on the ICC, and subsection 3.3.4 on the SCSL.

3.3.1. *The ICTY*

This subsection explains the applicable law of the ICTY in a nutshell (3.3.1.1) and examines the decisions of this international tribunal pertaining to the applicability of general principles of law (3.3.1.2).

3.3.1.1. *The Applicable Law*

On 22 February 1993, the UN Security Council decided to set up an international tribunal for the prosecution of people responsible for serious violations of international humanitarian law perpetrated in the territory of the former Yugoslavia since 1991. It also requested the UN Secretary-General to submit a report including proposals for the effective implementation of the decision.[332] The UN Secretary-General submitted such report on 3 May 1993.[333] On 25 May 1993 the UN Security Council, acting under Chapter VII of the UN Charter, *inter alia* approved the Report, decided to establish the ICTY, and to this end to adopt the Statute annexed to the Report. It also decided that all States must cooperate fully with the ICTY.[334]

The Statute has been amended seven times so far.[335]

There are four categories of crimes within the jurisdiction of the ICTY, namely: (i) grave breaches of the Geneva Conventions of 1949 (Article 2); (ii) violations of the laws or customs of war (Article 3); (iii) genocide (Article 4); and, (iv) crimes against humanity (Article 5).[336]

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[332] See S/RES/808 (1993), 22 February 1993.

[333] *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, S/25704. (Henceforth, the Report).

[334] See S/RES/827 (1993), 25 May 1993. On the origins of the ICTY see ICTY, *The Path to The Hague*, s.l., United Nations, 1995, 102 pp.; Bassiouni, Cherif and Manikas, Peter, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Irvington-on-Houston (New York), Transnational Publishers, 1999, 1092 pp.

[335] On 13 May 1998 by S/RES/1166 (1998); on 30 November 2000 by S/RES/1329 (2000); on 17 May 2002 by S/RES/1411 (2002); on 14 August 2002 by S/RES/1431 (2002); on 19 May 2003 by S/RES/1481 (2003); on 20 April 2005 by S/RES/1597 (2005) and; on 28 February by S/RES/1660 (2006). See http://www.un.org/icty/legaldoc-e/index.htm.

[336] With regard to crimes within the jurisdiction of the ICTY the Report says, 'the application of the principle *nullum crimen sine lege* requires that the international

Furthermore, the Statute sets out four principles of individual criminal responsibility. First, a person who planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of a crime within the jurisdiction of the ICTY is individually responsible for the crime. Secondly, the official position of a person does not absolve him of criminal responsibility nor mitigate the sentence. Thirdly, superiors who knew or should have known that their subordinates were about to or did commit criminal acts are required to take reasonable actions to prevent or punish subordinates; otherwise, they may be held responsible for such acts. Finally, superior orders are not to absolve an accused of criminal responsibility but may mitigate punishment (Article 7).[337]

With respect to the defences available to the accused, the UN Secretary-General affirmed in the Report that the ICTY 'will have to decide on various personal defences which may absolve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations.'[338] In fact, the ICTY resorted to general principles of law on this matter, as illustrated in subsection 3.3.1.2.

The Statute also lays down a rule on *non bis in idem* (Article 10) and gives rights to the accused (Article 21), *inter alia* equality before the ICTY, fair trial, and presumption of innocence.

Furthermore, judgments are to be reasoned and delivered in writing (Article 23) and the penalty shall be limited to imprisonment (Article 24). The Statute provides for appellate and review proceedings (Articles 25 and 26, respectively) as well.

As far as the enforcement of the sentences is concerned, imprisonment shall be served in a State designated by the ICTY that has consented to accept convicts (Article 27). If a convicted person is eligible for pardon or commutation of the sentence in conformity with the laws of the State in which the sentence is served, the ICTY shall decide the matter 'on the basis of the interests of justice and the general principles of law' (Article 28).

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tribunal should apply rules of international humanitarian law which are beyond doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.' See *Report*, § 34.

[337] The literature on individual criminal responsibility under international law is immense. For an overview of the topic see Cassese, Antonio, *op. cit*. 12, pp. 135–158; Werle, Gerhard, *op. cit*. 290, pp. 116–128. But for a thorough analysis see Ambos, Kai, *op. cit*. 14, *passim*.

[338] *Report*, § 58.

The RPE too are part of the applicable law of the ICTY. The judges of the ICTY adopted the RPE pursuant to Article 15 of the Statute. They have so far amended the RPE 40 times.[339] In the RPE there is one rule which refers explicitly to the general principles of law. This is Rule 89(C), which is a residual evidentiary rule and states that, 'In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.'

3.3.1.2. *Eighteen Decisions*

The large majority of the decisions examined below are judgments. The reason for this choice is just that most of the examples of resort to general principles of law by the ICTY appear in judgments. Nevertheless, I also examine here all other decisions giving examples relevant to this study. I identified eighteen relevant decisions. The sequence of their presentation is chronological, so as to display the evolution of the ICTY's jurisprudence on general principles of law.

3.3.1.2.1. *Prosecutor v. Tadić, Decision on Jurisdiction*

This decision concerns an appeal lodged by the Defence against the judgment of Trial Chamber II on 10 August 1995,[340] which denied the Defence's motion challenging the jurisdiction of the ICTY.[341]

The Appeals Chamber dealt with the principle that courts must be established by law. Moreover, in his separate opinion Judge Sidwa discussed the scope of the appellate competence in the light of the general principles of law. Below I examine these instances.

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[339] The most recent version of the RPE dates from 13 July 2007. See www.un.org/icty/legaldoc-e/index.htm.

[340] *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, App. Ch., 2 October 1995. See Fernández Liesa, Carlos, 'El Tribunal para la antigua Yugoslavia y el desarrollo del derecho internacional (Decisión de la Sala de Apelación, de 2 de octubre de 1995, en el Asunto Tadić-competencia)', *REDI,* Vol. 48, No. 2, 1996, pp. 11–44; Greenwood, Christopher, 'International Humanitarian Law and the Tadić Case', *EJIL,* Vol. 7, No. 2, 1996, pp. 265–283; Sassòli, Marco, 'La première décision de la Chambre d'Appel du Tribunal Pénal International pour l'Ex Yougoslavie: Tadić (compétence)', *RGDIP,* Vol. 100, No. 1, 1996, pp. 101–134; Fischer, Horst, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals*: *The International Criminal Tribunal for the Former Yugoslavia 1993–1998*, Antwerpen/Groningen/Oxford/Vienna, Intersentia/Hart Publishing/Verlag Österreich, Vol. 1, 1999, pp. 140–142.

[341] *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case No. IT-94-1-AR72, App. Ch., 2 October 1995, § 1.

Courts must be established by law

According to the Defence, the establishment of the ICTY was illegal because it was not established by law; to be duly established by law, the ICTY should have been created by treaty or by amendment of the UN Charter (patently, the Defence assumed the existence of relevant analogies between legislation and treaties).[342] For this reason, the Appeals Chamber examined the issue of whether the establishment of the ICTY 'was contrary to the general principle whereby courts must be "established by law" '.[343]

The ICCPR, the ECHR, and the ACHR grant the right to a fair trial by a competent, independent, and impartial tribunal established by law.[344] In the Defence's view, this right is a general principle of law by reason of its fundamental nature and because it is a minimum requirement for the administration of criminal justice at the international level.[345]

However, according to the Appeals Chamber,

> [T]he principle that a tribunal must be established by law … is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be 'established by law'.[346]

In this vein, the Appeals Chamber went on to explain that the meaning of the principle cannot be the same at the national and the international levels, because,

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[342] *Ibid*., §§ 26–27.

[343] *Ibid*., § 41 *et seq*.

[344] Article 14, paragraph 1 of the ICCPR reads as follows: 'In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' This right is also provided for the ECHR (Article 6, paragraph 1) and the ACHR (Article 8, paragraph 1). For a commentary on that legal provision of the ICCPR see Joseph, Sarah *et al*., *op. cit*. 301, pp. 391–426.

[345] *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case No. IT-94-1-AR72, App. Ch., 2 October 1995, § 41.

[346] *Ibid*., § 42.

> It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear-cut. Regarding the judicial function, the International Court of Justice is clearly the 'principal judicial organ' (*see* United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.
>
> It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be 'established by law' finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.[347]

In spite of these considerations, the Appeals Chamber did not reject the application of the principle in question, but it interpreted the principle differently from the usual interpretation at the level of national legal systems.

According to the Appeals Chamber, an international court or tribunal is deemed to be established by law if it provides for all guarantees of fairness in full conformity with internationally recognized human rights standards.[348] In the Appeals Chamber's view, this interpretation is the 'most sensible' and 'most likely meaning' in international law.[349] And, given that the ICTY is 'established by law', because the Statute and RPE of the tribunal ensure a fair trial as well as the impartiality and independence of the judges,[350] the Appeals Chamber concluded by dismissing the first ground of the Defence's appeal.[351]

The Appeals Chamber conceived of the principle that courts must be established by law as a general principle of law. It resorted to this

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[347] *Ibid*., § 43.
[348] *Ibid*., § 45.
[349] *Ibid*.
[350] *Ibid*., §§ 45–46.
[351] *Ibid*., § 47.

principle to fill the gap left by the absence of rules applicable to the legal issue at stake in the Statute and the RPE of the ICTY, as well as in customary law.

The Appeals Chamber did not derive the principle that 'courts must be established by law' from national legal rules, but identified it in human rights treaties (in particular, the ECHR).[352] Such a course of action is correct, because, as we shall see later, the identification of general principles of law that have crystallized in conventional human rights law does not require comparative law research.[353]

The Appeals Chamber was right to assert that the meaning of the principle cannot at the international level be the same as that at the level of national legal systems. The reason is that in national legal systems the word 'law' in the term 'established by law' means the law of the parliament or congress;[354] and, as the Appeals Chamber stated, there is no such thing in international society.

The Appeals Chamber did not however reject the application of the principle that courts must be established by law; it adjusted the meaning of the principle to the features of the international setting. Since the adjustment, for the Appeals Chamber the principle means that an international criminal court or tribunal is 'to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments'.

One has the impression that the adjustment was pointless. This is so because, in any event, the ICTY (as well as any other international criminal court or tribunal) must comply with the rule of law, i.e., it must ensure a fair trial. The obligation to ensure a fair trial is also not laid down only in the ICTY Statute, but also in customary law.[355] What is more, the ICTY Appeals Chamber deems this obligation to be part of *ius cogens*, given that Article 14 of the ICCPR 'reflects an imperative norm of international law to which the Tribunal must adhere'.[356] In short, the

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[352] See *ibid*., § 43.

[353] See subsection 4.1.3.

[354] See *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case No. IT-94-1-AR72, App. Ch., 2 October 1995, § 43.

[355] *Prosecutor v. Kayishema and Ruzindana, Judgment (Reasons),* Case No. ICTR-95-1-A, App. Ch., 1 June 2001, § 51.

[356] *Prosecutor v. Tadić, Appeals Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-AR77, App. Ch., 27 February 2001, p. 3. See also Lambert-Abdelgawad, Elisabet, 'Les Tribunaux pénaux pour l'ex-Yougoslavie et le Rwanda et l'appel aux sources du droit international des droits de l'homme', in Delmas-Marty, Mireille *et al*. (eds.), *Les sources du droit international pénal*, Paris, Société de législation comparée, 2004, p. 105.

ICTY must comply with the rule of law regardless of the applicability of the principle that courts must be established by law.

Therefore, if one assumes that the ICTY should be rooted in the rule of law pursuant to its regulatory instruments and to customary law, then the best interpretation of the principle 'courts must be established by law' is the second possible interpretation mentioned by the Appeals Chamber. That is that the words 'established by law' mean the establishment of international courts and tribunals by a body with the power to take binding decisions, such as the UN Security Council when acting under Chapter VII of the UN Charter.[357] Yet, the Appeals Chamber did not uphold this interpretation because, as stated above, in its view that the 'most sensible and most likely meaning of the term in the context of international law' is that 'established by law' means that the ICTY must be rooted in the rule of law.[358]

The passages of the Appeals Chamber's decision referred to above did not give rise to much scholarly writing. One of the few to comment was Crawford.[359] According to him, the Appeals Chamber's interpretation of the principle in question is problematic because it would be wrong to assert that international criminal courts and tribunals are subject to lower human rights standards than national criminal courts; otherwise, States might violate international human rights by setting up international criminal tribunals.[360] He also argues that Article 14 of the ICCPR does not state that a court is deemed to be established by law if it respects the fair trial standards; it does state that a court should respect human rights standards *and* it must be established by law. Thus, a judicial body the establishment of which is illegal or the judges of which are arbitrarily chosen cannot be considered to be established by law even if its proceedings guarantee the fair trial standards.[361] Crawford's opinion is most persuasive, even if it is unclear whether the Appeals Chamber really intended to suggest that international criminal courts and tribunals might be subject to lower human rights standards than their national counterparts might.

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[357] *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case No. IT-94-1-AR72, App. Ch., 2 October 1995, § 44.

[358] *Ibid*., § 45.

[359] Crawford, James, 'The Drafting of the Rome Statute', in Sands, Philippe (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge, Cambridge University Press, 2003, pp. 129–133.

[360] *Ibid*., p. 131.

[361] *Ibid*., p. 132.

No appeal lies unless conferred by statute

The Prosecutor had challenged the admissibility of the Defence's appeal with regard to the allegation that the ICTY had been established illegally, as the allegation did not relate to the jurisdiction of the ICTY pursuant to Rule 72(B) of the RPE.[362] However, the Appeals Chamber asserted its jurisdiction over the Defence's appeal based on its inherent or incidental jurisdiction.[363] Judge Sidwa dissented from the majority of the Appeals Chamber in that regard. In his opinion,

> The law relating to appeals in most national jurisdictions is that no appeal lies unless conferred by statute. The right to appeal a decision is part of substantive law and can only be granted by the law-making body by specific enactment. Where the provision for an appeal or some form of review by a higher forum is not regulated by the statute under which an order is passed, there is usually some omnibus statute providing for appeals in such cases. The courts have no inherent powers to create appellate provisions or acquire jurisdiction where none is granted. Where the law provides for an appeal, the court may, by the adoption of reasonable and proper rules, supply deficiencies in the statutory provisions as to practice. Appellate courts have no jurisdiction over incompetent appeals other than dismiss them. It is thus clear that a tribunal or court cannot assume appellate powers under any concept of inherent jurisdiction or by expanding its jurisdiction through any amendment to its rules.[364]

Apparently, Judge Sidwa found a general principle of law whereby 'no appeal lies unless conferred by statute'.[365] He resorted to this principle to confirm his opinion, which he had based on a literal interpretation of Rule 72(B) of the RPE.

How did Judge Sidwa decide that there is no right of appeal unless conferred by statute? Clearly, he derived the principle from national laws, as he referred to the law of appeal in 'national jurisdictions'. This brings us to the horizontal move. Although Judge Sidwa pointed to the fact that 'most' national jurisdictions recognize the principle, he did not put forward any evidence to that effect. Nevertheless, according to scholarly writing, the generality of national legal systems recognizes

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[362] *Ibid*., § 4.

[363] *Ibid*., §§ 14–22.

[364] *Separate Opinion of Judge Sidwa on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, App. Ch., 2 October 1995, § 6.

[365] By 'statute', Judge Sidwa meant "statutory law". That is, 'The body of law derived from statutes rather than from constitutions or judicial decisions. Also termed *statute law, legislative law; ordinary law*. See Common Law; Constitutional Law.' See Garner, Bryan (ed.), *op. cit*. 35, p. 1452.

the principle that no appeal lies unless conferred by Statute. For example, Pradel asserts that legislation is the regular means of conferring right to appeal in national legal systems.[366]

Judge Sidwa's opinion is relevant in connection with the issue of the transposition of general principles of law into international law. This is so because it reflects a vision of how the transposition of national law concepts operates in general and with regard to appeals in particular:

> International law is not totally grounded in national concepts, though at times it borrows ideas from national jurisdictions to meet the international range of its objectives. For the most part, it seeks to keep itself free of rigid, strict and inflexible national rules and principles where they tend to be dogmatic or obstruct a fair, liberal or equitable approach to a problem. The strict rules governing appeals and the whole range of rules and procedures surrounding the system, whether substantive or procedural, as found in national systems, may be a source of material to draw from, but international bodies would accept them free from strict rigidities binding them, from which they cannot extricate themselves. International law conceives of procedures which are flexible and subject to modification and change in extreme cases, should questions of fairness and equity come into play.[367]

Does Judge Sidwa's reasoning not lead to the conclusion that the principle that no appeal lies unless conferred by statute may have a different meaning in international law? As the Appeals Chamber mentioned in the decision, there is no international body having the power to enact laws binding upon all international legal subjects. Therefore, if the principle under examination were understood as having the same meaning that it has at the national level, it could not be transposed into international law because of the lack of a universal parliament with the power to enact legislation binding upon all the legal subjects within its jurisdiction.

We know that an international court or tribunal may adapt a general principle of law to the peculiarities of the international environment, if necessary. In the case of the principle that no appeal lies unless conferred by statute, an international court or tribunal may interpret the term 'statute' as meaning that no appeal lies unless conferred by international law (including conventional law, customary law, and general

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[366] Pradel, Jean, *op. cit*. 15, p. 615, § 486.

[367] *Separate Opinion of Judge Sidwa on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case No. IT-94-1-AR72, App. Ch., 2 October 1995, § 11.

principles of law), should questions of fairness be at stake. Yet, such reasoning would be incorrect. Not only does no appeal lie unless conferred by statute, but the legal provision granting the appeal must also be laid down by the competent law-making body. In the case of the ICTY, such body is the UN Security Council, because the 'constitutional' rules on appellate proceedings are laid down in the Statute, which the Security Council has adopted. Therefore, one cannot but conclude that the ICTY should not have assumed appellate powers that the Security Council had not granted it. In short, Judge Sidwa's opinion is well reasoned.

3.3.1.2.2. *Prosecutor v. Tadić, Decision on Non Bis in Idem*

This decision concerns two defence motions on the principle of *non bis in idem*, which the Prosecutor had opposed.[368] One of the defence arguments in support of the motions was that the proceedings instituted by the ICTY violated the *non bis in idem* principle, as the trial of the accused had already begun in Germany (the State from where the accused had been transferred to the ICTY). The Prosecutor replied that this principle did not apply to the case, since the German courts had not tried the accused.[369]

According to the Trial Chamber, the trial of the accused before the ICTY did not violate the *non bis in idem* principle.[370] In order to reach that conclusion, the Trial Chamber argued that there was no violation of this principle as provided for in the Statute:

> The principle of *non bis in idem* appears in some form as part of the internal legal code of many nations. Whether characterized as *non bis in idem*, double jeopardy or *autrefois acquis, autrefoit convict*, this principle normally protects a person from being tried twice or punished twice for the same acts. This principle has gained certain international status since it is articulated in Article 14(7) of the International Covenant on Civil and Political Rights as a standard of a fair trial, but it is generally applied so as to cover only a double prosecution within the same State.

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[368] *Prosecutor v. Tadić, Decision on the Defence Motion on the Principle of Non Bis in Idem*, Case No. IT-94-1-T, T. Ch. II, 14 November 1995, § 1. See Lagodny, Otto, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1993–1998*, Antwerpen/Groningen/Oxford, Intersentia/Hart Publishing/Verlag Österreich, Vol. 1, 1999, pp. 152–153.

[369] *Prosecutor v. Tadić, Decision on the Defence Motion on the Principle of Non Bis in Idem,* Case No. IT-94-1-T, T. Ch. II, 14 November 1995, §§ 2–4.

[370] *Ibid*., § 5.

> The principle is binding upon this International Tribunal to the extent that it appears in Statute, and in the form that it appears there.[371]

By pointing to the recognition of the *non bis in idem* principle by many national legal systems, purposely or accidentally the Trial Chamber made it clear that *non bis in idem* is a general principle of law. According to the Trial Chamber, this principle states that a person should not be tried or punished twice for the same acts. It also made it clear that the principle refers to double jeopardy *within the same State*. Hence, the principle does not prevent a person being tried in more than one State for the same acts.

However, the Trial Chamber did not apply *non bis in idem* as a general principle of law, but rather the rule on *non bis in idem* that is laid down in Article 10 of the ICTY Statute.[372] Such a course of action was correct, because this provision of the Statute is the relevant *lex specialis* and the general principle of law is *non bis in idem*, the *lex generalis*.

An interesting related question is the following: what would be the meaning of the *non bis in idem* principle at the international level? If the principle were to be transposed into international law with the same meaning as it has at the national level (prohibition of double prosecution or punishment *within the same State*), it would not bar an international court or tribunal from prosecuting or punishing an individual twice for the same acts. This is so because, strictly speaking, an international criminal court or tribunal is not a domestic court.

Obviously, the applicability of a general principle of law such as *non bis in idem* cannot be subject to such a rigid interpretation. This would make the applicability of the principle by an international court or tribunal unworkable. If one adapts the principle to the international environment, the principle would entail the prohibition of double prosecution

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[371] *Ibid*., § 9.

[372] Article 10 of the ICTY Statute reads as follows: '1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal. 2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted. 3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same acts has already been served.'

or punishment within the same international court or tribunal. In my opinion such an interpretation of the principle would be welcome, given that the ICTY Statute does not lay down any legal provision barring the international tribunal from prosecuting or punishing an individual twice for the same acts.[373]

Another possible interpretation of the *non bis in idem* principle at the international level could be to construe it as forbidding double prosecution or punishment in more than one international criminal court or tribunal. Such interpretation of the principle would be a barrier to abuse of power, which may be necessary at present due to the multiplication of international criminal jurisdictions and the resulting risk of overlapping jurisdictions.

3.3.1.2.3. *Prosecutor v. Erdemović, Sentencing Judgment*

This sentencing judgment concerns the defendant's guilty plea with regard to a charge of crimes against humanity.[374] Given the terms in which the accused had formulated his plea, the Trial Chamber deemed that he could have committed the crimes pursuant to superior orders and under duress.[375] The judgment is relevant to this study because it provides two examples concerning the applicability of general principles of law, namely: (i) the conditions of application of the defences of duress, state of necessity, and superior orders are particularly strict; and (ii) the severest penalties may be imposed for crimes against humanity.

The conditions of application of the defences of duress, state of necessity, and superior orders are particularly strict

As observed by the Trial Chamber, 'the Statute provides no guidance' on the conditions of application of the defences of duress, necessity, and superior orders.[376] And in order to fill the legal gap, the Trial Chamber resorted to general principles of law. In the Trial Chamber's

[373] The ICTR Statute and the SCSL Statute do not rule out such a possibility either; in contrast, the ICC Statute does rule so in Article 20, paragraph 1.

[374] *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T, T. Ch. I, 29 November 1996. See Van der Wilt, Harmen, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1993–1998*, Antwerpen/Groningen/Oxford/Vienna, Intersentia/Hart Publishing/Verlag Österreich, Vol. 1, 1999, pp. 534–536.

[375] *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T, T. Ch. I, 29 November 1996, § 14.

[376] *Ibid*., § 16.

view, 'general principles of law as expressed in numerous national laws and case-law' reveal that those conditions are particularly strict.[377] For this reason, it dismissed duress as a ground for excluding criminal responsibility in this particular case.

The Trial Chamber is alleged to have derived that principle from 'numerous national laws and case-law'. This decision thus confirms the doctrinal view that general principles of law can be derived from national law in general rather than national legislation in particular.[378] However, despite the Trial Chamber's reference to 'numerous national laws and case-law' that would recognize the principle in question, the Trial Chamber gave as its only example that of French criminal legislation, judicial decisions, and scholarly writing.[379]

Therefore it remains unclear whether or not the general principle of law allegedly identified by the Trial Chamber does really exist. In fact, the exclusive reference to French law makes the Trial Chamber's determination a hasty generalization rather than a comparative law study, as the sample is too small to support the Trial Chamber's conclusion.[380] In other words, had the Trial Chamber provided more relevant examples, the Trial Chamber's ruling would have been more persuasive.

The severest penalties apply to crimes against humanity

Furthermore, the Trial Chamber noted that neither the Statute nor the RPE gives any indication of the length of the imprisonment to which a person responsible for a crime may be sentenced, with the exception of the references to the general practice regarding prison sentences in the courts of the former Yugoslavia and to the penalty of life imprisonment.[381]

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[377] *Ibid*., § 19.

[378] On the role played by decisions of national courts in the determination of general principles of law see Nollkaemper, André, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY', in Boas, Gideon and Schabas, William (eds.), *International Criminal Law Developments in the Case-law of the ICTY,* Leiden, Nijhoff, 2003, pp. 286–289.

[379] *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T, T. Ch. I, 29 November 1996, § 19, footnote 13.

[380] Cassese and Nollkaemper too criticized that very same aspect of the Trial Chamber's ruling. See Cassese, Antonio, '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 Sienho Yee et Wang Tieya (eds.), *International Law in the Post-Cold World*, London, Routledge, 2001, p. 47; Nollkaemper, André, *op. cit*. 378, p. 394.

[381] Article 24, paragraph 1, ICTY Statute and Rule 101(A), ICTY RPE, respectively.

For this reason, it decided to ascertain the scale of penalties applicable to crimes against humanity by drawing upon the 'general principles of law recognized by all nations'.[382]

Then the Trial Chamber stated:

> [T]here is a general principle of law common to all nations whereby the severest penalties apply for crimes against humanity in national legal systems. It thus concludes that there exists in international law a standard according to which a crime against humanity is one of extreme gravity demanding the most severe penalties when no mitigating circumstances are present.[383]

After a brief overview of international practice and an inspection of general practice regarding prison sentences in the courts of the former Yugoslavia, the Trial Chamber stated:

> In conclusion, the Trial Chamber finds that reference to the general practice regarding prison sentences applied by the courts of the former Yugoslavia is, in fact, a reflection of the general principle of law internationally recognized by the community of nations whereby the most severe penalties may be imposed for crimes against humanity. In practice, the reference means that all the accused who committed their crimes on the territory of the former Yugoslavia could expect to be held criminally responsible. No accused can claim that at the time the crimes were perpetrated he was unaware of the criminal nature of his acts and the severity of the penalties sanctioning them. Whenever possible, the International Tribunal will review the relevant legal practices of the former Yugoslavia but will not be bound in any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction.[384]

The Trial Chamber identified a general principle of law whereby the severest penalties apply for crimes against humanity. It had recourse to it to fill the gap left by the absence of specific legal rules applicable to the issue at stake.

One may have the impression that the Trial Chamber has identified a general principle of law that may be useless for normative purposes. In fact, the principle leaves open the question of what 'the severest penalties' are. Is it the death penalty exclusively? Is it also life imprisonment?

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[382] *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T, T. Ch. I, 29 November 1996, § 26.

[383] *Ibid*. § 31.

[384] *Ibid*. § 40.

What about a penalty of forty years' imprisonment; is that not severe? And a penalty of twenty years' imprisonment, is that not severe as well? Certainly, the Trial Chamber did not find what it was looking for, that is, a scale of penalties.

The legal consequence of the principle as set out by the Trial Chamber is rather peculiar. That 'all the accused who committed their crimes on the territory of the former Yugoslavia could expect to be held criminally responsible' is the legal consequence of the principle of individual criminal responsibility, rather than of the principle that the severest penalties apply for crimes against humanity.

As far as the general recognition of the principle by nations is concerned, the Trial Chamber's determination is another example of hasty generalization. As Van der Wilt stated, 'the Trial Chamber failed to identify national judicial precedents, it merely assumed that the relevant provisions of law in the former Yugoslavia did no deviate from the general sentencing practice concerning crimes against humanity, exhibited by the Nuremberg Tribunal and beyond'.[385]

Cassese too criticized the Trial Chamber's determination, for two reasons. First, it failed to identify the national law upon which it relied; this reason is similar to the one put forward by Van der Wilt. Secondly, it did not mention whether it took account of national laws on war crimes and genocide, so as to establish whether these laws provide for penalties as serious as those relating to crimes against humanity.[386] The observations made by Van der Wilt and Cassese are correct.

Finally, it should be noted that the principle in question cannot be interpreted as permitting the imposition of the death penalty (which is, needless to say, the severest penalty) by the ICTY. The reason for this is that the ICTY Statute limits the penalty to be imposed by the tribunal to imprisonment.[387] Hence, the general principle of law that the severest penalties apply for crimes against humanity is to be interpreted in the light of the legal regime of the international criminal court or tribunal in which it would apply. Put differently, the severity of the punishment to be imposed on those convicted cannot exceed the limits laid down by the regulatory instruments of the international criminal court or tribunal concerned.

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[385] Van der Wilt, Harmen, *op. cit*. 374, pp. 534–535.
[386] Cassese, Antonio, *op. cit*. 380, p. 48.
[387] See Article 24, paragraph 1, ICTY Statute.

3.3.1.2.4. *Prosecutor v. Tadić, Opinion and Judgment*

This decision dealt among other things with whether the legal principle of *unus testis, nullus testis* is a general principle of law.[388] The decision illustrates that a given legal principle must be generally recognized in national law in order to become a general principle of law.

The issue arose out of the fact that the RPE of the ICTY do not require corroboration of the victim's testimony in cases of sexual assault.[389] *A contrario sensu*, does it mean that the evidence of a victim of a crime other than sexual assault necessarily has to be corroborated? Put differently, does the legal principle of *unus testis, nullus testis* apply in such a situation? In the Trial Chamber's view, it does not.[390]

The Trial Chamber arrived at that conclusion after examining national legal systems of the Romano-Germanic and 'Marxist' legal families. In fact, it found that most of the national legal systems of the Romano-Germanic legal family (it reviewed legislation of Belgium, Denmark, Germany, Greece, Italy, the Netherlands,[391] Portugal, and Spain, as well as judgments from France, Belgium, and the Netherlands) no longer require one person's evidence to be corroborated.[392] It found the same answer in the legislation of two national legal systems of what the Trial Chamber called the 'Marxist' legal family, namely, those of the former Yugoslavia and China, which follow the Romano-Germanic principle of the freedom of evaluation of evidence.[393]

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[388] *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997. See Scharf, Michael, 'Prosecutor v. Tadić. Case No. IT-94-1-T. ICTY, May 7, 1997', *AJIL,* Vol. 91, No. 4, 1997, p. 718–721; Boot, Machteld, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1993–1998*, Antwerpen/Groningen/Oxford, Intersentia/Hart Publishing/Verlag Österreich, Vol. 1, 1999, pp. 452–456.

[389] Rule 96(i), ICTY RPE.

[390] *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997, §§ 535–539.

[391] As observed by the Trial Chamber, the Netherlands is an exception to the majority in the Romano-Germanic legal systems, as Article 342, paragraph 2 of the Code of Criminal Procedure of that country explicitly prohibits Dutch courts from basing a conviction on the declaration of only one witness. See *ibid*.

[392] As the Trial Chamber pointed out, 'The determinative powers of a civil law judge are best described by reference to the principle of the free evaluation of evidence: in short, the power inherent in the judge as a finder of fact to decide soley on the basis of his or her personal intimate conviction.' *Ibid*., § 537 (footnote ommited).

[393] *Ibid*., § 538.

The Trial Chamber's finding is correct and consistent with scholarly writing.[394] However, its conclusion is somewhat perplexing. Rather than conclude that *unus testis, nullus testis* is not a general principle of law, it asserted that it is not a rule of customary law and, hence, the ICTY is not bound to apply it.[395] The conclusion is confusing because the Trial Chamber was apparently looking for a general principle of law (it had examined national legal systems that it classified in legal families). While the comparison of national legal systems of the main families of the world may be relevant so far as the identification of general principles of law is concerned, it is immaterial in respect of the determination of customary rules of international law. In brief, if the reference to customary law was not a typing mistake, then the Trial Chamber failed to distinguish between general principles of law and customary law, two autonomous sources of international law.

3.3.1.2.5. *Prosecutor v. Erdemović, Judgment*

In this judgment the Appeals Chamber dealt with highly controversial legal issues,[396] as demonstrated by the fact that the five members of the Appeals Chamber delivered separate opinions.

As far as the general principles of law are concerned, the Appeals Chamber denied the existence of a principle whereby duress is a complete defence to a charge of crimes against humanity or war crimes involving the killing of innocent human beings.[397] On the other hand, it identified the principle that an accused deserves less punishment because he is less responsible when he performs a criminal act under duress.

The Prosecutor had charged the accused with one count of a crime against humanity, or alternatively with one count of a violation of the

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[394] See Pradel, Jean, *op. cit*. 15, pp. 534–535.

[395] *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997, § 539.

[396] *Prosecutor v. Erdemović, Judgment,* Case No. IT-96-22-A, App. Ch., 7 October 1997. See Swaak-Goldman, Olivia, 'Prosecutor v. Erdemović, Judgment. Case No. IT-96-22-A', *AJIL,* Vol. 92, No. 2, 1998, pp. 282–287; Van der Wilt, Harmen, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1993–1998*, Antwerpen/Groningen/Oxford, Intersentia/Hart Publishing/ Verlag Österreich, Vol. 1, 1999, pp. 654–656.

[397] For a general discussion on the issue of duress as a defence to a charge of crimes involving the killing of innocent human beings see Ambos, Kai, *op. cit*. 14, pp. 488–496. See also, by the same author, 'Other Grounds for Excluding Criminal Responsibility', in Cassese, Antonio *et al*. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, New York, Oxford University Press, 2002, pp. 1003–1048.

laws or customs of war. The accused pleaded guilty to a crime against humanity. The Trial Chamber accepted the plea and sentenced him to ten years' imprisonment.[398]

After that, the Defence lodged an appeal requesting the Appeals Chamber to revise the sentence, given that the crime had been committed under duress. The majority of the Appeals Chamber, by three votes to two, decided that duress is not a complete defence in international law to a charge of crimes against humanity or war crimes involving the killing of innocent human beings.[399]

In the opinion of Judges McDonald and Vohrah, of the majority, the law applicable to the issue at stake was that 'exhaustively listed' in Article 38 of the ICJ Statute. After determining that there was no customary rule on the matter, they undertook a comparative analysis of the 'world's legal systems' to derive a relevant general principle of law. As a result, they found the general principle of law that an accused deserves less punishment because he is less responsible when he performs a criminal act under duress.[400] Judge Li (the remaining judge in the majority) endorsed Judges McDonald and Vohrah's opinion on this particular point.[401]

The opinion of Judge Stephen, in the minority with respect to this particular legal issue, is worth considering. He proposed to recognize the defence of duress as a general principle of law not just 'because of the approach of the civil law but also as a matter of simple justice'.[402] Interestingly, his concept of the general principles of law seems to be based on natural law.[403] The reason for this is that he proposed recognizing duress as a general principle of law 'as a matter of simple justice', notwithstanding that the principle at stake is not generally recognized in national law, in particular, in the Common Law legal family.

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[398] *Prosecutor v. Erdemović, Judgment,* Case No. IT-96-22-A, App. Ch., 7 October 1997, § 1–10.

[399] *Ibid*., § 19.

[400] *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 40, 55–72.

[401] *Prosecutor v. Erdemović, Separate and Dissenting Opinion of Judge Li*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 3.

[402] *Prosecutor v. Erdemović, Separate and Dissenting Opinion of Judge Stephen*, Case No. IT-96-22-A, App. Ch., 7 October 1997, §§ 25–26.

[403] Natural law is 'A philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than form legislative or judicial action; moral law embodied in principles of right and wrong'. See Garner, Bryan, *op. cit*. 35, p. 1055.

According to Simma and Paulus, the difference between Judges McDonald and Vohrah, on the one hand, and Judge Stephen, on the other, on whether or not duress is a complete defence under general principles of law, reveals that Common Law judges do not always arrive at the same conclusion.[404] Apparently, Simma and Paulus meant that judges from the same legal family do not always agree on whether the family recognizes a given legal principle. However, that is not what happened in the judgment in question. Judge Stephen, like Judges McDonald and Vohrah, did acknowledge that the Common Law does not recognize duress as a complete defence in certain circumstances.[405] What distinguishes Judge Stephen's opinion from the joint opinion of Judges McDonald and Vohrah in that regard is that Judge Stephen put forward for consideration the acceptance of duress as a general principle of law 'as a matter of simple justice', i.e., regardless of the prescriptions of the law.

The judgment is material to this study also because it shows that, in spite of the subsidiary nature of general principles of law as a source of international law, the gap-filling function of these principles may have a crucial role in the context of international criminal law. In the case under examination, had the Appeals Chamber determined that duress is a complete defence under general principles of law, the accused would have been acquitted and released immediately because he had been charged with only one count. However, given that for the majority of the members of the Appeals Chamber such a general principle of law does not exist, eventually the ICTY sentenced the accused to five years' imprisonment.[406] Put differently, individual freedom may depend on the existence of a relevant general principle of law. At least this is the case as far as personal defences are concerned, since the purpose of defences is to advance grounds for excluding criminal responsibility.

The moves for determining a general principle which were undertaken by Judges McDonald, Vohrah, and Stephen deserve particular attention.

With regard to the vertical move, Judges McDonald and Vohrah, on the one hand, and Judge Stephen, on the other, did not agree on what the outcome of legal research aimed at determining a general principle of law should be. Whereas for the former it should be a 'consistent concrete

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[404] Simma, Bruno et Paulus, Andreas, *op. cit*. 12, p. 63, § 14.

[405] *Prosecutor v. Erdemović, Separate and Dissenting Opinion of Judge Stephen*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 66.

[406] See *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T bis, T. Ch. II ter, 5 March 1998, disposition.

rule', for the latter it should not be a concrete legal rule but a general principle that embodies the reasons for the creation of a norm.[407] Judge Stephen was right in so contending. As explained in subsection 2.6.3 above, (i) general principles of law consist of abstractions of legal rules deprived of their particular elements; and (ii) in determining a general principle of law, it is crucial to identify the *ratio legis* and the fundamental principles that are common to a particular institution within different national legal systems. It is thus clear that the outcome of a comparative law study of this nature should be a general legal principle rather than a concrete and detailed legal rule, without prejudice to the fact that the legal principle thus derived will play the role of a legal rule. That is, it will fulfil a normative function in the decision.

With reference to the horizontal move, the joint opinion of Judges McDonald and Vohrah is the first wide-ranging comparative law research carried out into the practice of the ICTY. It included thirty national legal systems which classified as 'civil law systems'[408] 'common law systems''[409] and 'criminal law of other States'.[410] The research included national legal systems the case law of which 'was, as a practical matter, accessible' to the judges.[411] The examination takes account of legislation, judicial decisions, and scholarly writing.

In brief, the issue of duress as a complete defence in international law to a charge of murder as a crime against humanity or war crime has been the first controversial ICTY ruling with regard to general principles of law. The decision under examination has contributed to the development of international criminal law. In (opposite) effect, as rightly pointed out by Schabas, the ICC Statute provides for the defence of duress, which means that the States Parties to this treaty set aside the precedent of the Appeals Chamber.[412]

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[407] *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 72; *Prosecutor v. Erdemović, Separate and Dissenting Opinion of Judge Stephen*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 63.

[408] France, Belgium, the Netherlands, Spain, Germany, Italy, Norway, Sweden, Finland, Venezuela, Brazil, Nicaragua, Chile, Panama, Mexico, the Former Yugoslavia, and Poland.

[409] England, USA, Australia, Canada, South Africa, India, Malaysia, and Nigeria.

[410] Japan, China, Morocco, Somalia, and Ethiopia.

[411] *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 57.

[412] Schabas, William, *op. cit*. 297, pp. 90–91. See also Article 31, paragraph 1(d), ICC Statute.

3.3.1.2.6. *Prosecutor v. Delalić et al., Judgment*

This Trial Chamber's judgment dealt with events alleged to have taken place at a prison camp in Bosnia and Herzegovina in 1992.[413]

The Prosecutor had charged the four accused with grave breaches of the Geneva Conventions of 1949 and violations of the laws or customs of war, under Articles 2 and 3 of the ICTY Statute respectively.[414] In this judgment the Trial Chamber dealt with the following general principles of law: (i) *res iudicata*; (ii) *nullum crimen nulla poena sine lege*; (iii) that the adjudication of criminal culpability requires an analysis of the objective and subjective elements of the crime; (iv) that the burden of proof rests upon the prosecutor; and (v) *in dubio pro reo*.

Res iudicata

The Trial Chamber had to determine whether the armed conflict that had taken place in Bosnia and Herzegovina since its independence in March 1992 was international in character, with the purpose of establishing whether Article 2 of the ICTY Statute applied to the case.[415]

In the opinion of the Prosecutor the conflict was international.[416] In its turn, the Defence submitted that the Prosecutor should not be allowed to postulate the existence of an international armed conflict because Trial Chamber II had already adjudicated on this question in the judgment in the *Tadić* case, to which the Prosecutor had been a party. In this judgment, the Trial Chamber had decided that the conditions for the application of Article 2 of the Statute were not met. For this reason, the Defence submitted that the issue of the nature of the armed conflict was *res iudicata* for the Prosecutor.[417]

However, in the view of the Trial Chamber,

> There can be no question that the issue of the nature of the armed conflict relevant to the present case is not *res iudicata*. The principle of *res iudicata* only applies *inter partes* in a case where a matter has already been judicially

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[413] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998. See Swaak-Goldman, Olivia, 'Prosecutor v. Delalić. No. IT-96-21-T', *AJIL*, Vol. 93, No. 2, 1999, pp. 514–519; Van der Wilt, Harmen, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997–1999*, Antwerpen/Oxford/New York, Intersentia, Vol. 3, 2001, pp. 669–683.

[414] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998, § 3.

[415] *Ibid*., § 204–235.

[416] *Ibid*., § 204.

[417] *Ibid*., § 205.

> determined within that case itself. As in national criminal systems which employ a public prosecutor in some form, the Prosecution is clearly always a party to cases before the International Tribunal. The doctrine of *res iudicata* is limited, in criminal cases, to the question of whether, when the previous trial of a particular individual is followed by another of the same individual, a specific matter has already been fully litigated. In national systems where a public prosecutor appears in all criminal cases, the doctrine is clearly not applied so as to prevent the prosecutor from disputing a matter which the prosecutor has argued in a previous, different case.[418]

The Trial Chamber did not reject the defence submission just because the conditions for the application of the principle of *res iudicata* were not met in the case. It also rejected it because it did not feel bound by the decisions taken by other Trial Chambers in earlier cases.[419]

The legal reasoning of the Trial Chamber was correct. The principle of *res iudicata* was inapplicable because the parties to the *Tadić* case were not the same as those to the *Delalić et al*. case. For long scholars have recognized that 'Once a case has been adjudicated by a valid and final judgment, the same issue may not be disputed again *between the same parties*, so long as that judgment stands.'[420] In criminal law, this negative effect of the *res iudicata* principle is embodied in the maxim *non bis in idem*.[421]

Nullum crimen nulla poena sine lege

The Trial Chamber considered the principle in the judgment to be a principle of interpretation of the criminal law applicable by the ICTY. According to the Trial Chamber, *nullum crimen sine lege* and *nulla poena sine lege* 'are well recognized in the world's major criminal justice systems as being fundamental principles of criminality''.[422]

The Trial Chamber also pointed out that *nullum crimen nulla poena sine lege* is related to another 'fundamental principle' of criminal law, namely 'the prohibition against *ex post facto* criminal laws with its derivative rule of non-retroactive application of criminal laws and criminal sanctions' and 'the requirement of specificity and the prohibition of ambiguity in criminal legislation'.[423] However, even if *nullum*

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[418] *Ibid*., § 228.
[419] *Ibid*.
[420] Cheng, Bin, *op. cit*. 20, p. 337, and the arbitral and judicial decisions cited therein. Italics mine.
[421] *Ibid*. See also Novak, Manfred, *op. cit*. 9, p. 272.
[422] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998, § 402.
[423] *Ibid*.

crimen sine lege and *nulla poena sine lege* 'exist and are recognized in all the world's major criminal justice systems',[424] '[i]t is not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems. This is essentially because of the different methods of criminalization of conduct in national and international criminal justice systems'.[425]

According to the Trial Chamber, these methods are different because,

> Whereas the criminalization process in a national criminal justice system depends upon legislation which dictates the time when the conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties and conventions, or after a customary practice of the unilateral enforcement of a prohibition by States.[426]

For these reasons, the Trial Chamber concluded that the requirements for the application of the principle in international criminal law are different from the conditions for its application in national law.[427]

The reference to the recognition of the principle by national legal systems reveals that the Trial Chamber conceived of the *nullum crimen nulla poena sine lege* principle as a general principle of law.[428] Even if for many scholars the *nullum crimen sine lege* principle is a customary rule of international law,[429] the Trial Chamber's concept of these principles is not necessarily wrong. As explained earlier,[430] a given legal principle may be part of conventional law, customary law, and general

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[424] *Ibid*, § 403.
[425] *Ibid*.
[426] *Ibid*, § 404.
[427] 'It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective zof maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order. To this end, the affected State or States must take into account the following factors, *inter alia*: the nature of international law; the absence of international legislative policies and standards; the *ad hoc* processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States.' *Ibid*., § 405.
[428] Werle is of the same opinion. See Werle, Gerhard, *op. cit*. 290, pp. 32–33, footnote 172.
[429] See *ibid*.
[430] See section 2.4.2.

principles of law at one and the same time. And this could be the case with the *nullum crimen nulla poena sine lege* principle.[431]

The Trial Chamber correctly related this principle to the prohibition of retroactive criminal laws (*lex praevia*) and the specificity of criminal laws (*lex certa*), which are required by Article 15 of the ICCPR[432] and the doctrine of the Human Rights Committee respectively.[433]

Article 15 of the ICCPR, however, does not lay down the other two requirements of the *nullum crimen nulla poena sine lege* principle, namely (i) that crimes may be laid down only in written law (*lex scripta*) and (ii) the prohibition of analogy *in malam partem* (*lex stricta*).[434]

Historically, the requirement of written law or *lex scripta*, understood as legislation enacted by a parliament, has been typical of the national legal systems of the Romano-Germanic legal family. In those of the Common Law legal family, in contrast, the main source of criminal law has been the common law, as developed by judicial decisions. However, the very significant difference between the methods of criminalization employed by the Romano-Germanic legal family, on the one hand, and the Common Law family, on the other, has decreased over the time. This is so because, these days, in Common Law jurisdictions such as England and Wales, an important volume of criminal law is to be found in statutes (statutory offences).[435] Even so, it should be noted that in the Common Law legal family *lex scripta* is not a formal requirement of the *nullum crimen nulla poena sine lege* principle. This is also evidenced by the fact that in these jurisdictions the courts apply a sort of scale of sentences that has been developed at common law.[436]

The requirement of *lex stricta*, at its turn, seems to be less obvious.[437] Sometimes it is considered to consist of the principle of strict interpretation, according to which criminal laws are to be interpreted

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[431] Compare with Lamb, Susan, '*Nullum Crimen, Nulla Poena sine Lege* in International Criminal Law', in Cassese, Antonio et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, New York, Oxford Univeristy Press, 2002, pp. 733–766.

[432] See the text of Article 15 of the ICCPR in footnote 8, above.

[433] See the references in footnote 9, above.

[434] See Ambos, Kai, op. cit. 9, p. 21. See also Cassese, Antonio, op. cit. 12, pp. 141–142 and Lamb, Susan, *op. cit*. 431, p. 734.

[435] See Ashworth, Andrew, *Principles of Criminal Law*, 4th edition, Oxford, Oxford University Press, 2003, p. 6.

[436] With regard to England and Wales see *ibid*., pp. 19–23.

[437] See Ambos, Kai, *op. cit*. 9, p. 23.

strictly, in favour of the accused in case of doubt.[438] And at other times it is understood as prohibiting recourse to analogy *in malam partem*, that is, to the detriment of the accused. While the prohibition of recourse to analogy *in malam partem* is characteristic of the national legal systems of the Romano-Germanic legal family,[439] it is not distinctive of those national legal systems in which judges have the power to create law.[440]

It thus appears that *nullum crimen nulla poena sine lege* as a general principle of law encompasses only two requirements, namely the prohibition of retroactive criminal laws (*lex praevia*) and the specificity of criminal laws, that is, the elements of the crimes must be as clearly expressed as possible (*lex certa*). These are the only two requirements of the principle *nullum crimen nulla poena sine lege* common to the two main legal families of the world.

In international criminal law, the requirement of specificity is more flexible than in the national legal systems of the Romano-Germanic legal family,[441] especially as far as the *nullum poena* element of the principle is concerned.[442] The requirement of specificity at the international level seems to be more limited than at the level of national level because, while these usually require a narrow scale of penalties,[443] neither general nor particular international criminal law lays down a scale of penalties.[444] However, even if the lack of a scale of penalties in international criminal law may result in considerable judicial discretion in punishing convicted persons,[445] certain provisions of the statutes and

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[438] *Ibid*.

[439] For example with regard to German criminal law see Roxin, Claus, *op. cit*. 321, p. 40.

[440] See Ambos, Kai, *op. cit*. 9, p. 23.

[441] See Werle, Gerhard, *op. cit*. 290, pp. 32–33, § 91.

[442] Cassese's view on the matter is radical: 'The principle is not applicable at the international level'. See Cassese, Antonio, *op. cit*. 12, p. 157.

[443] See Werle, Gerhard, *op. cit*. 290, pp. 32–33, § 91. See also Ambos, Kai, *op. cit*. 9, pp. 23–28.

[444] The ICTY Appeals Chamber has denied the existence of a hierarchy between genocide, crimes against humanity, and war crimes. See *Prosecutor v. Tadić, Judgment in Sentencing Appeals,* Case No. IT-94-1-A and IT-94-1-A*bis*, App. Ch., 26 January 2000, § 69.

[445] The ICTY Appeals Chamber has stressed that sentencing is 'a discretionary decision'. See *Prosecutor v. Krstić, Judgment,* Case No. IT-98-33-A, App. Ch., 19 April 2004, § 242. See also Schabas, William, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*, New York, Cambridge University Press, 2006, p. 563 *et seq*.

RPE of the various international criminal courts and tribunals serve as a curb to excessive judicial discretion.[446] For example, penalties are limited to imprisonment,[447] fines,[448] and forfeiture of proceeds acquired by means of the crime.[449]

In conclusion, the Trial Chamber's assertion that 'the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards' is right in part. While the principle in international criminal law is different from the principle as understood in the Romano-Germanic legal family in respect of the requirements of *lex scripta* and the prohibition of analogy *in malam partem*, it is not very different from the concept of the principle in the Common Law legal family. The *nullum crimen nulla poena sine lege* principle as a general principle of law thus encompasses the requirements of *lex praevia* and *lex certa*.

The adjudication of criminal liability requires an analysis of the objective and subjective elements of the crime

One of the four accused had been charged, *inter alia*, with 'wilful killing', which is punishable under Article 2 of the Statute, and 'murder', which is punishable under Article 3. The question arose whether there is a difference between wilful killing and murder, so as to make the elements of these crimes materially different from each other.[450]

In the view of the Trial Chamber, the elements of those crimes are identical. In other words, wilful killing and murder are the same crime. It arrived at that conclusion by interpreting Articles 2 and 3 in accordance with the ordinary meaning of the terms employed in these legal provisions and in the context of the Geneva Conventions of 1949 (the instruments from which those terms had been 'borrowed' by the ICTY's Statute drafters).[451]

Then the Trial Chamber proceeded to ascertain and formulate the elements of the wilful killing/murder crime.[452] It took such a course

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[446] See Cassese, Antonio, *op. cit*. 12, p. 157.

[447] Article 24, paragraph 1, ICTY Statute; Article 23, paragraph 1, ICTR Statute; Article 19, paragraph 1, SCSL Statute; Article 77, paragraph 1, ICC Statute.

[448] Article 77, paragraph 2, ICC Statute.

[449] *Ibid*.

[450] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998, §§ 420–421.

[451] *Ibid*., § 422.

[452] See Swaak-Goldman, Olivia, *op. cit*. 413, p. 517; Van der Wilt, Harmen, *op. cit*. 413, p. 677.

of action because 'It is apparent that it is a general principle of law that the establishment of criminal culpability requires an analysis of two aspects'.[453] These aspects are the *actus reus*, that is, the physical act necessary for the crime, which is also known as the 'objective element' of crimes; and the *mens rea*, i.e., the necessary mental element, which is also known as 'the subjective element'.[454]

In that passage of the judgment, the Trial Chamber determined the general principle of law that the establishing of criminal culpability requires an analysis of the objective and subjective elements of the crime. The material scope of this principle is unambiguous: international criminal courts and tribunals must decide whether the requirements of the elements of a crime are met in order to decide criminal responsibility.

The principle played an interpretative function in the judgment. In fact, the Trial Chamber resorted to it as a means of interpreting Articles 2 and 3 of the Statute.

In respect of the determination of the principle that the establishing of criminal culpability requires an analysis of the objective and subjective elements of the crime, the Trial Chamber affirmed that the existence of the principle is 'apparent'. This 'apparent' existence may be the reason the Trial Chamber merely cited a judicial decision from the USA to support its contention,[455] instead of providing more evidence of its existence.

The burden of proof rests upon the prosecutor

After recalling that Article 21, paragraph 3 of the Statute lays down the presumption that the accused is innocent until proven guilty,[456] the Trial Chamber remarked on the lack of provisions in the RPE regulating the burden of proof on any party to the proceedings and stated:

> It is a fundamental requirement of any judicial system that the person who has invoked its jurisdiction and desires the tribunal or court to take action on his behalf must prove his case to its satisfaction. As a matter of common sense, therefore, the legal burden of proving all facts

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[453] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998, § 424.

[454] *Ibid*., § 425. On the functions and structure of the elements of crimes see Binder, Alberto, *op. cit*. 321, pp. 134–138.

[455] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998, § 424, footnote 433.

[456] *Ibid*., §§ 599–604.

> essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings.[457]

The Trial Chamber resorted to the principle that the burden of proof rests upon the prosecutor in order to fill the gap left by the absence of a relevant legal rule in the RPE. This principle is the criminal law version of the *onus probandi actori incumbit* principle; as demonstrated above,[458] early international arbitral tribunals conceived of the latter as a 'principle of universal jurisprudence'.

The principle that the burden of proof rests upon the prosecutor is one of the corollaries of the presumption of innocence, a basic human right guaranteed not only by the ICTY Statute, but also by human rights treaties,[459] national laws,[460] and the ICC Statute (see Article 66, paragraph 2).

In dubio pro reo

After resorting to the principle that the burden of proof rests on the Prosecutor, the Trial Chamber invoked another corollary of the presumption of innocence, namely *in dubio pro reo:*

> The general principle to be applied by the Trial Chamber is clearly, on the basis of this brief analysis, that the Prosecution is bound in law to prove the case alleged against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.[461]

Rule 87(A) of the ICTY RPE regulates the burden of proof on the Prosecutor, but does not lay down the *in dubio pro reo* principle. It thus seems that the Trial Chamber considered *in dubio pro reo* to be a general principle of law.

Finally, it should be noted that *in dubio pro reo* concerns the appraisal of facts 'as to whether the offence has been proved', as stated by the Trial Chamber, and not the judgment on the law. The appraisal of law is actually within the realm of the related principle of *favor rei* (see subsections 3.3.1.2.7 and 3.3.2.2.1, below)

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[457] *Ibid*., § 599.

[458] See subsection 2.2.2.4, *Affaire du Queen*.

[459] The presumption of innocence is guaranteed, *inter alia*, by Article 14, paragraph 2 of the ICCPR.

[460] See Cryer, Robert *et al*., *International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, p. 356.

[461] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998, § 601.

3.3.1.2.7 *Prosecutor v. Furundžija, Judgment*

This judgment provides one of the clearest and most controversial examples of the applicability of general principles of law by the ICTY.[462] It concerns the definition of the crime of rape under general principles of law.

The Prosecutor had charged Furundžija with violations of the laws and customs of war, more precisely with outrages upon personal dignity including rape under Article 3 of the Statute. The alleged act of rape consisted of forced oral penetration. The Trial Chamber could not find any definition of the crime of rape under conventional and customary international law, nor could it discern any element of the crime of rape from the general principles of international criminal law and those of international law. Hence, in order to fill the gap, it deemed it necessary 'to look for principles of criminal law common to the major legal systems of the world', i.e., general principles of law. According to the Trial Chamber, 'These principles may be derived, with all due caution, from national laws.'[463]

The Trial Chamber observed 'that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault.'[464] This preliminary finding reveals the Trial Chamber's readiness to define the crime of rape in accordance with such trend, as it eventually did.

After examining various national legal systems, the Trial Chamber held:

> It is apparent from our survey of national legislation that, in spite of inevitable discrepancies, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.[465]

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[462] *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998. See Schabas, William, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997–1999*, Antwerp/Oxford/New York, Intersentia, Vol. 3, 2001, pp. 753–760.

[463] *Ibid*., § 177.

[464] *Ibid*., § 179.

[465] *Ibid*., § 181.

The Trial Chamber's examination of domestic legal systems shows that this is the definition of the crime of rape under general principles of law. Therefore, this was the law to be applied to the facts of the case. Had this law been applied, forced oral penetration would have been assimilated not to rape but to sexual assault. This is so because while some national legal systems assimilate forced oral penetration to rape, some other systems do assimilate it to sexual assault, as the comparative law study undertaken by the Trial Chamber demonstrates.[466]

The Trial Chamber however followed a different course of action. It decided to revisit general principles of international criminal law and those of international law, with the aim of seeking what it called 'an appropriate solution' to the legal issue at stake.[467] The subsequent legal reasoning was the following: (i) forced oral penetration is a humiliating and degrading attack on human dignity; (ii) the essence of international humanitarian law and human rights law lies in the protection of human dignity; (iii) given (i) and (ii), forced oral penetration should be classified as rape.[468] Ultimately the Trial Chamber defined the *actus reus* of the crime of rape as follows: (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.[469]

Patently, this formulation of the *actus reus* of the crime of rape is broader than under general principles of law, because it includes forced oral penetration. Unfortunately as it is and however bad it sounds, the Trial Chamber's examination of domestic legal systems shows that despite the current trend to the contrary, the generality of national legal systems still do not assimilate forced oral penetration to rape.

In any event, in researching the definition of the crime of rape under general principles of law the Trial Chamber examined national legislation and the decisions of national courts. It did not look for a common legal rule, but a common principle underlying the different national legal systems. Such a method of proceeding was technically

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[466] *Ibid*., § 182.
[467] *Ibid*. See Schabas, William, *op. cit*. 462, pp. 756–757.
[468] *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998, § 183.
[469] *Ibid*., § 185.

correct, and led the Trial Chamber to find the definition of the crime of rape in general principles of law.

Having done this, it was not only unnecessary, but also contradictory, for the Trial Chamber to return to general principles of international law to settle the issue at stake. In fact, the Trial Chamber had already stated that resort to the general principles of international law was of no avail on this matter.[470]

In effect, one has the impression that assimilating forced oral penetration to rape in this case was unfair to the accused, because, by defining rape in the light of general principles of international law instead of general principles of law, the Trial Chamber violated the principle of strict construction of criminal statutes.[471] Finally yet importantly, if doubts about the definition of the crime persisted, the definition should have been interpreted in favour of the accused (*favor rei*). The principles of strict construction of criminal status and *favor rei* are part of general international criminal law and thus applicable by the ICTY.[472]

As far as the horizontal move of the determination process is concerned, the Trial Chamber investigated eighteen national legal systems. The choice of legal systems it made was appropriate for demonstrating the universality of the general principle of law thus found,[473] as they were representative of the different legal families and regions of the world.

This judgment also provides material for discussion with reference to the transposition issue. At the beginning of its search for a relevant general principle of law, the Trial Chamber stated:

> Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should

[470] *Ibid*., § 177.

[471] The principle of strict interpretation of criminal status prescribes that 'one is not allowed to broaden surreptiously, by way of interpretation, the contents of criminal rules, so as to make them applicable to instances nos specifically envisaged by the rules.' See Cassese, Antonio, *op. cit*. 12, p. 154.

[472] Therefore Article 22, paragraph 2 of the ICC Statute expresses general international law. This provision reads as follows: 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the persons being investigated, prosecuted or convicted'. See Lamb, Susan, *op. cit*. 431, pp. 752–753.

[473] Chile, China, Germany, Japan, SFRY, Zambia, Austria, France, Italy, Argentina, Pakistan, India, South Africa, Uganda, Australia (New South Wales), the Netherlands, England and Wales, and Bosnia and Herzegovina, in that order.

> not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since 'international trials exhibit a number of features that differentiate them from national criminal proceedings', account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.[474]

The Trial Chamber relied upon Judge Cassese's separate and dissenting opinion in the *Erdemović* case (Judge Cassese was one of the three members of the Trial Chamber dealing with the *Furundžija* case).

Although the Trial Chamber was right in asserting that reference should not be made to a single legal family to ascertain general principles of law, it is unclear how 'the special features of international trials' (features that the Chamber invoked but did not set out) may affect the transposition of a general principle of law on the definition of the crime of rape. The Trial Chamber's *obiter dictum* is rather puzzling.

3.3.1.2.8. *Prosecutor v. Tadić, Judgment*

In this judgment,[475] the Appeals Chamber recognized the importance of the principle of personal culpability in international criminal law. Furthermore, in the Appeals Chamber's view, the Doctrine of Common Purpose is inapplicable under general principles of law. Finally, the declaration appended to the judgment by Judge Nieto-Navia examined the scope of the *non bis in idem* principle as a general principle of law.

Nullum crimen sine culpa and the Doctrine of Common Purpose

The question arose whether under international criminal law the accused could be held criminally responsible for the killing of five men, even if there was no evidence that he personally had killed any of them.

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[474] *Ibid*., § 178 (footnote ommited).

[475] *Prosecutor v. Tadić, Judgment,* Case No. IT-94-1-A, App. Ch., 15 July 1999. For a commentary on the judgment, see Sassoli, Marco and Olson, Laura, 'Prosecutor v. Tadić. Case No. IT-94-1-A', *AJIL,* Vol. 94, No. 3, 2000, pp. 571–578; Gill, Terry, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997–1999*, Antwerp/Oxford/New York, Intersentia, Vol. 3, 2001, pp. 868–875.

A fundamental issue consisted of determining whether the acts of one individual may lead to the criminal culpability of another where both participate in the execution of a common criminal plan.[476] From the outset, the Appeals Chamber stated

> The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*). In national legal systems this principle is laid down in Constitutions, in laws, or in judicial decisions. In international criminal law the principle is laid down, *inter alia,* in Article 7(1).[477]

It is thus clear that the Appeals Chamber recognized the principle of culpability, a basic principle of criminal law, as a general principle of law.[478] However, it is also plain that the Appeals Chamber did not invoke and apply the principle as a general principle of law, for the reason that Article 7, paragraph 1 of the ICTY Statute lays down the principle of personal culpability. In fact, that passage of the Appeals Chamber's judgment reveals the enormous persuasive force that the invocation of certain 'fundamental' general principles of law may bring to legal reasoning. This is particularly the case in situations such as the one in that passage of the judgment, in which the Appeals Chamber did not reinforce a finding by resorting to a given general principle of law as a subsidiary argument, but began its legal reasoning by turning to it. In this particular case, the Appeals Chamber resorted to the principle of culpability as the yardstick against which the consistency of the Doctrine of Common Purpose with international criminal law had to be measured.[479]

With regard to this doctrine, the Appeals Chamber first ascertained its customary status as a form of accomplice liability and its implicit recognition by the Statute.[480] Then it stated:

> It should be emphasised that reference to national legislation and case-law only serves to show that the notion of common purpose upheld in

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[476] *Prosecutor v. Tadić, Judgment,* Case No. IT-94-1-A, App. Ch., 15 July 1999, § 185.
[477] *Ibid*, § 186 (footnotes omitted).
[478] The Appeals Chamber referred to the recognition of the principle by the Italian constitution, French and Austrian legislation, and decisions of British and German courts.
[479] *Prosecutor v. Tadić, Judgment,* Case No. IT-94-1-A, App. Ch., 15 July 1999, § 187.
[480] *Ibid*., § 220.

> international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case-law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognized by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case.[481]

Hence, while the Doctrine of Common Purpose is part of customary law, it is not a form of accomplice liability under general principles of law.

True, the Appeals Chamber's finding did not have any practical significance in the case at hand, given that the doctrine is part of customary law and the ICTY can apply it on this legal basis. One may wonder why the Appeals Chamber was interested in determining whether some general principle of law reflected the Doctrine of Common Purpose, considering that it had already ascertained its customary status and it was thus applicable as such. Perhaps the Appeals Chamber simply intended to reinforce the legal reasoning by pointing to the recognition of the Doctrine of Common Purpose under customary law and several national legal systems, even if the recognition of the doctrine by national legal systems is not so general as to make it a general principle of law.

This brings us to the horizontal move in the determination process. Interestingly, while the Appeals Chamber began by requiring a rather high standard for ascertaining the general recognition by States of the Doctrine of Common Purpose ('most, if not all, countries'), it concluded by declaring that it would be necessary for the main legal families of the world to adopt the same approach. After a careful examination, it seems that the expression 'most, if not all, countries' was not intended as a standard for determining general recognition, but as a retorical tool making it clear that the doctrine was not generally recognized in national law.

The Appeals Chamber relied upon the traditional classification of national legal systems into legal families, namely the Romano-Germanic and the Common Law, to establish the requirement of general recognition. With regard to the former, it examined the law of Germany, the Netherlands, France, and Italy; and with respect to the latter, the law of

[481] *Ibid*., § 225.

England and Wales, Canada, the USA, Australia, and Zambia.[482] It is noticeable that while the choice of the examples concerning the Common Law was representative of different regions of the world (Europe, America, Oceania, and Africa), the choice of those regarding the Romano-Germanic legal family was entirely Eurocentric.

Non bis in idem

In this case the Prosecutor had lodged an appeal against the defendant's acquittal on certain counts, based on Article 25 of the Statute. This provision does not bar the Prosecutor from appealing against an acquittal. Pursuant to the *non bis in idem* principle, an individual shall not be tried or punished twice for the same crime.[483] For this reason, Judge Nieto-Navia deemed it necessary to deal with a twofold issue: (i) whether *non bis in idem* is a general principle of law and, if yes, (ii) whether Article 25 is consistent with *non bis in idem*.[484]

After examining the laws of the USA, England and Wales, France, and Germany, Judge Nieto-Navia found no common legal principle on that point: whereas appeals against acquittal do not infringe the *non bis in idem* principle in the Romano-Germanic legal family, they do violate *non bis in idem* in the Common Law family. Judge Nieto-Navia thus concluded that there is no general principle of law prohibiting the Prosecutor from lodging appeals against acquittals and, thus, no need to determine whether Article 25 of the Statute conflicts with the *non bis in idem* principle.[485]

Judge Nieto-Navia's finding, i.e., that there is no general principle of law prohibiting the Prosecutor from lodging an appeal against acquittal, is correct. However, he did not provide a clear answer (in the affirmative or in the negative) to his own first 'yes/no question', namely whether *non bis in idem* is a general principle of law. Instead, he replied that there is no general principle of law preventing the Prosecutor from appealing against an acquittal.

At first glance, it seems that Judge Nieto-Navia's answer may have two opposite meanings. The first may be that *non bis in idem* is not a general principle of law and, thus, he considered it unnecessary to

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[482] *Ibid*., § 224.
[483] See 3.3.1.2.2, above.
[484] *Prosecutor v. Tadić, Judgment, Declaration of Judge Nieto-Navia*, Case No. IT-94-1-A, App. Ch., 15 July 1999, § 1.
[485] *Ibid*., § 3–9.

answer question (ii). The second may be that *non bis in idem* is a general principle of law, which prohibits trial or punishment for a crime for which an individual has already been *finally* acquitted or convicted in accordance with the relevant procedural law. There are two strong reasons to believe that Judge Nieto-Navia referred to the second possible meaning: such interpretation of the principle does not prohibit acquittals of lower courts from being appealed and is consistent with the provisions of the ICCPR.[486]

3.3.1.2.9. *Prosecutor v. Kupreskić et al., Judgment*

This judgment[487] is relevant to this study because the Trial Chamber considered the existence of general principles of law on the cumulation of offences (*concursum delictorum*).[488]

At the outset, the Trial Chamber stated:

> In delving into this new area of international criminal law, the Trial Chamber will rely on general principles of international criminal law and, if no such principle is found, on the principles common to the various legal systems of the world, in particular those shared by most civil law and common law criminal systems. In this search for and examination of the relevant legal standards, and the consequent enunciation of the principles applicable at the international level, the Trial Chamber might be deemed to set out a sort of *ius praetorium*. However, its powers in finding the law are of course far more limited than those belonging to the Roman *praetor*: under the International Tribunal's Statute, the Trial Chamber must apply *lex lata* i.e. existing law, although it has broad powers in determining such law.[489]

This passage of the judgment reveals the importance that general principles of law may play in filling legal gaps once a Chamber has determined that applicable conventional and customary international law (including general principles of international criminal law) does not exist.

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[486] Article 14(7) of the ICCPR reads as follows: 'No one shall be liable to be tried or punished again for an offence for which he has already been *finally* convicted or acquitted in accordance with the law and penal procedure of each country.' (Italics mine). See Joseph, Sarah *et al*., *op. cit*. 301, pp. 460–461.

[487] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000. For a commentary on the judgment in general, see Schabas, William, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1999–2000*, Antwerpen/Oxford/New York, Intersentia, Vol. 4, 2002, pp. 888–892.

[488] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000, §§ 673–695.

[489] *Ibid*., § 669.

As for the methodology to be employed to extract both sets of legal principles, the Trial Chamber declared:

> General principles of international criminal law, whenever they may be distilled by dint of construction, generalisation or logical inference, may also be relied upon. In addition, it is now clear that to fill possible gaps in international customary and treaty law, international and national criminal courts may draw upon general principles of criminal law as they derive from the convergence of the principal penal systems of the world. Where necessary, the Trial Chamber shall use such principles to fill any *lacunae* in the Statute of the International Tribunal and in customary law. However, it will always be necessary to bear in mind the dangers of wholesale incorporation of principles of national law into the unique system of international criminal law as applied by the International Tribunal.[490]

The issue of the cummulation of offences is relevant to both substantive and procedural international criminal law.[491] With respect to the former, it concerns whether and on what conditions the same act or transaction may violate more than one rule of international criminal law and, in the case of double conviction for a single action, how this should impact on sentencing.[492] With regard to the latter, it touches upon the issue of the conditions on which the Prosecutor may choose cumulative charges for the same act or transaction, when the Prosecutor should submit alternative charges, and what the powers of a Trial Chamber are to adjudicate upon a charge that has been incorrectly formulated by the Prosecutor.[493]

The Trial Chamber set out four legal principles regarding the substantive law of the cumulation of offences, namely (i) reciprocal speciality, (ii) speciality, (iii) consumption, and (iv) protected values. These principles regulate the issue of the cummulation of offences where a single criminal transaction simultaneously breaches two or more legal provisions.[494]

The first principle ascertained by the Trial Chamber is the Romano-Germanic one of reciprocal speciality, which corresponds to the so-called 'Blockburger test' of the US courts. Pursuant to this principle, 'where the same act or transaction constitutes a violation of two distinct

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[490] *Ibid*., § 677.
[491] *Ibid*., § 670.
[492] *Ibid*.
[493] *Ibid*. See generally Cassese, Antonio, *op. cit*. 12, p. 212; Walther, Susanne, 'Cumulation of Offences', in Cassese, Antonio *et al*. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, New York, Oxford University Press, 2002, pp. 475–478; *Werle*, Gerhard, *op. cit*. 290, pp. 178–179.
[494] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 678–679.

statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of an additional fact which the other does not.'[495] The Trial Chamber derived the principle from decisions of courts of the USA and 'civil law courts'.[496] The ICTY Appeals Chamber reaffirmed the validity and importance of this principle in other cases.[497]

The second principle is that of speciality, which applies if the requirements of the principle of reciprocal speciality are not met. According to this principle, 'one of the offences falls entirely within the ambit of the other offence'. For the Trial Chamber, the principle reflects a principle of general international law (*lex specialis derogat legi generali*), which national criminal laws such as the Dutch and Italian criminal codes recognize.[498] The ICTY Appeals Chamber confirmed the validity of this principle in another case.[499]

The third principle is the Romano-Germanic one of consumption, also known as the principle of the lesser included offence in the Common Law legal family.[500] According to this principle, conviction of a lesser offence than the one charged is permitted as long as the definition of the greater offence necessarily includes that of the lesser offence.[501] The Trial Chamber determined the existence of this principle after examining English scholarship, judgments from courts of Austria, Germany, and France, and the case law of the European Commission and Court of Human Rights.[502] The ICTY Appeals Chamber approved the principle: 'It is … an established principle of both the civil and common law that punishment should not be imposed for both a greater offence and a lesser included offence. Instead, the more serious crime subsumes the less serious (*lex consumens derogat legi consumptae*)'.[503] The Appeals

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[495] *Ibid*., § 681.

[496] *Ibid*., §§ 681, 685.

[497] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-A, App. Ch. 20 February 2001, § 339; *Prosecutor v. Jelisic, Judgment*, Case No. IT-95-10-A, App. Ch. 5 July 2001, § 82; etc.

[498] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 683.

[499] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-A, App. Ch. 20 February 2001, § 340.

[500] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000, §§ 687–688.

[501] *Ibid*., § 687, footnote 953.

[502] *Ibid*., §§ 687–692.

[503] *Prosecutor v. Kunarac et al., Judgment*, Case No. IT-96-23 & IT-96-23/1-A, App. Ch., 12 June 2002, § 170.

Chamber also recognized the difficulties in applying this principle at the international level, given the lack of a scale of penalties under international criminal law.[504]

The fourth principle set out by the Trial Chamber is the principle of different values, according to which, 'if an act or transaction is simultaneously in breach of two criminal provisions protecting different values, it may be held that that act or transaction infringes *both* criminal provisions.'[505] The Trial Chamber identified the principle after investigating judgments of the courts of Canada, France, Austria, and Italy.[506] It should be noted that the ICTY Appeals Chamber has not endorsed this principle.[507]

The question arises whether the four principles referred to above are genuine general principles of law. According to Cassese, the norms regulating the issue of the cumulation of offences can be deduced from the 'principles of criminal law common to the major legal systems of the world as well as international case law'; however, he relies upon the practice of the ICTY alone.[508] Werle is apparently of the same opinion. In his view, the methodology for deriving principles on the cumulation of offences consists of 'a distillation of general legal principles taken from the corresponding rules of national legal systems'.[509]

In fact, it is doubtful whether the four principles set out by the Trial Chamber are genuine general principles of law. Some of them (reciprocal speciality) are too detailed and precise to be considered abstractions of legal rules. Others are not generally recognized in national law (or at least their general recognition by nations has not been demonstrated by the Trial Chamber), but have been crafted by referring to some national laws and general international law (the principle of speciality), or to a few national laws and the case law of the European Court and Commission of Human Rights (the principle of protected values). Only the principle of consumption/lesser included offence was wholly derived from the main legal families of the world and is abstract enough to be a general principle of law. Considered as a whole, the principles in

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[504] *Ibid*., § 171.

[505] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 694.

[506] *Ibid*., §§ 693, 695, footnotes 956 and 957, respectively.

[507] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-A, App. Ch. 20 February 2001, §§ 412–413.

[508] Cassese, Antonio, *op. cit*. 12, pp. 214–215.

[509] Werle, Gerhard, *op. cit*. 290, p. 179.

question seem to fit better into the category of *ius praetorium* than that of general principles of law.

Then the Trial Chamber dealt with the procedural law aspect of the issue of the cumulation of offences. Because neither the Statute nor the RPE of the ICTY or the general principles of international criminal law regulate the manner in which Trial Chambers should proceed in the case of a wrong legal classification of facts by the Prosecutor (especially when certain elements of the crime charged against the accused have not been proved but the evidence reveals that, if the facts were characterized in a different way, a crime under the jurisdiction of the ICTY would have been committed), the Trial Chamber embarked upon an examination of national criminal laws to derive 'principles of criminal law common to the major legal systems of the world'.[510]

The Trial Chamber did not find a relevant legal principle common to the Common Law and Romano-Germanic legal families. The basic difference between these families in this regard lies in the greater powers enjoyed by the courts of the Romano-Germanic legal family to establish the applicable law. These powers are based on the *iura novit curia* principle. Furthermore, in some Romano-Germanic legal systems, the powers of courts in this respect are narrower than in others. In Germany and Spain, for instance, the court may only reclassify the facts of the case in the course of the trial if it has notified the accused and permitted him to prepare his defence. In other States, such as France and Italy, courts may give a different legal classification of the facts from that submitted by the Prosecution, without automatically notifying the accused.[511]

Because of the lack of a pertinent 'general principle of criminal law common to all major legal systems of the world', the Trial Chamber decided to search for 'a general principle of law consonant with the fundamental features and the basic requirements of international criminal justice'.[512] Two requirements were laid down in light of the undeveloped nature of international criminal law. The first is that the rights of the accused be fully protected. And the second is that 'the Prosecutor and, more generally, the International Tribunal be in a position to exercise all the powers expressly or implicitly deriving from the Statute, or inherent

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[510] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 728.

[511] *Ibid*., §§ 729–737.

[512] *Ibid*., § 738.

in their functions, that are necessary for them to fulfil their mission efficiently and in the interests of justice'.[513]

In that vein the Trial Chamber pinpointed a series of long, detailed, and precise guidelines, which,[514] for this very reason, are not real general principles of law but judge-made law.

3.3.1.2.10. *Prosecutor v. Tadić, Judgment on Allegations of Contempt*

In this judgment the Appeals Chamber asserted the existence of a general principle of law whereby courts have inherent power to deal with contempt.[515]

The judgment concerns contempt proceedings against Tadić's former counsel. In these proceedings, the accused submitted that the changes made to Rule 77 of the ICTY RPE during the relevant period (September 1997/April 1998) expanded the ambit of conduct that amounted to contempt of the ICTY, infringing his rights.[516]

Rule 77 describes the conduct that amounts to contempt.[517] Until the last amendment, the then existing paragraph (E) stated that nothing in Rule 77 affected the inherent power of the ICTY to hold in contempt people who knowingly and wilfully interfered with its administration of justice. Rule 77 has not since then referred to such inherent power.

As a preliminary point, the Appeals Chamber decided it was necessary to examine the general question of the ICTY's power to deal with contempt. It held that the ICTY has this power because it is essential for an international criminal tribunal to take action against interferences in the administration of justice. As for the content of the power, that could be determined in the light of the 'usual sources of international law'.[518]

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[513] *Ibid*., § 739.

[514] *Ibid*., § 742.

[515] *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin,* Case No. IT-94-1-A-R77, App. Ch., 31 January 2000. For a general comment on this judgment see Cockayne, James, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1999–2000*, Antwerpen/Oxford/New York, Intersentia, Vol. 4, 2002, pp. 191–200.

[516] *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-AR77, App. Ch., 31 January 2000, § 12.

[517] Rule 77 was adopted on 11 February 1994, revised on 30 January 1995, amended on 25 July 1997, revised again on 12 November 1997 and amended again on 13 December 2001. See www.un.org/icty/legaldoc-e/index.htm (last visited on 14 June 2006).

[518] *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-AR77, App. Ch., 31 January 2000, § 13.

Customary law did not govern the matter.[519] Hence the Appeals Chamber embarked upon an examination of the 'general principles of law common to the major legal systems of the world, as developed and refined (where applicable) in international jurisprudence',[520] in short, the general principles of law.

Although the law of contempt originated in the context of the Common Law, many national legal systems of the Romano-Germanic legal family have enacted legislation with parallel results.[521] While the power to deal with contempt in Common Law legal systems is part of the inherent jurisdiction of courts, in the Romano-Germanic legal family the power is enacted by legislation.[522]

The Appeals Chamber went on to state:

> A power in the Tribunal to punish conduct which tends to obstruct, prejudice or abuse its administration of justice is a necessity in order to ensure that its exercise of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded. Thus the power to deal with contempt is clearly within its inherent jurisdiction. That is not to say that the Tribunal's powers to deal with contempt or conduct interfering with the administration of justice are in every situation the same as those possessed by domestic courts, because its jurisdiction as an international court must take into account its different setting within the basic structure of the international community.[523]

For these reasons, the Appeals Chamber concluded that the ICTY's inherent power to deal with contempt had existed since the establishment of the ICTY and it did not depend on the existence of a specific provision of the RPE.[524]

It is doubtful whether there is a general principle of law giving courts the inherent power to deal with contempt, contrary to the Appeals Chamber's

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[519] *Ibid*., § 14.
[520] *Ibid*., § 15.
[521] *Ibid*.
[522] *Ibid*., § 17.
[523] *Ibid*., § 18 (footnote omitted).
[524] 'The inherent power of the Tribunal to deal with contempt has necessarily existed ever since its creation, and the existence of that power does not depend upon a reference being made to it in the Rules of Procedure and Evidence. As the Appeals Chamber is satisfied that the current formulation of Rules 77(A) to (D) falls within that inherent power, the amendments made in December 1998 did not increase the nature of the conduct which amounts to contempt to the prejudice of the Respondent's rights.' *Ibid*., § 28. The finding was reaffirmed in a subsequent decision: *Prosecutor v. Aleksovski, Judgment on Appeal by Anto Nobilo against Finding of Contempt,* Case No. IT-95-14/1-AR77, App. Ch., 30 May 2001, § 38.

contention. In fact, the legal principle underlying both the Common Law and Romano-Germanic legal families is that courts have the power to deal with contempt, but not the *inherent* power to do so. This is so because, as the Appeals Chamber showed, in the national legal systems of the Romano-Germanic family the power to deal with contempt is granted by legislation.

Scholars who commented on this decision have disapproved the Appeals Chamber's conclusion. According to Cockayne, the conclusion is 'troubling' because the evidence furnished by the Appeals Chamber can also be interpreted in the sense that Romano-Germanic legal systems do not consider it essential for criminal courts to have the power to deal with contempt, and that, where the power is deemed necessary, it must be granted by legislation. Had the ICTY followed that approach, it would have been able to exercise such power only if the UN Security Council had invested it with it.[525]

The Appeals Chamber 'found' the principle in question by inspecting national legal systems of the Common Law and Romano-Germanic families. Within the first group, it scrutinized judgments of English, Canadian, Australian, and American courts. Within the second group, it examined legislation from Germany, China, France, and Russia.[526] Interestingly, while in this case the Appeals Chamber included the Chinese legal system as an example of the Romano-Germanic legal tradition, a Trial Chamber had referred to it as a 'Marxist legal system'.[527]

With respect to the transposition of that principle into international law, it should be noted that in spite of the Appeals Chamber's concerns about the potential impact that the different structure of international law and national legal systems may have upon the applicability of domestic legal principles at the international level, eventually it transposed the principle at stake into the international arena and applied it to the case without more.

3.3.1.2.11. *Prosecutor v. Blaškić, Judgment*

The Trial Chamber's judgment in the *Blaškić* case is relevant to this study for two reasons.[528] First, the Trial Chamber stated that the rules on

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[525] Cockayne, James, *op. cit*. 515, p. 193.

[526] *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-AR77, App. Ch., 31 January 2000, § 16–17.

[527] See subsection 3.3.1.2.4, above.

[528] *Prosecutor v. Blaškić, Judgment,* Case No. IT-95-14-T, T. Ch. I, 3 March 2000. See Keijzer, Nico and Van Sliedregt, Elies, 'Commentary', in Klip, André and Sluiter,

individual criminal responsibility laid down in Article 7, paragraph 1 of the Statute reflect general principles of law. Secondly, it applied the principle of proportionality in sentencing as both a rule of the ICTY Statute and a general principle of law.

Personal culpability

With regard to the first principle, The Trial Chamber held:

> The Trial Chamber concurs with the views deriving from the Tribunal's case law, that is, that individuals may be held responsible for their participation in the commission of offences under any of the heads of individual criminal responsibility in Article 7(1) of the Statute. This approach is consonant with the general principles of criminal law and customary international law.[529]

Put differently, Article 7, paragraph 1 of the Statute reflects the principle of personal culpability or individual criminal responsibility, which the ICTY Appeals Chamber had already determined.[530] It is probable that the principle was invoked not so much to confirm the consistency of Article 7, paragraph 1 of the Statute with general international law – which was not contested by the parties – as to reinforce the legal reasoning on the basis of a fundamental principle of criminal law.

Proportionality in sentencing

The Trial Chamber dealt with the principle of proportionality in sentencing in these terms:

> [T]he principle of proportionality, a general principle of criminal law, and Article 24(2) of the Statute call on the Trial Chamber to bear in mind the seriousness of the offence and could consequently constitute the legal basis for a scale of sentences.[531]

It is thus clear that the principle of proportionality in sentencing in the ICTY's legal framework has a dual nature, as both a general principle of law and a specific rule of the Statute (Article 24, paragraph 2).[532] It is also obvious that the principle was not called upon to fill any legal lacuna; nor it was required to interpret the second paragraph of Article 24 of the

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Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1999–2000*, Antwerpen/Oxford/New York, Intersentia, Vol. 4, 2002, pp. 656–667.

[529] *Prosecutor v. Blaškić, Judgment,* Case No. IT-95-14-T, T. Ch. I, 3 March 2000, § 264.

[530] See subsecion 3.3.1.2.8, above.

[531] *Prosecutor v. Blaškić, Judgment,* Case No. IT-95-14-T, T. Ch. I, 3 March 2000, § 796.

[532] The relevant part of Article 24, paragraph 2 of the ICTY Statute reads as follows: 'In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence'.

Statute. By pointing first to the principle of proportionality as a general principle of law, it is probable that the Trial Chamber intended to enhance the impact of its statement, as if general principles of law were a hierarchically superior source of international law, even above the Statute.

The ICTY has frequently resorted to the principle of proportionality in sentencing. For example, it has declared that this principle is based on classical retributive theory which calls for the imposition of punishment that is proportional to the harm done by the offender.[533] Punishment must be proportional to the wrong done, i.e., it must fit the crime.[534] The principle of proportionality in sentencing is so important for the ICTY[535] that it prompted the Appeals Chamber to declare that the pursuit of other sentencing purposes, such as rehabilitation, would violate the principle of proportionality if such purposes were given excessive importance.[536]

3.3.1.2.12. *Prosecutor v. Furundžija, Judgment*

This judgment deals *inter alia* with the principle of the impartiality of the judiciary. It is pertinent to this study because it reveals some controversy about whether the principle is customary in nature and/or a general principle of law.[537]

Rule 15(A) of the ICTY RPE regulates the issue of the disqualification of judges. It states that a judge shall not sit on a trial or appeal in any case in which his impartiality may be affected. In the Appeals Chamber's view, this provision is to be interpreted in accordance with the general rule that 'a Judge should not only be subjectively free from bias, but also … there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias'.[538] The Appeals Chamber

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[533] *Prosecutor v. Nikolić, Sentencing Judgment,* Case No. IT-02-60/1-S, T. Ch., 2 December 2003, § 86.

[534] *Prosecutor v. Brdanin, Judgment,* Case No. IT-99-36-T, T. Ch., 1 September 2004, § 1090.

[535] It is a 'primary consideration', according to the Appeals Chamber. See *Prosecutor v. Aleksovski, Judgment*, Case No. IT-95-14/1-A, App. Ch., 24 March 2000, § 182.

[536] *Prosecutor v. Kordić et al., Judgment,* Case No. IT-95-14/2-A, App. Ch., 17 December 2004, § 1073.

[537] *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-A, App. Ch., 21 July 2000. For a commentary see Lombardi, Greg and Scharf, Michael, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 2000–2001*, Antwerp/Oxford/New York, Intersentia, Vol. 5, 2003, pp. 357–368.

[538] *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-A, App. Ch., 21 July 2000, §§ 189–191.

did not assert the legal nature of that general rule, but Judges Shahabuddeen and Robinson clarified the issue by declaring that the Appeals Chamber had implicitly referred to customary law.[539]

In Judge Shahabuddeen's view, searching for the foundation of the principle of impartiality in general international law was needless, for the reason that Article 13 of the Statute lays down the principle and regulates the issue at stake.[540] He also asserted that the principle of impartiality is a general principle of law,[541] rather than a customary rule as the Appeals Chamber had concluded.[542] This also seems to be the view of Lombardi and Scharf, who consider the principle of impartiality of the judiciary 'the cornerstone of all sound legal systems',[543] that is, a general principle of law.

The real issue at stake was to ascertain the standard for the application of the principle of impartiality as laid down in the Statute.[544] If the standard were a customary rule, it ought to be demonstrable by the ordinary means for the determination of rules of international law, but such customary rule does not exist.[545] For Judge Shahabuddeen, looking for a customary rule on the impartiality of the judiciary was pointless, as the duty of the Appeals Chamber was to interpret and apply the principle of impartiality in accordance with the circumstances of the case. In so doing, the Appeals Chamber could have examined decisions of international courts and tribunals in order to establish how the principle had been applied hitherto.[546]

Judge Shahabuddeen distinguished between the emergence of a new customary rule reflecting a general principle of law and the judicial interpretation of how a general principle of law applies. Whereas in the first situation the original general principle of law applies as qualified by the new customary rule, in the second the original principle applies as interpreted by the courts.[547] The latter situation is consonant with the

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[539] See Lombardi, Greg and Scharf, Michael, *op. cit*. 537, p. 358.

[540] *Prosecutor v. Furundžija, Judgment, Declaration of Judge Shahabuddeen*, Case No. IT-95-17/1-A, App. Ch., 21 July 2000, § 2.

[541] He made that determination on the basis of scholarly writing and decisions of international courts. *Ibid*., § 1.

[542] *Ibid*., § 2.

[543] Lombardi, Greg and Scharf, Michael, *op. cit*. 537, p. 357.

[544] *Prosecutor v. Furundžija, Judgment, Declaration of Judge Shahabuddeen*, Case No. IT-95-17/1-A, App. Ch., 21 July 2000, § 3.

[545] *Ibid*.

[546] *Ibid*., § 4.

[547] *Ibid*., § 5.

nature of the general principles of law, which consist not of specific legal rules but of general propositions underlying such rules.[548]

3.3.1.2.13. *Prosecutor v. Delalić et al., Judgment*

The Appeals Chamber's judgment in the *Delalić et al*. case touches upon two issues relevant to this study, namely: (i) are the general principles of law a method of criminalization in international law? And, (ii) is diminished responsibility a defence under general principles of law?[549]

Are the general principles of law a method of criminalization in international law?

In the appellate proceedings in this case, three of the accused challenged the Trial Chamber's finding that common Article 3 of the Geneva Conventions of 1949 entails individual criminal responsibility under international law. In their view, the Trial Chamber's interpretation of that legal provision violates the *nullum crimen sine lege* principle.[550] However, in the Appeals Chamber's opinion, common Article 3 had attained customary status and the acts specified therein were 'criminal according to the general principles of law recognized by civilized nations', as provided for Article 15, paragraph 2 of the ICCPR.[551]

Common Article 3 is certainly part of customary law.[552] However, the argument based on the general principles of law is unpersuasive because of two reasons.

First, even if the ILC used broadly to interpret the word *lege* in the *nullum crimen sine lege* principle (i.e., as encompassing conventional law, customary law, and general principles of law),[553] eventually it exclude the reference to general principles of law in the Draft Code of Offences against Peace and Security of Mankind. In formulating the

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[548] *Ibid*., § 6.

[549] *Prosecutor v. Delalić et al., Judgment*, Case No. IT-96-21-A, App. Ch., 20 February 2001. For a commentary on the judgment see Boot, Machteld, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 2000–2001*, Antwerp/Oxford/New York, Intersentia, Vol. 5, 2003, pp. 600–616.

[550] *Prosecutor v. Delalić et al., Judgment*, Case No. IT-96-21-A, App. Ch., 20 February 2001, § 153 *et seq*.

[551] *Ibid*., § 173.

[552] The ICJ ascertained the customary status of Article 3 common to the 1949 Geneva Conventions in *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment, ICJ Reports 1986*, pp. 113–114, § 218.

[553] See Thiam, Doudou (rapporteur), 'Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind', *Yearbook of the International Law Commission*, 1986, Vol. II, § 163.

final version of Article 13, paragraph 2 of the Draft (which reads 'Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law'), the ILC intended to prevent prosecutions based on 'too vague' legal grounds. For this reason it employed the expression 'in accordance with international law' in place of less precise ones such as 'in accordance with the general principles of international law'.[554] Put differently, the criminalization of human conduct on the basis exclusively of general principles of law may jeopardize the specificity required by the *nullum crimen sine lege* principle by reason of their vagueness.

Secondly, in spite of the wording of Article 15, paragraph 2 of the ICCPR, this provision refers to customary law and not to general principles of law. The general principles referred to in the provision are the principles of international law recognized in the Charter and the judgment of the IMT, which possessed customary status at the time of the adoption of the ICCPR.[555]

Finally, it is worth observing that even though the supplementary argument presented by the Appeals Chamber is somewhat unconvincing, it does not invalidate the main finding, namely that the conduct described in common Article 3 does entail criminal responsibility under international customary law.

Is diminished mental responsibility a defence under the general principles of law?

At trial one of the accused contended that diminished mental responsibility was a complete defence pursuant to Rule 67(A)(ii) of the ICTY RPE. The Trial Chamber accepted the argument.[556]

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[554] 'Report of the ILC on the work of its forty-eighth session, Jun. 5-Aug. 26, 1996', GAOR 51st Session, Supp. No. 10 (A/51/10), p. 72, § 1, 73, p. 73, § 5. See Ambos, Kai, 'General Principles of Criminal Law in the Rome Statute', *CLF*, 1999, Vol. 10, No. 1, p. 5.

[555] See Novak, Manfred, *op. cit*. 9, p. 281. See also O'Keefe, Roger, 'Recourse by the *Ad Hoc* Tribunals to General Principles of Law and to Human Rights Law', in Delmas-Marty, Mireille *et al*. (eds.), *Les sources du droit international pénal*, Paris, Société de législation comparée, 2004, pp. 297–298; Ambos, Kai, *op. cit*. 14, p. 36 (and the authors cited in footnote 17).

[556] Rule 67(A)(ii) as then in force read as follows: 'As early as reasonably practicable and in any event prior to the commencement of the trial … the defence shall notify the Prosecutor of its intent to offer … any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.'

However, in the opinion of the Appeals Chamber, the provisions of Rule 67(A)(ii) were insufficient to make diminished mental responsibility a defence under international criminal law. It argued that the ICTY does not have the power to adopt rules of procedure and evidence which create new defences. If a defence of diminished responsibility existed in international criminal law, 'it must be found in the usual sources of international law –in this case, in the absence of reference to such defence in established customary or conventional law, in the general principles of law recognized by all nations.'[557]

After an overview of national legal systems, the Appeals Chamber declared:

> [T]he relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense. This is the appropriate general legal principle representing the international law to be applied in the Tribunal. Rule 67(A)(ii)(b) must therefore be interpreted as referring to diminished mental responsibility where it is to be raised by the defendant as a matter in mitigation of sentence.[558]

Therefore, under general principles of law diminished responsibility might be a mitigating factor in sentencing, but not a ground for excluding criminal responsibility. The finding was reaffirmed in subsequent decisions of the ICTY.[559] It is also consonant with the provisions of the ICC RPE.[560]

The Appeals Chamber ascertained the principle after reviewing the law of Scotland, England, Australia, Hong Kong, Singapore, Barbados, the Bahamas, France, Germany, Italy, the Russian Federation, Turkey, Japan, South Africa, the former Yugoslavia, and Croatia.[561] The number of national legal systems examined is relatively significant, but the list does not cover any national legal system from Latin America and it includes only one from Africa. The inclusion of legal systems from

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[557] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-A, App. Ch., 20 February 2001, § 583.

[558] *Ibid*., § 590.

[559] See *Prosecutor v. Banović, Sentencing Judgment*, Case No. IT-02-65/1-S, T. Ch. III, 28 October 2003, § 79–81; *Prosecutor v. Češić, Sentencing Judgment*, Case No. IT-95-10/1-S, T. Ch. I, 11 March 2004, § 93. See also Werle, Gerhard, *op. cit*. 290, pp. 159–160, §§ 467–468.

[560] See Rule 145(2)(a)(i).

[561] *Ibid*., §§ 585–588.

Latin American and Africa would not necessarily have altered the outcome of the research, but would have made it truly international and, thus, more consonant with the essentially universal character of the general principles of law as a source of international law.

3.3.1.2.14. *Prosecutor v. Kunarac et al., Judgment*

This judgment relates to the general principles of law in two respects.[562] First, like the *Furundžija* judgment examined above, it deals with the definition of the crime of rape under general principles of law. Secondly, it determines that the presumption of innocence laid down in Article 21, paragraph 3 of the Statute and the provisions of Rule 87(A) embodies a general principle of law.

Rape under general principles of law

For the Trial Chamber, the definition of the crime of rape as formulated in the *Furundžija* case required some clarification with regard to the second objective element of the crime, namely coercion or force or threat of force against the victim or a third person.[563] The second objective element had been 'more narrowly stated than is required by international law.'[564] That definition 'does not refer to other factors which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim', which is, for the Trial Chamber, the real scope of the definition of the crime of rape under international law.[565]

Then the Trial Chamber stated:

> As observed in the *Furundžija* case, the identification of the relevant international law on the nature of the circumstances in which the defined acts of sexual penetration will constitute rape is assisted, in the absence of customary or conventional international law on the subject, by reference to the general principles of law common to the major national legal systems of the world. The value of these sources is that they may disclose 'general concepts and legal institutions' which, if common to a broad spectrum of national legal systems, disclose an international approach to

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[562] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23-T & IT-96-23/1-T, T. Ch. II, 22 February 2001. For a commentary on the judgment see Askin, Kelly, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 2000–2001*, Antwerp/Oxford/New York, Intersentia, Vol. 5, 2003, pp. 806–817.

[563] See subsection 3.3.1.2.7, above.

[564] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23-T & IT-96-23/1-T, T. Ch. II, 22 February 2001, § 438.

[565] *Ibid*.

> a legal question which may be considered as an appropriate indicator of the international law on the subject. In considering these national legal systems the Trial Chamber does not conduct a survey of the major legal systems of the world in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles, or in the words of the *Furundžija* Judgment, 'common denominators', in those legal systems which embody the *principles* which must be adopted in the international context.[566]

In this passage of the judgment, the Trial Chamber points to the gap-filling function that general principles of law may have in judicial decisions, as well as to the nature of these principles. A general principle of law is a concept underlying national legal rules, but not a legal rule common to national legal systems.

That passage of the judgment also shows that for the Trial Chamber the existence of a general principle of law is determined if a *broad* range of national legal systems – not *all* the national legal systems – recognizes the underlying legal principle at stake. The Trial Chamber is correct.

Interestingly, the Trial Chamber's description of the legal regime of the general principles of law does not mention the requirement of consistency with international law and with international criminal trials, which some ICTY chambers had repeatedly stated.

Furthermore, the Trial Chamber found that 'the basic underlying *principle* common to [national legal systems is] that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim.'[567] Thus, 'the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual *autonomy*.'[568]

The circumstances that make sexual acts criminal may be categorized in three classes: '(i) where the act is accompanied by force or the threat of force to the victim or a third party; (ii) where the act is accompanied by force *or* a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or (iii) where the act takes place without the consent of the victim.'[569] The Trial Chamber thus reformulated the definition of

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[566] *Ibid*., § 439 (footnotes omitted).
[567] *Ibid*,, § 440.
[568] *Ibid*.
[569] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23-T & IT-96-23/1-T, T. Ch. II, 22 February 2001, § 442.

the crime of rape contained in the judgment in the *Furundžija* case, and the reformulation was later reaffirmed by the Appeals Chamber.[570] Yet, as the Trial Chamber acknowledged, the Furundžija court's and its own formulations were not substantially different.[571] In the end, both formulations lead to the same result.[572]

Another relevant aspect of the judgment is the fact that the Trial Chamber was aware that any general principle of law on the definition of the crime of rape had to be derived from 'The relevant law in force in different jurisdictions at the time relevant to these proceedings'.[573] Put differently, the prohibition of using criminal law retroactively to the detriment of the accused had to be safeguarded.

Finally, it is worth noting that the Trial Chamber examined thirty-three national legal systems in order to formulate the objective element of the crime of rape under general principles of law. The systems were representative of the main legal families, law conceptions, and regions of the world.[574]

Presumption of innocence. Guilt must be proved beyond reasonable ground

Before setting out the factual and legal findings in the judgment, the Trial Chamber made these general observations regarding the evaluation of evidence:

> The Trial Chamber has applied to the accused the presumption of innocence stated in Article 21(3) of the Statute, which embodies a general principle of law, so that the Prosecution bears the onus of establishing the guilt of the accused, and – in accordance with Rule 87(A), which also embodies a general principle of law – the Prosecution must do so beyond reasonable doubt.[575]

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[570] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23 & IT-96-23/1-A, App. Ch., 12 June 2002, § 128.

[571] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23-T & IT-96-23/1-T, T. Ch. II, 22 February 2001, § 459.

[572] See Werle, Gerhard, *op. cit*. 290, p. 249.

[573] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23-T & IT-96-23/1-T, T. Ch. II, 22 February 2001, § 442.

[574] The national legal systems examined are the following: Bosnia and Herzegovina, Germany, Korea, China, Norway, Austria, Spain, Brazil, Sierra Leone, USA (California, Maryland and Massachusetts), Switzerland, Portugal, France, Italy, Denmark, Sweden, Finland, Estonia, Japan, Argentina, Costa Rica, Uruguay, Philippines, England and Wales, Canada, New Zealand, Australia (New South Wales and Victoria), India, Bangladesh, South Africa, Zambia, Belgium, and Nicaragua.

[575] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23-T & IT-96-23/1-T, T. Ch. II, 22 February 2001, § 559.

The presumption of innocence is a basic principle of procedural criminal law. Article 14, paragraph 2 of the ICCPR and other provisions of regional human rights treaties recognize it.[576] It is also a general principle of law, for the reason that it is generally recognized in national law.[577] As the Trial Chamber correctly stated, one of the corollaries of the presumption of innocence is that the burden of proof rests upon the prosecutor, itself a general principle of law as determined earlier by another Trial Chamber.[578] True, the role to be played by the presumption of innocence as a general principle of law in the context of the ICTY is restricted, because the presumption is provided for in a particular legal provision of the Statute, namely Article 21, paragraph 3.

A more controversial contention is that under general principles of law guilt must be proved beyond reasonable doubt. It is contentious because, while the standard usually employed in the Common Law legal family is that guilt must be proved beyond reasonable doubt, in the Romano-Germanic legal family guilt is established on 'the intimate conviction of the judge'.[579] In this respect some scholars have contended that these are two different approaches,[580] whereas others have suggested that the differences are merely terminological (the intimate conviction being more a rule pertaining to the evaluation of evidence with regard to the guilt of the accused).[581]

In any case, it should be noted that in the ICTY's legal framework the issue of whether the reasonable doubt test is a general principle of law is merely theoretical. This is so because Rule 87(A) prescribes such standard of proof, and there is thus no need to resort to the general principles of law in order to regulate the standard of proof of guilt. The same is true as far as the other current international criminal courts and tribunals are concerned, as their statutes or rules of procedure and evidence lay down identical tests.[582]

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[576] See, for instance, Article 2, paragraph 2 of the ACHR.

[577] See Zappalà, Salvatore, 'The Rights of the Accused', in Cassese, Antonio *et al*. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, New York, Oxford University Press, 2002, pp. 1340–1341.

[578] See subsection 3.3.1.2.6.

[579] See Cryer, Robert *el al*., *op. cit*. 460, p. 356; Zappalà, Salvatore, *op. cit*. 577, pp. 1346–1347.

[580] See Cryer, Robert *et al*., *ibid*.

[581] Zappalà, Salvatore, *op. cit*. 577, p. 1347, footnote 76.

[582] See Rule 87(A), ICTR RPE; Article 66, paragraph 3, ICC Statute; Rule 87(A), SCSL RPE.

3.3.1.2.15. *Prosecutor v. Kordić & Čerkez, Judgment*

This judgment deals, amog others, with the issue of self-defence as a ground for evading international criminal responsibility.[583] At trial, the Defence argued that the acts of which the accused – a Bosnian Croat- was charged were committed in self-defence, given that the Muslims had attacked the Bosnian Croats in Central Bosnia.[584] For this reason, the Trial Chamber weighed up whether self-defence was a ground for excluding criminal responsibility under the applicable law of the ICTY.

According to the Trial Chamber, self-defence 'may be broadly defined as providing a defence to a person who acts to defend or protect himself or his property (or another person or person's property) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack.'[585] Despite the lack of reference to self-defence in the Statute as a ground for excluding criminal responsibility, defences in general are 'general principles of criminal law' which the ICTY must consider in adjudicating on the cases before it.[586]

In the Trial Chamber's view, the provision on self-defence set out in Article 31, paragraph 1(c) of the ICC Statute 'reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law.'[587] After ascertaining the two conditions for the application of this defence pursuant to that provision, namely imminence and proportionality,[588] it refused to apply the principle of self-defence in this case because the conditions for its application had not been met.[589]

This is one of those findings in which the ICTY seems to confuse general principles of law with customary rules.[590] This is because the recognition of the defence of self-defence by 'most national criminal codes' may be evidence of self-defence as a general principle of law, rather than of customary law. In fact, other scholars also acknowledge self-defence as a general principle of law rather than as a customary

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[583] *Prosecutor v. Kordić & Čerkez, Judgment,* Case No. IT-95-14/2-T, T. Ch. III, 26 February 2001.
[584] *Ibid*., § 448.
[585] *Ibid*., § 449.
[586] *Ibid*.
[587] *Ibid*., § 451.
[588] *Ibid*.
[589] *Ibid*., § 827.
[590] See subsection 3.3.1.2.4, above.

rule of international law.[591] Although self-defence could nevertheless have attained customary status, the Trial Chamber's reference to the recognition of self-defence in national criminal laws is not enough to determine a rule of customary law to that effect. For such purpose, the Trial Chamber should have had recourse to the usual means of determination of rules of international law, i.e., judgments and scholarly writing, or have itself ascertained the relevant general State practice and *opinio iuris*. The Trial Chamber did none of this.

3.3.1.2.16. *Prosecutor v. Milutinović et al, Decision on Jurisdiction*
In this decision the Appeals Chamber dealt with the issue of whether the application of the Doctrine of Joint Criminal Enterprise (or Common Purpose) by the ICTY violated the *nullum crimen nulla poena sine lege* principle.[592]

According to the Appeals Chamber, *nullum crimen nulla poena sine lege* is a 'principle of justice',[593] which requires that 'a criminal conviction can only be based on a norm which existed at the time the acts or omission with which the accused is charged were committed'.[594] Most importantly, the principle also requires that 'the criminal liability in question was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time' to uphold a criminal conviction and sentence pursuant to the charges formulated in the indictment.[595] In short, the ICTY must be sure that the crime or the type of criminal responsibility with which the accused is charged was foreseeable and that the law providing for such type of criminal responsibility was accessible at the relevant time.[596]

The European Court of Human Rights developed the requirements of 'foreseeability' and 'accessibility', as pointed out by the Appeals

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[591] See Scaliotti, Massimo, 'Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility, Part 1', *ICLR,* Vol. 1, No. 1, 2001, pp. 159–161; Pradel, Jean, *op. cit*. 15, p. 327, § 223; Ambos, Kai, *op. cit*. 14, p. 88.

[592] *Prosecutor v. Milutinović et al., Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction –Joint Criminal Enterprise-*, Case No. IT-99-37-AR72, App. Ch., 21 May 2003, § 34 et seq.

[593] *Ibid*, § 37.

[594] *Ibid*.

[595] *Ibid*.

[596] *Ibid*, § 38.

Chamber.[597] As for the specific features of international law that may impact on the process of determining whether a given crime or type of criminal responsibility was foreseeable and accessible to the accused, the Appeals Chamber pointed to the absence of a universal legislature and the fact that international law is made by treaties, customs, and judicial decisions.[598] Interestingly, the Appeals Chamber did not mention the general principles of law; this is surprising because the ICTY has hitherto relied heavily on these principles. The Appeals Chamber went on to affirm that customary law may provide enough guidance on the standard the breach of which could entail criminal responsibility, notwithstanding its unwritten nature.[599]

Whether or not the Appeals Chamber was right in so contending is not entirely clear. This is because of the danger of convicting individuals of conduct criminalized by customary law (and, by the same token, by general principles of law). In fact, unwritten legal rules and principles do not always provide enough guidance to individuals on what conduct is criminal under international law. Consider, for example, conduct amounting to a violation of common Article 3 to the 1949 Geneva Conventions.[600] What is more, practice shows that even international judges sometimes disagree on whether given conduct amounted to an international crime at any given time.[601] For these reasons, international criminal courts and tribunals should be very careful in assessing whether in a particular case customary law or general principles of law provide sufficient guidance to individuals. It is asking a great deal to expect ordinary people to be aware of the customary rules of international criminal law in all circumstances. Whether or not ignorance of criminal law should exclude criminal responsibility is a related but different matter.[602]

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[597] *Ibid*, §§ 38–39.

[598] *Ibid*, § 39.

[599] *Ibid*, § 41.

[600] *See Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, App. Ch., 2 October 1995, §§ 128–136.

[601] Consider, for example, *Prosecutor v. Norman et al., Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Dissenting Opinion of Justice Robertson*, Case No. SCSL-04-14-AR72(E), App. Ch., 31 May 2004.

[602] On ignorance of the criminal law see the literature cited in Werle, Gerhard, *op. cit*. 290, p. 152, footnotes 349 and 350. With regard to the ICC, see Esser, Albin, ''Mental Elements –Mistake of fact and Mistake of Law', in Cassese, Antonio *et al*. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1, New York, Oxford University Press, 2002, p. 934 *et seq*.

3.3.1.2.17. *Prosecutor v. Stakić, Judgment*

This case concerns the scope of the *in dubio pro reo* principle.[603]

In the judgment, the Trial Chamber dismissed the Defence submission that 'the principle *in dubio pro reo* should apply as a principle for the interpretation of the substantive criminal law of the Statute', for the reason that 'that this principle is applicable to findings of fact and not of law'.[604] As explained earlier in this study,[605] the *in dubio pro reo* principle is a legal consequence of the presumption of innocence set out in Article 21, paragraph 3 of the Statute.

3.3.1.2.18. *Prosecutor v. Nikolić, Judgments*

The Trial Chamber's sentencing judgment and the Appeals Chamber's judgment in the *Nikolić* case provide the next example relevant to this study.[606] They deal with the principle of *lex mitior*,[607] probably as a general principle of law.[608]

In 1992, the year in which the accused was alleged to have committed the crimes in question, the Penal Code of the SFRY laid down a maximum term of imprisonment of fifteen years, other than for crimes punishable by death. Thus, if the principle were applicable in proceedings before the ICTY, Nikolić's counsel argued, the penalty would always be limited to an inflexible term (fifteen years, as provided for in the Penal Code of the SFRY), instead of a term up to and including life imprisonment, as provided for in Rule 101(A) of the ICTY RPE.[609]

The Trial and Appeals Chambers disagreed with the Defence, but differed in their interpretation of the *lex mitior* principle.

The ICTY Statute and the RPE do not include this principle. After examining a few national legal systems as well as international human

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[603] *Prosecutor v. Stakić, Judgment,* Case No. IT-97-24-T, T. Ch. II, 31 July 2003.

[604] *Ibid*., § 416 (footnote omitted).

[605] See subsection 3.3.1.2.4, above.

[606] *Prosecutor v. Nikolić, Sentencing Judgment,* Case No. IT-94-2-S, T. Ch. II, 18 December 2003; *Prosecutor v. Nikolić, Judgment on Sentencing Judgment,* Case No. IT-94-2-A, App. Ch., 4 February 2005.

[607] 'The principle of *lex mitior* is understood to mean that, if the law relevant to the offence of the accused has been amended, the less severe law should be applied.' *Prosecutor v. Nikolić, Judgment on Sentencing Judgment,* Case No. IT-94-2-A, App. Ch., 4 February 2005, para. 81.

[608] *Prosecutor v. Nikolić, Sentencing Judgment,* Case No. IT-94-2-S, T. Ch. II, 18 December 2003, § 157–165.

[609] *Ibid*., § 158–159.

rights treaties (in particular, the ICCPR),[610] the Trial Chamber concluded that the principle applies only to cases where the commission of a crime and the subsequent imposition of a penalty take place in the same jurisdiction, and thus not to cases before the ICTY.[611]

Two of the five national legal systems examined by the Trial Chamber (the Swiss and the Swedish) expressly provide that the principle of *lex mitior* applies to cases where the crime takes place in a different jurisdiction from that in which the convicted person is punished, as was the case with *Nikolić*. The Trial Chamber considered that this condition was not generally recognized in national law, and concluded that it 'does not form part of the principle of *lex mitior* as an internationally recognized standard'.[612] The Trial Chamber also alleged that under general international law States are not bound to apply the scale of penalties of the State in which the crime took place.[613] For these reasons, it concluded that the ICTY, having primacy over the courts of the former Yugoslavia, is not obliged to apply their lighter penalties.[614]

In other words, the Trial Chamber acknowledged that the principle of *lex mitior* forms part of international law, but deemed it inapplicable to the case, because the accused's crime was committed in a jurisdiction that was not the one in which he was going to receive the punishment, and because the ICTY had primacy over domestic courts.

The Trial Chamber's finding is controversial for at least three reasons. First, it is not correct to contend, as the Trial Chamber did, that the ICCPR requires the principle to be applied only in cases where the commission of a crime and the resulting imposition of a penalty take place in the same jurisdiction. Article 15, paragraph 1 of the ICCPR – which lays down the principle of *lex mitior* – prescribes that no one shall be given a heavier penalty than that provided by law at the time of the commission of the crime. It also states that if, after the commission of the crime, the law provides for the imposition of a lighter punishment, the guilty person shall benefit from that.

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[610] As evidenced by the Trial Chamber's reference to the Criminal Codes of Sweden, Germany, Bosnia and Herzegovina, Republika Srpska, and Switzerland; and the ICCPR, ACHR, and the ECHR.

[611] *Prosecutor v. Nikolić, Sentencing Judgment,* Case No. IT-94-2-S, T. Ch. II, 18 December 2003, § 163.

[612] *Ibid.,* § 164.

[613] *Ibid*.

[614] *Ibid*., § 165.

Secondly, the Trial Chamber's examination of the scope of the principle of *lex mitior* could have carried more weight, had the Trial Chamber examined more national legal systems and evaluated the doctrine of the Human Rights Committee in this regard. That could have permitted it to determine whether the scope of the principle of *lex mitior* as laid down in the Swiss and Swedish criminal codes (favourable to the arguments of the accused) was generally recognized in national law or just peculiar to these two codes.

Thirdly, the primacy of the ICTY over national courts does not mean that the ICTY is not bound to apply the lighter penalites of the courts of the former Yugoslavia. According to Article 9, paragraph 2 of the Statute, primacy means that 'At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.' Thus, the issue of primacy is immaterial to the issue of the applicability of the principle of *lex mitior* by the ICTY.

Later, in the appellate proceedings, the Appeals Chamber rejected the Trial Chamber's argument based on 'primacy'. For the Appeals Chamber, while the issue of primacy is one of jurisdictional powers, the issue of *lex mitior* is not.[615] What matters, the Appeals Chamber declared, is that the law which is the more favourable to the accused is binding upon the ICTY. The principle is thus applicable only if a law more favourable to the accused amends the law binding upon the ICTY.[616]

Clearly, this ruling will prevent the ICTY having to apply the principle of *lex mitior* whenever the criminal laws of the State in the territory of which a crime within the jurisdiction of the ICTY has been committed are amended in a manner more favourable to the accused. That is, it will assert that the final determination of the kind and size of penalty imposed upon a convicted person by the ICTY are subject to the laws of the State in which the crimes were committed. In short, it is understandable that an Appeals Chamber wishes to preserve the legal certainty and authority of the judicial system in which it operates, and this is exactly what the ICTY's Appeals Chamber did by interpreting the principle of *lex mitior* as it did.

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[615] *Prosecutor v. Nikolić, Judgment on Sentencing Judgment,* Case No. IT-94-2-A, App. Ch., 4 February 2005, § 80.

[616] *Ibid*., § 81.

3.3.2. *The ICTR*

This subsection provides an overview of the relevant law of the ICTR (3.3.2.1) and examines three decisions relating to the application of general principles of law (3.3.2.2).

3.3.2.1. *The Applicable Law*

The UN Security Council established the ICTR and adopted its Statute on 8 November 1994.[617] Despite some subsequent amendments, the provisions of the Statute are still analogous to those of the ICTY Statute.

The ICTR has the power to prosecute people responsible for serious violations of international humanitarian law perpetrated in the territory of Rwanda in 1994. It also has the power to prosecute Rwandan citizens responsible for such violations committed in the territory of neighbouring States in the same year (Article 1).

The jurisdiction *ratione materiae* of the ICTR covers the crime of genocide (Article 2), crimes against humanity (Article 3), and violations of common Article 3 to the Geneva Conventions and Additional Protocol II (Article 4). And, like the ICTY, the ICTR has jurisdiction only over natural people (Article 5).

The provisions on individual criminal responsibility are identical to those of the ICTY Statute. Thus, an individual who planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of a crime within the competence *ratione materiae* of the ICTR shall be criminally responsible. Neither the official position of a defendant nor the fact that he acted pursuant to a superior order is a ground for exluding criminal responsibility. The fact that a subordinate committed a crime within the competence *ratione materiae* of the ICTR does not absolve his or her superior of criminal responsibility in the circumstances described in the Statute (Article 7).

Furthermore, sentences of imprisonment are to be served in Rwanda or in any other State that has agreed to accept those convicted (Article 26). If the convicted person is elegible for pardon or commutation of sentence, the President of the ICTR decides the point 'on the basis of the interests of justice and the general principles of law' (Article 27).

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[617] S/RES/955 (1994), 8 November 1994.

Finally, like their counterparts in the ICTY, the judges of the ICTR adopt the RPE (Article 14). Hitherto, they have amended the RPE fourteen times.[618] These rules, like the RPE of the ICTY, lay down the residual evidentiary rule whereby 'In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.' (Rule 89(C))

3.3.2.2. *Three Decisions*

The following three decisions cover a number of instances relating to the application of general principles of law by the ICTR. Two of these decisions are full judgments; the other is a decision on a request for review or reconsideration. They are in chronological order.

3.3.2.2.1. *Prosecutor v. Akayesu, Judgment*

This judgment is germane to this study because it deals with the following legal principles: (i) *unus testis, nullus testis*; (ii) individual criminal responsibility or personal culpability; and (iii) *favor rei*.[619]

Unus testis, nullus testis

At trial the Prosecutor adduced only one witness to give evidence of certain facts alleged in the indictment. For this reason, the Trial Chamber examined whether 'the principle found in Civil Law systems *unus testis, nullus testis*' – which requires corroboration should apply to the case.[620]

According to the Trial Chamber, the ICTR has the power to decide a legal issue on the basis of the evidence of a single witness if this is 'relevant and credible', for two reasons.[621] First, pursuant to Rule 89(A) the ICTR is not bound to apply national rules of evidence. Secondly, as far

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[618] Text in http://69.94.11.53/ENGLISH/rules/070605/070605.pdf.

[619] *Prosecutor v. Akayesu, Judgment*, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998. For a general commentary on the judgment see Amann, Diane, 'Prosecutor v. Akayesu. Case ICTR-96-4-T', *AJIL*, Vol. 93, No. 1, 1999, pp. 195–199; Schabas, William, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals*: *The International Criminal Tribunal for Rwanda 1994–1999*, Antwerp/Groningen/Oxford/Vienna, Intersentia/Hart Publishing/Verlag Österreich, Vol. 2, 2001, pp. 539–554.

[620] *Prosecutor v. Akayesu, Judgment*, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, § 132.

[621] *Ibid*., § 135.

as evidentiary matters are concerned the ICTR is bound to apply the provisions of the Statute and the RPE, in particular Rule 89.[622] For this reason, it did not apply *unus testis, nullus testis* to the case.

The Trial Chamber's conclusion is correct and consistent with ICTY precedents. As indicated earlier in this study,[623] an ICTY Trial Chamber had already held that *unus testis, nullus testis* is not a general principle of law.

Individual criminal responsibility

Later in the judgment the Trial Chamber held that Article 6, paragraph 1 of the ICTR Statute lays down 'basic principles of individual criminal liability, which are undoubtedly common to most national criminal jurisdictions'.[624] Put differently, this provision reflects the principle of individual criminal responsibility, a general principle of criminal law.

It is clear that the Trial Chamber did not invoke the general recognition by nations of the principle of individual criminal responsibility in order to apply it to the case as a general principle of law, since there was no legal gap to be filled or legal rule to be interpreted. In so doing, the Trial Chamber affirmed the consistency of Article 6, paragraph 1 with international law, more precisely with the general principles of criminal law. To summarize, the Trial Chamber stressed the general recognition by nations of the principle of individual criminal responsibility in order to reinforce its legal reasoning in the judgment.

Favor rei

Later in the judgment the Trial Chamber remarked that the English version of Article 2, paragraph 2(a) of the ICTR Statute says 'killing', while the French version of this provision says *meurtre. Meurtre*, unlike killing, requires an additional element of intent.[625]

The Trial Chamber held that the version more favourable to the accused should be endorsed, because of 'the presumption of innocence of the accused, and pursuant to the general principles of criminal law'.[626]

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[622] *Ibid*., § 133.

[623] See subsection 3.3.1.2.4, above.

[624] *Prosecutor v. Akayesu, Judgment*, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, § 471.

[625] *Ibid*., § 500.

[626] *Ibid*., § 501. Similar reasoning with regard to the same legal provision is found in *Prosecutor v. Kayishema and Ruzindana, Judgment,* Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999, §§ 101–103; and in *Prosecutor v. Musema, Judgment and Sentence,* Case No. ICTR-96-13-T, T. Ch. I, 27 January 2000, § 155.

The Trial Chamber's *obiter dictum* –the accused had not been charged with any crime listed in Article 2, paragraph 2(a) of the Statute-[627] is correct. As indicated earlier,[628] in issues of statutory interpretation a doubt must be interpreted in favour of the accused as a consequence of the presumption of innocence. The *favor rei* principle is part of general international criminal law, more precisely a general principle of criminal law. Thus, international criminal courts and tribunals can apply it even if it is not explicitly laid down in their regulatory instruments.

3.3.2.2.2 *Barayagwiza v. Prosecutor, Decision*

This decision concerns a request for review or reconsideration.[629] It is relevant to this book because the declaration appended to it by Judge Nieto-Navia dealt with the *res iudicata* principle.[630]

In this case, the Prosecutor submitted a motion for review or reconsideration of the Appeals Chamber's decision of 3 November 1999. In the decision, the Appeals Chamber had upheld the accused's appeal against the decision of Trial Chamber II which had dismissed his preliminary motion challenging the legality of his arrest and detention. In upholding the appeal, the Appeals Chamber dismissed the indictment against the accused and directed his immediate release.[631] In the decision of 31 March 2000, however, the Appeals Chamber reviewed its earlier decision.[632]

In their written briefs, the Prosecutor and the Defence had invoked the *res iudicata* principle. Although the Appeals Chamber did not address the issue of the applicability of the principle to the case, Judge Nieto-Navia did consider it in his declaration. He said that *res iudicata* is one of the general principles of law referred to in Article 38 of the

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[627] See *Prosecutor v. Akayesu, Judgment*, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, § 6.

[628] See subsection 3.3.1.2.7, above.

[629] *Barayagwiza v. Prosecutor, Decision (Prosecutor's Request for Review or Reconsideration)*, Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000. For a commentary on the decision see Schabas, William, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 2000–2001*, Antwerp/Oxford/New York, Intersentia, Vol. 6, 2003, pp. 261–266.

[630] *Barayagwiza v. Prosecutor, Decision (Prosecutor's request for review or reconsideration), Declaration of Judge Nieto-Navia*, Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000, § 19–26.

[631] *Barayagwiza v. Prosecutor, Decision (Prosecutor's Request for Review or Reconsideration*), Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000, §§ 1–2.

[632] *Ibid*., § 75.

ICJ Statute; therefore, it ought to be applied as such by the ICTR if the conditions for its application are met. The principle prescribes that 'once a case has been decided by a final and valid judgment rendered by a competent tribunal, the same issue may not be disputed again between the same parties before a court of law'.[633] Only final judgments are to be considered *res iudicata*; judgments delivered by lower courts are usually subject to appeal.[634]

In Judge Nieto-Navia's view, reviews of final decisions pursuant to Article 25 of the Statute do not violate the *res iudicata* principle. If the Appeals Chamber deemed its decision dismissing the indictment against the accused to be final, Article 25 of the Statute opens up the possibility for review of final decisions if the conditions laid down in this provision are met.[635]

Thus, the effects of the *res iudicata* principle are limited. This can be – and they are usually limited- by the legal regime in which they were laid down.[636] In the case of the ICTR, Article 25 of the Statute, which regulates the review proceedings before the tribunal, prescribes the limits of the principle in question.

3.3.2.2.3. *Kambanda v. The Prosecutor, Judgment*

In this judgment,[637] the Appeals Chamber invoked and applied the *iura novit curia* principle.

On 1 May 1998 former Primer Minister Kambanda had pleaded guilty to counts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and murder and extermination as crimes against humanity.[638] The Trial Chamber accepted the guilty plea. A pre-sentencing hearing was held on 3 September 1998 and the judgment was delivered on the following day. The Trial Chamber sentenced Kambanda to life imprisonment.

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[633] *Barayagwiza v. Prosecutor, Decision (Prosecutor's Request for Review or Reconsideration), Declaration of Judge Nieto-Navia*, Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000, § 19.

[634] *Ibid*., § 21.

[635] *Ibid*., § 25.

[636] See Pradel, Jean, *op. cit*. 15, p. 628 *et seq*.

[637] *Kambanda v. The Prosecutor, Judgment,* Case No. ICTR97-23-A, App. Ch., 19 October 2000. For a commentary on the judgment see Nemitz, Jan, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals*: *The International Criminal Tribunal for Rwanda 2000–2001*, Antwerp/Oxford/New York, Intersentia, Vol. 6, 2003, pp. 681–686.

[638] *Kambanda v. The Prosecutor, Judgment,* Case No. ICTR97-23-A, App. Ch., 19 October 2000, § 2.

During the appellate proceedings, Kambanda submitted that, should the Appeals Chamber reject his main request to overturn the guilty verdict and order a retrial, it should revise the entire sentence on five specific grounds. The Defence however did not advance any legal argument. The Prosecution, in its turn, contended that the Defence's failure to advance legal arguments was sufficient ground *in limine* to dismiss Kambanda's submissions.[639]

After hearing the arguments of the parties, the Appeals Chamber stated:

> [I]n the case of errors of law, the arguments of the parties do not exhaust the subject. It is open to the Appeals Chamber, as the final arbiter of the law of the Tribunal, to find in favour of an Appellant on grounds other than those advanced: *iura novit curia*. Since the Appeals Chamber is not dependent on the arguments of the parties, it must be open to the Chamber to consider an issue raised on appeal even in the absence of substantial argument. The principle that an appealing party should advance arguments in support of his or her claim is therefore not absolute: it cannot be said that a claim *automatically* fails if no supporting arguments are presented.[640]

From the above paragraph, it follows that the Appeals Chamber applied the *iura novit curia* principle, a well-established general principle of law.[641] Given that no rule of the Statute or the RPE embodies the principle, it is safe to contend that the Appeals Chamber applied it to fill the gap.

Furthermore, this example shows that legal issues settled by international criminal courts and tribunals in the light of general principles of law may lead to the adoption of appropriate legal rules to regulate such issues. In fact, in 2002 the President of the ICTR Appeals Chamber adopted the Practice Direction on Formal Requirements for Appeal from Judgments.[642] One of those requirements is to advance legal arguments with regard to the grounds of appeal (Article 4, paragraph a). If a party to the appellate proceedings does not comply with the formal requirements laid down in the Practice Direction, a Pre-Trial Judge or the Appeals Chamber may, 'within its discretion, decide upon an

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[639] *Ibid*., § 96.
[640] *Ibid*., § 98.
[641] See, for example, *Lotus, Judgment No. 9, 1927, PCIJ, Series A, No. 10*, p. 31; *Brazilian Loans, Judgment No. 15, 1929, PCIJ, Series A, No. 21*, p. 124; *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, PCIJ, Series A, No. 23*, pp. 18–19.
[642] Text in http://69.94.11.53/ENGLISH/basicdocs/pracdirections/formalreqe.htm.

appropriate sanction, which can include an order for clarification or re-filing. The Appeals Chamber may also reject a filing or dismiss submissions therein' (Article 13).

3.3.3. *The ICC*

The ICC is the first permanent international criminal court and is treaty-based. Its Statute was adopted on 17 July 1998 and came into force on 1 July 2002. The jurisdiction and functioning of the ICC are regulated by the provisions of its Statute and RPE.[643]

This subsection provides a brief examination of Article 21 of the Statute, which sets out the applicable law of the ICC (3.3.3.1). It also analyses three decisions in which the ICC has dealt, implicitly or explicitly, with the applicability of certain general principles of law (3.3.3.2).

3.3.3.1. *The Applicable Law*

Unlike the statutes of past and other current international criminal courts and tribunals, the ICC Statute lays down a specific rule setting out the applicable law.

Article 21 of the Statute reads as follows:[644]

> 1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

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[643] The amount of literature on the ICC is immense. See, e.g., Schabas, William, *op. cit*. 297, *passim*.

[644] For a commentary on Article 21 of the ICC Statute see McAuliffe de Guzmán, Margaret, *op. cit*. 22, pp. 435–446; Pellet, Alain, *op. cit*. 10, pp. 1051–1084; Verhoeven, Joe, 'Article 21 of the Rome Statute and the Ambiguities of Applicable Law', in *NYIL*, Vol. XXXIII, 2002, pp. 3–22.

> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
>
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

The ICC is bound to apply the legal rules and principles derived from the sources listed in paragraph 1. In contrast, it is allowed – but not bound – to apply the 'principles and rules of law as interpreted in its previous decisions' mentioned in paragraph 2. Pellet and Verhoeven are right in affirming that paragraph 2 states the obvious,[645] as the *stare decisis* principle is not part of general international law.[646]

In Article 21, paragraph 1 one may identify the so-called 'proper law' of the ICC,[647] i.e. the Statute, the Elements of the Crimes, and the RPE,[648] and the traditional sources of international law, namely conventions,[649] custom,[650] and general principles of law,[651] notwithstanding the peculiar wording employed by the drafters of the Statute.

Whatever the utility of Article 21 may be,[652] this provision lays down four requirements for the application of general principles of law by the ICC, which I call (i) subsidiarity, (ii) abstraction, (iii) representativeness, and (iv) consistency.

With regard to the first requirement, the Statute requires the ICC to apply general principles of law if no relevant rules can be derived from the sources listed in paragraphs 1(a) and (b). This means that the drafters of the ICC Statute had a rather narrow conception of the functions that general principles of law may play in judicial decisions. In their conception, such principles appear to be useful only to fill legal gaps. However, there is no doubt that the ICC may turn to general principles

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[645] Pellet, Alain, *op. cit*. 10, p. 1066; Verhoeven, Joe, *op. cit*. 644, p. 13.

[646] See Shahabuddeen, Mohamed, *Precedent in the World Court*, Cambridge, Grotius Publications/Cambridge University Press, 1996, *passim*.

[647] See Pellet, Alain, *op. cit*. 10, pp. 1053–1054.

[648] Article 21, paragraph 1(a), ICC Statute.

[649] Article 21, paragraph 1(b), ICC Statute.

[650] *Ibid*.

[651] Article 21, paragraph 1(c), ICC Statute.

[652] See Verhoeven, Joe, *op. cit*. 644, pp. 15–19, 21.

of law for other purposes, such as interpreting rules of the Statute and the RPE[653] or enhancing legal reasoning.

As for the requirement of abstraction, it means that the ICC must abstract principles from legal rules, rather than apply particular national legal rules. This is consistent with the traditional methodology for determining general principles of law.[654]

The requirement of representativeness prescribes that the legal principle at stake must be generally recognized in national law to be considered a general principle of law. The French version of the Statute is clearer than the English and Spanish versions in that respect.[655] It reads, *'les lois nationales représentant les différents systèmes juridiques du monde'*. The test to be applied by the ICC to choose the national laws to be the object of the comparison remains an open question; the only guidance provided by the Statute is that the national laws should include 'as appropriate, the national laws of States that would normally exercise jurisdiction over the crime'.[656] According to Saland, the inclusion of that segment of the rule is the price paid in the Rome Conference for reaching a compromise between those who believed that national laws could apply directly and those who considered that they could apply only via the general principles of law.[657]

Yet, the wording employed by the drafters of the Statute is vague. Article 21, paragraph 1(c) does not stipulate when it is 'appropriate' to take account of the 'national laws of States that would normally exercise jurisdiction over the crime'. It does not explain which such States are either. Apparently, the negotiating States referred to the States that may exercise jurisdiction in accordance with the traditional connecting criteria of criminal jurisdiction, in particular, territory and the nationality

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[653] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo*, Case No.: ICC-01/04-01/06, PT Ch. I, 24 February 2006, § 42. In this decision, the Pre-Trial Chamber declared that it could resort to general principles of law in order to determine the content of the gravity threshold set out in Article 17, paragraph 1(d) of the Statute. Eventually, it did not.

[654] See subsection 2.6.3, above.

[655] The Spanish version refers to 'principios generales del derecho que derive la Corte del derecho interno de los sistemas jurídicos del mundo'.

[656] See Article 21, paragraph 1(c), ICC Statute.

[657] Saland, Per, 'International Criminal Law Principles', in Lee, Roy (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, The Hague/London/Boston, 1999, pp. 214–215.

of the offender. In fact, the Draft Statute presented by the Preparatory Committee in 1998 mentioned the 'general principles of law derived form the Court from national laws or specific national laws from specific States as listed'; the list mentioned the territorial State and the State of the offender's nationality.[658]

As for the requirement of consistency, it means that the legal principles thus derived must be compatible with the Statute and international law. In Verhoeven's view, the reasons for laying down this requirement are 'rather mysterious'.[659] For this scholar, considering that general principles of law are to be applied in the absence of rules and principles derived from the sources listed in Article 21, paragraph 1(a) and (b), 'it is difficult to understand how they could be contradicting a-by hypothesis-non-existent rule.'[660] In Pellet's view, in contrast, the prescription of that requirement is fully justified, because of the special structure of international law and international criminal trials.[661] Pellet based his view on Judge Cassese's dissenting opinion in the *Erdemović* case.

The four conditions for the application of general principles of law by the ICC do not add anything new to the legal regime of the general principles of law under general international law. Nevertheless, the explicit reference to these conditions has the merit of making their existence clear.

3.3.3.2. *Three Decisions*

The number of decisions adopted by the ICC so far is rather small, if compared with the number taken by the ICTY or the ICTR. The reason is its recent institution and the fact that it has not so far held any trials. Still, there are three decisions which relate to the application of general principles of law and are thus germane to this book.

The decisions are in chronological order.

3.3.3.2.1. *Situation in Uganda, Decision on Prosecutor's Position*

This decision concerns *inter alia* a motion for reconsideration submited by the Prosecutor in the context of the situation in Uganda.[662] In that

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[658] See Pellet, Alain, *op. cit*. 10, p. 1075.
[659] See Verhoeven, Joe, *op. cit*. 644, p. 12.
[660] *Ibid*.
[661] Pellet, Alain, *op. cit*. 10, pp. 1075–1076.
[662] *Situation in Uganda, 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*, Case No.: ICC-02/04-01/05, PT. Ch. II, 28 October 2005.

motion, the Prosecutor had requested the Pre-Trial Chamber 'to reconsider [the Pre-Trial Chamber's] decision to delete from the warrants of arrest the dates, locations, and characteristics of the attacks', because, among other reasons, the delation impeded the Prosecutor's 'ability to maximize the potential for garnering international support for the execution of the warrants'.[663] He also requested 'clarification' of a particular issue identified in a document relating to the motion.[664] The Pre-Trial Chamber rejected the motion because the Statute and the RPE 'make no provision for such a broad remedy'.[665]

A contrario sensu, the Pre-Trial Chamber held that remedies exist if the regulatory instruments of the ICC provide for them. Put differently, it implicitly applied the general principle of law that no recourse lies unless conferred by statute.[666] In so doing, it filled the gap left by the absence of rules in the Statute or the RPE prescribing that the methods of recourse available to the parties are only those conferred by the regulatory instruments of the ICC.[667]

3.3.3.2.2. *Situation in the Democratic Republic of the Congo, Judgment on Application for Extraordinary Review*

This decision concerns the Prosecutor's application for extraordinary review of the Pre-Trial Chamber's decision denying leave to appeal against a previous Pre-Trial Chamber decision allowing victims to participate in the proceedings.[668] The review was 'extraordinary' in that neither the Statute nor the RPE provide for it.[669] In the Prosecutor's view, the interpretation of Article 82, paragraph 1(d) of the Statute left

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[663] *Ibid*., § 8.
[664] *Ibid*., § 9.
[665] *Ibid*., § 18.
[666] See subection 3.3.1.2.1, above.
[667] The same principle was applied following the same legal reasoning in a later decision adopted by another Pre-Trial Chamber. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecution Motion for Reconsideration*, Case No.: ICC-01/04-01/06, PT. Ch. I, 23 May 2006, p. 3. The finding was reaffirmed in a later decision: *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal*, Case No.: ICC-01/04-01/06, PT. Ch. I, 23 June 2006, § 9.
[668] *Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, Case No.: ICC-01/04, App. Ch., 13 July 2006.
[669] *Ibid*., § 3.

a lacuna apt to be filled by the general principles of law referred to in Article 21, paragraph 1(c).[670]

The Prosecutor asserted that many national legal systems of the main legal families of the world allow decisions of a hierarchically lower court rejecting an appeal to a higher court to be reviewed.[671] He gave the examples of fourteen national legal systems of the Romano-Germanic legal family,[672] five of the Common Law,[673] and three of the Islamic conception of law,[674] as he classified them.

In its turn, the Appeals Chamber observed that in all the Romano-Germanic and Common Law legal systems referred to by the Prosecutor, the right to review decisions of lower courts is granted by statutory law. This means that appellate courts do not have an inherent power to review decisions of subordinate courts disallowing an appeal.[675]

It also explained that the alleged general principle of law is not such, for the reason that it is not generally recognized in the Romano-Germanic legal family. For instance, the French legal system does not provide for the review of decisions disallowing a right to appeal. Another given example is the German legal system, which does not provide for review of decisions like those envisaged in Article 82, paragraph 1(d) of the ICC Statute. The Appeals Chamber also said that in all the national legal systems invoked by the Prosecutor the modalities for the exercise of such right differ and vary from one national legal system to another.[676] For these reasons, the Appeals Chamber concluded that no general principle of law prescribes the review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal.[677] It also contended that Article 82 of the Statute contains no lacuna to be filled by general principles of law, since it exhaustively defines the right to appeal against decisions of the Pre-Trial and Trial Chambers.[678]

It thus follows that while the Appeals Chamber denied the existence of a general principle of law which permits the review of decisions of

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[670] *Ibid*., §§ 5, 22.
[671] *Ibid*., § 25.
[672] Argentina, Chile, Ecuador, El Salvador, Finland, Germany, Mexico, Portugal, Spain, Guatemala, Honduras, Nicaragua, Panama, and Uruguay. *Ibid*., § 26.
[673] USA, United Kingdom, Canada, Sierra Leone, and Australia. *Ibid*., § 28.
[674] Malaysia, Philippines, and Singapore. *Ibid*., § 31.
[675] *Ibid*., §§ 26, 28.
[676] *Ibid*., §§ 27–29, 31.
[677] *Ibid*., § 32.
[678] *Ibid*., § 39.

hierarchically subordinate courts disallowing or not permitting an appeal, it implicitly applied the principle that no remedy lies unless conferred by statute.

The Appeals Chamber's finding is right. Two aspects of the decision deserve special consideration.

First, the Appeals Chamber went too far in arguing that there was no general principle of law on the matter because the rules regulating the right to appeal in the various countries are not standard. As explained above, Article 21, paragraph 1(c) of the Statute defines the general principles of law as principles derived from national legal rules, not as legal rules common to the generality of national legal systems. Therefore, the existence of uniform national legal rules in the main legal families of the world is not a condition for deriving from them a relevant general principle of law. In fact, declaring that no remedy lies unless conferred by statute would have been a sufficient explanation for dismissing the Prosecution's submission.

Secondly, the comparative research undertaken by the Appeals Chamber did not include any national legal system from Africa. Even if the outcome of the research remained the same, including national legal systems from Africa would have made the research truly international and evidenced the ICC's commitment to a pluralist conception of international criminal law.

3.3.3.2.3. *Situation in the Democratic Republic of the Congo, Decision on Witness Familiarization and Proofing*

This decision dealt with the issue of the admissibility of the practice of witness proofing.[679] According to the Pre-Trial Chamber, general principles of law do not allow witness proofing.[680]

In this case, the Prosecution had asserted (and the Defence denied), that witness proofing is 'a widely accepted practice in international criminal law'.[681] The measures covered by the Prosecution's definition of witness proofing may be divided into two categories, namely witness familiarization and witness proofing.[682] The first category includes

[679] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Practices of Witnesses Familiarization and Witness Proofing*, Case No.: ICC-01/04-01/06, PT. Ch. I, 8 November 2006.
[680] *Ibid*., § 42.
[681] *Ibid*., §§ 1–6.
[682] *Ibid*., § 18.

measures aimed at familiarizing witnesses with the framework of the ICC, the sequence of witness interrogation, the role of the participants at the hearing, etc. The second encompasses measures intended to help in the process of recollection, such as comparing witness statements to identify inconsistencies and telling the witness what questions the Prosecution's Trial Lawyer intends to put during the hearing.[683]

The Statute and the RPE regulate certain measures of familiarization of witnesses with the ICC.[684] Some of such measures are not only permitted, but also mandatory.[685] In contrast, the Pre-Trial Chamber deemed the practice of witness proofing to be inadmissible. No provision of the Statute, the RPE, or the Regulations of the Court governs this practice. In addition, it is not 'a widely accepted practice in international criminal law', as asserted by the Prosecution. For these reasons, the Pre-Trial Chamber resorted to general principles of law as a source of international criminal law.[686]

At the outset, the Pre-Trial Chamber observed that any general principle of law applicable to the issue at stake should be derived from 'national laws of the legal systems of the world including, as appropriate, the national laws of the Democratic Republic of the Congo'.[687] Then it found a great discrepancy in the various national legal systems examined.[688] Witness proofing is unethical or unlawful in nine of the ten national legal systems investigated by the Pre-Trial Chamber.[689] Accordingly, the Chamber concluded that there is no general principle of law permitting the practice.[690] It went on to declare, 'if any general principle of law were to be derived from the national laws of the legal systems of the world on this particular matter, it would be the duty of the Prosecution to refrain from undertaking the practice of witness proofing'.[691] For these reasons, the Pre-Trial Chamber ordered the Prosecution not to practise witness proofing.[692]

The Pre-Trial Chamber's decision was correct, even if at odds with the practice of the ICTY and the ICTR. These international tribunals accept

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[683] *Ibid*., §§ 14–17.
[684] *Ibid*., §§ 20–22.
[685] *Ibid*., § 23.
[686] *Ibid*., §§ 28–33.
[687] *Ibid*., § 35.
[688] *Ibid*., § 36.
[689] *Ibid*., § 37.
[690] *Ibid*., § 42.
[691] *Ibid*.
[692] *Ibid*., disposition.

the practice in certain circumstances.[693] In the context of the ICTY and the ICTR, the practice is not based on any particular general principle of law but on Rule 89(B) of their respective rules of procedure and evidence.

The Pre-Trial Chamber did not affirm the existence of a general principle of law whereby the Prosecution must refrain from proofing witnesses. In fact, the Chamber did not intend to proclaim the existence of such a principle; it used a conditional clause ('if any general principle of law were to be derived…') as a retorical tool aimed at reinforcing the legal reasoning of the decision it had already taken on the basis of other legal grounds.

A peculiar aspect of the decision is the broad interpretation made by the Pre-Trial Chamber of the term 'national laws' in Article 21, paragraph 1(c) of the Statute. In fact, it examined not just national legislation and case law, but also codes of conduct of national bar associations (in particular the Code of Conduct of the Bar Council of England and Wales).[694] Such method of proceeding was justified in the circumstances of the case, for the reason that in some States relations between lawyers and witnesses are regulated in part or in whole by deontological codes adopted by bar associations and not by legislation.[695]

The national laws covered by the comparative study were the laws of Brazil, Spain, France, Belgium, Germany, Scotland, Ghana, England and Wales, Australia, and the the USA. It should be noted that the Pre-Trial Chamber did not take cognizance of the national laws of the Democractic Republic of the Congo. Even if the inclusion of these laws would not have changed the outcome of the research, at least it would have contributed to giving *effet utile* to the words 'including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime' in Article 21, paragraph 1(c) of the Statute. Alternatively, it would have contributed to ascertaining when it is appropriate to look at such laws in the search for general principles of law.

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[693] See the practice cited by the Prosecution in *ibid*, § 32. A more recent ICTY decision authorizing witness proofing is *Prosecutor v. Milutinović et al., Decision on Ojdanić Motion to Prohibit Witness Proofing*, Case No. IT-05-87-T, T. Ch., 12 December 2006. For the ICTR see *Prosecutor v. Karemera et al., Decision on Interlocutory Appeal Regarding Witness Proofing*, Case No. ICTR-98-44-AR73.8, App. Ch., 11 May 2007.

[694] *Ibid*., §§ 38–39.

[695] See, for example, Article 705 of the Code of Conduct of the Bar Council of England and Wales, reproduced in *ibid*. § 38. See also Article 39 of the *Normas de Etica Profesional del Colegio de Abogados de la Provincia de Buenos Aires*. The text of these norms is available at www.calp.org.ar/Instituc/regladisci.asp.

3.3.4. *The SCSL*

The SCSL was established by agreement concluded between the UN and the government of Sierra Leone, pursuant to Security Council Resolution 1315 of 14 August 2000.[696]

This subsection provides an overview of the applicable law of the SCSL (3.3.4.1) and three examples of its resort to general principles of law (3.3.4.2).

3.3.4.1. *The Applicable Law*

The main regulatory instruments of the SCSL are its Statute and RPE. Pursuant to the former, the SCSL has the power to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since 30 November 1996 (Article 1).

The crimes within the jurisdiction of the SCSL are crimes against humanity, violations of common Article 3 to the Geneva Conventions and Additional Protocol II, other serious violations of international humanitarian law, and certain crimes under Sierra Leonean law (Articles 2–5, respectively). Article 5 is a particular rule of conventional international law which derogates from the general rule of international law requiring international courts and tribunals not to apply national law as such. Legal provisions such as Article 5 of the SCSL Statute are peculiar to the statutes of the so-called 'internationalized criminal courts and tribunals'.[697]

The rules of the SCSL Statute on individual criminal responsibility are identical to those of the ICTY and the ICTR. Yet, with regard to crimes under Sierra Leonean law, the applicable rules on individual criminal responsibility are those established under Sierra Leonean law (Article 6).

A provision peculiar to this Statute is Article 7. In accordance with it, the SCSL does not have jurisdiction over people who were under the age of fifteen at the time of the perpetration of the crime.[698]

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[696] See Frulli, Micaela, 'The Special Court for Sierra Leone: Some Preliminary Comments', *EJIL,* Vol. 11, No. 4, 2000, pp. 857–869; Beresford, Stuart and Muller, Alexander, 'The Special Court for Sierra Leone: An Initial Comment', *LJIL*, Vol. 14, No. 3, 2001, pp. 635–651.

[697] See Swart, Bert, 'Internationalized Courts and Substantive Criminal Law', in Romano, Cesare *et al*. (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia,* Oxford, Oxford University Press, 2004, pp. 295–298.

[698] See Corriero, Michael, 'The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone', *NYJHR*, Vol. 18, No. 3,

Another unusual provision is Article 10. This provision prescribes that amnesties in respect of the crimes listed in Articles 2–4 are not a bar to prosecution before the SCSL. In contrast, amnesties are a bar to prosecution in respect of crimes under Sierra Leonean law.[699]

The SCSL can impose upon those convicted imprisonment for a specified number of years (Article 19). Therefore, it can impose neither the death penalty nor life imprisonment. Imprisonment is to be served in Sierra Leone or in any State that has concluded an agreement with the SCSL for the enforcement of sentences. If the convicted person is eligible for pardon or commutation of sentence, the President of the SCSL shall decide the matter 'on the basis of the interests of justice and the general principles of law' (Article 22).

3.3.4.2. *Three Decisions*

The SCSL has so far delivered only two judgments on the merits of a case, in which there has been no explicit recourse to general principles of law as a source of international criminal law.[700] Furthermore, it is difficult to come across examples of the application of these principles in the other decisions. Even so, I detected three examples. These examples are analysed below. They are in chronological order.

3.3.4.2.1. *Prosecutor v. Norman et al., Decision on Lack of Jurisdiction*

The first example is the *Norman el al*. case. It concerns crimes against humanity, violations of common Article 3 to the 1949 Geneva Conventions and Additional Protocol II, and other serious violations of international humanitarian law allegedly committed by members of the former Civil Defence Forces of Sierra Leone. In this decision, the Appeals Chamber dealt with a motion on lack of jurisdiction with regard to the crime of

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2002, pp. 337–360; Smith, Alison, 'Child Recruitment and the Special Court for Sierra Leone', *JICJ*, Vol. 2, N. 4, 2004, pp. 1141–1153; Custer, Michael, 'Punishing Child Soldiers: The Special Court for Sierra Leone and the Lessons to be Learned from the United States's Juvenile Justice System', *TICLJ,* Vol. 19, No. 2, 2005, pp. 449–476.

[699] See Macaluso, Daniel, 'Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lomé Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone', *BJIL*, Vol. 27, No. 1, 2001, pp. 347–380; Meisenberg, Simon, 'Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone', *IRRC*, Vol. 86, No. 856, 2004, pp. 837–851.

[700] *Prosecutor v. Brima et al., Judgment,* Case No. SCSL-04-16-T, T. Ch. II, 20 June 2007. *Prosecutor v. Fofana and Kondewa, Judgment*, Case NO. SCSL-04-14-T, 2 August 2007.

child recruitment. In so doing, it resorted to the *nullum crimen sine lege* and *nullum crimen sine poena* principles.[701]

The fundamental Defence submission was that the SCSL had no jurisdiction over the accused under Article 4(c) of the Statute (crime of child recruitment), as this crime was not part of customary international law at the times germane to the indictment. Thus, conviction of the crime of child recruitment would violate the *nullum crimen sine lege* principle to the prejudice of the accused.[702] The Prosecution challenged the Defence submission.[703] Hence, the Appeals Chamber had to decide whether the customary rule prohibiting child recruitment entailed criminal responsibility at the time relevant to the indictment.[704]

At the beginning of its judgment the Appeals Chamber stated,

> It is the duty of this Chamber to ensure that the principle of non-retroactivity is not breached. As essential elements of all legal systems, the fundamental principle *nullum crimen sine lege* and the ancient principle *nullum crimen sine poena*, need to be considered.[705]

Given the reference to their essence and recognition by all legal systems, it is likely that the Appeals Chamber conceived of the principles as general principles of law. While there is no doubt that a violation of the prohibition on retroactive criminal law breaches the *nullum crimen nulla poena sine lege* principle,[706] the link made by the Appeals Chamber between the prohibition on retroactive criminal law and the principle 'no crime without punishment' is not entirely clear. The Appeals Chamber did not consider the issue, notwithstanding its previous announcement.

As far as the first principle referred to above is concerned, it suffices to say that the Appeals Chamber also recognized the requirement of *lex certa* as being an essential element of the *nullum crimen sine lege* principle, by pointing to the jurisprudence of the ICTY.[707] Eventually, in the

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[701] *Prosecutor v. Norman et al., Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, Case No. SCSL-04-14-AR72(E), App. Ch., 31 May 2004.

[702] *Ibid*., § 1.

[703] *Ibid*., § 2.

[704] *Ibid*., § 24.

[705] *Ibid*., § 24.

[706] See subsection 3.3.1.2.6, above. See also Article 15 of the ICCPR.

[707] *Prosecutor v. Norman et al., Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, Case No. SCSL-04-14-AR72(E), App. Ch., 31 May 2004, § 25.

light of various international legal instruments and national laws the Appeals Chamber concluded that, at the time relevant to the indictment, child recruitment entailed criminal responsibility under international law. Consequently, it dismissed the Defence motion.[708]

3.3.4.2.2. *Prosecutor v. Norman et al., Decision on Judicial Notice and Admission of Evidence*

In this decision, an SCSL Trial Chamber resorted to the principle that courts have the power to take judicial notice of facts in common knowledge.[709]

Before considering the merits of the Prosecutor's motion for judicial notice, the Trial Chamber thought it necessary to examine the nature and scope of judicial notice under national and international laws. According to the Trial Chamber, judicial notice enjoys universal recognition. Although the judicial notice originated in the Common Law legal family, the Romano-Germanic family adopted it later.[710] Given the reference to the recognition of the institution by the main legal families of the world, it is highly probable that the Trial Chamber considered the courts' power to take judicial notice of facts in common knowledge to be a general principle of law. There is a similar *obiter dictum* in another SCSL decision.[711]

In ascertaining the content and scope of the principle in question, the Trial Chamber referred to the German and the Russian penal codes as being national criminal laws recognizing judicial notice. On the other hand, it gave the examples of the Austrian Penal Code and the Slovenian Criminal Act as examples of the contrary.[712] It seems rather contradictory to affirm that the courts' power to take judicial notice of facts in common knowledge enjoys universal recognition and at the same time to give examples of national legal systems that do not recognize such power. Even so, there is no doubt that general principles of law recognize this power. As stated above, the recognition of a given legal principle in national law does not need to be unanimous in order to make it a general principle of

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[708] *Ibid*., §§ 30–56.

[709] *Prosecutor v. Norman et al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-14-PT, T. Ch., 2 June 2004.

[710] *Ibid*., § 15.

[711] *Prosecutor v. Sesay el al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-15-PT, T. Ch., 24 June 2004, § 26.

[712] *Prosecutor v. Norman et al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-14-PT, T. Ch., 2 June 2004, § 15.

law, but general.[713] Moreover, the teaching of learned scholars confirms the recognition of judicial notice as a general principle of law.[714]

One wonders why the Trial Chamber dealt with the institution of judicial notice as a general principle of law, considering that Rule 94(A) gives the chambers of the SCSL the power to take judicial notice of facts in common knowledge. One has the impression that the Trial Chamber did not intend to ascertain the existence of the principle at stake, but rather its content and scope, and, in particular, under what circumstances a given fact is deemed to fall within common knowledge.

Finally, it is worth observing that although the Trial Chamber declared that it would examine 'Common and Civil Law perspectives' for that purpose,[715] it in fact examined only judgments of English courts and the procedural law of the USA.[716] Yet, in the end, it relied upon the relevant jurisprudence of the ICTR.[717]

3.3.4.2.3. *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal to Attend Hearing*

In this decision,[718] a SCSL Trial Chamber deals with the principle that an accused should be tried in his presence.

The principal issue at stake was whether the trial could proceed in the absence of one of the accused. Having considered Article 17 of the Statute and Rule 60 of the RPE,[719] the Trial Chamber arrived at the conclusion that a trial *in absentia* in the context of the SCSL is permissible and lawful in certain circumstances.[720] Then it said:

> Consistent with this reasoning, the Chamber also notes that in most national law systems, the general rule is that an accused person should be

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[713] See subsection 2.6.2.

[714] See, e.g., Cheng, Bin, *op. cit*. 20, pp. 303–304.

[715] *Prosecutor v. Norman et al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-14-PT, T. Ch., 2 June 2004, p. 7.

[716] *Ibid*., §§ 18–20.

[717] *Ibid*., § 30.

[718] *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days*, Case No. SCSL-04-15-T, T. Ch., 12 July 2004.

[719] Article 17, paragraph 4(d) of the SCSL Statute grants the accused the right to be tried in their presence. Rule 60 of the SCSL REP reads as follows: 'An accused may not be tried in his absence, unless: (i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do; or (ii) the accused, having made his initial appearance, is at large and refuses to appear in court.'

[720] *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days*, Case No. SCSL-04-15-T, T. Ch., 12 July 2004, § 8.

> tried in his or her presence, but that exceptionally, courts of justice can have recourse to trial of an accused person in his absence where such an option becomes imperative but in limited circumstances.[721]

It is probable that the Trial Chamber resorted to general principles of law in order to show the consistency of that legal provision with international law. This is so because Rule 60 of the SCSL RPE regulates the circumstances in which a trial may proceed in the absence of the accused. Although the spectrum of national laws examined by the Trial Chamber was extremely limited (it looked only at Canadian law),[722] the deficiency was somewhat compensated for by the Trial Chamber having recourse to decisions of the ICTR.[723]

Finally, it is worth noting that the Trial Chamber confirmed that the right of the accused to be tried in his presence is subject to limitations, as Rule 60 prescribes.

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[721] *Ibid*., § 9. A similar decision was adopted in *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Accused, Sesay and Kallon to Appear for their Trial*, Case No. SCSL-04-15-T, T. Ch., 12 January 2005, § 12.

[722] *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days*, Case No. SCSL-04-15-T, T. Ch., 12 July 2004, § 9.

[723] *Ibid*., § 10.

Chapter Four

ANALYSIS OF PRACTICE AND OF RELEVANT SCHOLARLY WRITING

4.1. The Autonomy of General Principles of Law as a Source of International Criminal Law

The decisions of international criminal courts and tribunals examined in the last chapter confirm the autonomy of general principles of law as a formal source of international law, that is, a source distinct from international conventions and custom (section 4.1.1). Moreover, general principles of law are a meaningful material source of international criminal law (subsection 4.1.2).

Considering that the ICTY has suggested that there are three different sets of general legal principles (general principles of criminal law, general principles of international criminal law, and general principles of law consonant with the basic requirements of international justice), the issue arises whether there are substantial differences between them (subsection 4.1.3).

4.1.1. *General Principles of Law as a Formal Source of International Criminal Law*

International criminal law is a branch of public international law. Thus, it draws upon the same formal sources, namely conventions, custom, and general principles of law. The ICTY, for example, has explicitly referred to Article 38 of the ICJ Statute[724] and 'the usual sources of international law'[725] as the places in which to find its applicable law.

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[724] See *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. IIquater, 16 November 1998*, § 414*; *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 40.

[725] *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin,* Case No. IT-94-1-A-AR77, App. Ch., 31 January 2000, § 13; *Prosecutor v. Delalić et al., Judgment*, Case No. IT-96-21-A, App. Ch., 20 February 2001, § 583.

Scholars are of the same opinion. Among them we find Simma, Paulus, Cassese, Degan, and Ambos. Below I provide a brief overview of their opinions on this matter.

Simma and Paulus state that the sources of international criminal law are identical to those of general international law. For this reason, they refer to the sources listed in Article 38 of the ICJ[726] as being the sources of international criminal law.

Cassese, too, explains that general principles of law are a source of international criminal law because this is a branch of general international law. His classification of the sources of international criminal law is quite detailed. He classifies them as follows: primary sources (treaties and custom); secondary sources (which are included in conventional rules, such as binding resolutions of the UN Security Council); general principles of international criminal law, or general principles of law; and general principles of law recognized by the community of States.[727] According to Cassese, international criminal courts and tribunals should look at the sources in the following order. First, conventional rules and the rules stipulated in secondary sources if these have laid down the provisions which confer jurisdiction on the court or tribunal and which organize the procedure (such as the Statutes and the RPE of the ICTY, the ICTR, the SCSL, and the ICC). Secondly, if such rules do not exist or contain gaps, then international criminal courts and tribunals should have recourse to customary law or to conventions explicitly or implicitly referred to in them. Thirdly, if such rules do not exist or do not regulate the legal issue at stake, international courts and tribunals should resort to general principles of international criminal law, or to general principles of law. Finally, if a legal gap still exists, then international judicial bodies should turn to general principles of criminal law common to the nations of the world.[728]

It should be noted that Cassese's classification of the sources of international criminal law does not differ from the usual sources of general international law, namely conventions, custom, and general principles of law. First, a secondary source is a conventional source of the second degree; as far as the binding resolutions of the UN Security Council are concerned, their source of validity is no other than the UN

[726] Simma, Bruno and Paulus, Andrea, *op. cit*. 12, p. 55, §§ 1–2.
[727] Cassese, Antonio, *op. cit*. 12, p. 26.
[728] *Ibid*.

Charter, i.e., an international convention.[729] Secondly, the general principles of international criminal law are likely to have attained customary status. Thirdly, the general principles of criminal law common to the nations of the world are general principles of law; instead of relating to law in general, i.e., Law – what Cassese calls 'general principles of law' – , they relate to criminal law in particular.

Degan, too, in his turn takes the view that international criminal law flows from the sources listed in Article 38, paragraph 1 of the ICJ Statute.[730] General principles of law are thus an autonomous source of international (criminal) law if they are not transformed into customary law.[731]

Ambos also identifies the sources of international criminal law in Article 38 of the ICJ Statute.[732] In his view general principles of law as understood in their traditional sense (that is, as derived from national legal systems) may be taken into account to verify or deny the existence of customary rules *in statu nascendi* which have not yet been consolidated. Despite the fact that the international practice scrutinized in the last chapter apparently does not provide any examples in that regard, I agree with Ambos that general principles of law may be able to have such function.

Ambos is also of the opinion that general principles of law may be found in the so-called 'soft law' (decisions of international quasi-judicial organs, statements made in diplomatic conferences, etc.), as a sort of 'universal *opinio iuris* without State practice'. In his view, that leads to an assimilation between custom and general principles of law, in the sense of 'principles and rules of international law' as laid down in Article 21, paragraph 1(b) of the ICC Statute. He gives the example of the ICTY declaring the prohibition of reprisals in the event of attacks against civilians on the battlefield, based on 'demands of humanity and the dictates of public conscience, as manifested in *opinio necessitatis*'.[733]

Cassese holds a similar view. He says that practice and *opinio iuris* play a different role in international humanitarian law because of the

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[729] On Article 25 of the UN Charter see Suy, Erik and Angelet, Nicolas, 'Article 25', in Cot, Jean-Pierre *et al*. (eds.), *La Charte des Nations Unies: Commentaire article par article*, 3rd edition, Paris, Economica, 2005, pp. 909–918.

[730] Degan, Vladimir, *op. cit*. 13, p. 50.

[731] *Ibid*.

[732] Ambos, Kai, *op. cit*. 14, p. 35.

[733] *Ibid*., pp. 37–38.

Martens Clause, which puts on an equal footing State practice and the 'laws of humanity' and 'dictates of public conscience'. As a result, the requirement of State practice may not need to apply to the formation of a rule or principle based on the laws of humanity or the dictates of public conscience. For the same reason, the requirement of *opinio iuris* or *opinio necessitatis* may be particularly important. Consequently, a general *opinio iuris* on the binding character of a particular rule or principle may lead to the formation of a customary rule or principle, even when there is no general and consistent State practice or no practice at all.[734]

4.1.2. *General Principles of Law as a Formal and Material Source of International Criminal Law*

The frequent application of general principles of law by international criminal courts and tribunals has revealed the need better to regulate certain legal issues. This is why some of those principles were later transformed into specific legal rules. Therefore, general principles of law are not just a formal source of international criminal law, but also an important material source.[735]

As an illustration, I give seven examples of this transformation: (i) the principle that courts have the power to take judicial notice of facts in common knowledge is reflected by Article 21 of the IMT Charter, Article 13, paragraph d of the IMTFE Charter, Rule 94 of the ICTY RPE, Rule 94 of the ICTR RPE, and Rule 94 of the SCSL RPE; (ii) the principle of personal culpability has attained customary status[736] and is also reflected in the principle of individual criminal responsibility laid down in Article 7, paragraph 1 of the ICTY Statute, Article 6, paragraph 1 of the ICTR Statute, Article 25 of the ICC Statute, and Article 6, paragraph 1 of the SCSL Statute; (iii) the *nullum crimen sine lege* principle has attained customary status and is also laid down in Article 22 of the ICC Statute;[737] (iv) the *nulla poena sine lege* principle is reflected by Article 23 of the ICC Statute;[738] (v) the prohibition on retroactive criminal

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[734] See Cassese, Antonio, *op. cit*. 164, pp. 160–161.

[735] For the concept of material source see footnote 149.

[736] See, for instance, *Prosecutor v. Blaškić, Judgment,* Case No. IT-95-14-T, T. Ch. I, 3 March 2000, § 264.

[737] See Dupuy, Pierre-Marie, 'Normes internationales pénales et droit impératif', in Ascensio, Hervé *et al*. (eds.), *Droit international pénal*, Paris, Centre de droit international de l'Université Paris X-Nanterre, 2000, p. 73.

[738] *Ibid*.

laws to the detriment of the accused (*nullum crimen sine lege praevia*) is a general principle of international criminal law and is also laid down in Article 24, paragraph 1 of the ICC Statute;[739] (vi) the *lex mitior* principle is laid down in Article 24, paragraph 2 of the ICC Statute; and (vii) the principle that an accused shall be tried in his presence is reflected in Article 21, paragraph 4(d) of the ICTY Statute, Article 20, paragraph 4(d) of the ICTR Statute, Article 67, paragraph 1(d) of the ICC Statute, and Article 17, paragraph 4(d) of the SCSL Statute.

To be clear, not only is the effective application of general principles of law by international criminal courts and tribunals important in the development of international criminal law because it identifies areas where specific legal rules are needed; also the mere consideration of the applicability of general principles of law with regard to a particular issue may prompt States to legislate on such areas. Consider, for example, the issue of duress as a ground for excluding criminal responsibility, which, probably as a result of the discussion held by the ICTY Appeals Chamber on the matter,[740] prompted the drafters of the ICC Statute to regulate the issue by inserting into it a specific provision (Article 31, paragraph 1(d)).

4.1.3. *A Difference between Three Sets of Legal Principles?*

A Trial Chamber of the ICTY referred to the existence of three kinds of general legal principles upon which the tribunal might rely in the following circumstances:

> [A]ny time the Statute does not regulate a specific matter, and the *Report of the Secretary-General* does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (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. It must be assumed that the draftspersons intended the Statute to be based on international law, with the consequence that any possible *lacunae* must be filled by having recourse to that body of law.[741]

The question arises what the similarities and differences are between those three sets of legal principles and, more precisely, what their formal

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[739] *Ibid*.

[740] See subsection 3.3.1.2.5, above.

[741] *Prosecutor v. Kupreskić et al., Judgment*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 591.

source is. The Trial Chamber did not elaborate on the matter. Nevertheless, it dealt with the third set of legal principles. It said that one of the principles requires that 'the rights of the accused be fully safeguarded'. The other principle prescribes that 'the Prosecutor and, more generally, the International Tribunal be in a position to exercise all the powers expressly or implicitly deriving from the Statute, or inherent in their functions, that are necessary for them to fulfil their mission efficiently and in the interests of justice'.[742]

Cassese, who was the Presiding Judge of the Trial Chamber which made the distinction, later clarified the issue to some extent in his textbook on international criminal law. General principles of international criminal law 'include principles specific to criminal law, such as the principles of legality, and of specificity, the presumption of innocence, the principle of equality of arms, etc.'[743] These principles are applied at the international level because of their transposition from national legal systems to international criminal law; at present, they are embedded in the international legal system.[744] Therefore, their determination does not require an exhaustive comparative law study, but can be made by way of generalization and induction from the principal traits of the international legal order.[745]

Yet, it is worth noting that Cassese's examples reveal that the general principles of international criminal law have a common origin and are similar in content and scope to the 'general principles of criminal law common to the major legal systems of the world'. There is one reason for this: principles such as the legality of crimes and penalties and the presumption of innocence are also legal principles 'common to the major legal systems of the world'.

As for the legal basis for the application of 'general principles of criminal law common to the major legal systems of the world' and the 'general principles of international criminal law', there is room to argue that it derives from the very same source of international (criminal) law, namely general principles of law. The only difference between these principles is that while recourse to international jurisprudence and comparative law is the appropriate method for arriving at the former, the latter may be identified in conventional and customary rules of international

[742] *Ibid*., § 739.
[743] Cassese, Antonio, *op. cit*. 12, p. 31.
[744] *Ibid*.
[745] *Ibid*.

criminal law (in particular, in international human rights instruments). In fact, one may identifiy general principles of international criminal law, such as the right to a fair trial, the presumption of innocence, and the prohibition of retroactive criminal laws to the prejudice of the accused in Articles 14 and 15 of the ICCPR. This may explain why the application of general principles of international criminal law by international criminal courts and tribunals is not subject to the prior transposition of these principles into international law; they are already part of it.

More intriguing is the concept of general principles of law consonant with the basic requirements of international justice. From the outset, one may wonder whether the idea of the existence of general principles of law *that are not* consonant with the basic requirement of international justice is plausible at all. Put differently, such principles cannot be other than the 'usual' general principles of law, such as the *res iudicata* and *iura novit curia* principles. True, the two examples provided by the Trial Chamber do not fit into this concept and, what is more, it is uncertain whether they are real general principles of law. This is true in particular of the second example, as the 'principle' stated by the Trial Chamber is rather a declaration of judicial policy deprived of substantial legal content.

4.2. A Subsidiary Source of International Criminal Law?

International criminal courts and tribunals have conceived of general principles of law as a subsidiary source of international criminal law. The ICTY has done this openly, as for instance when one of its Trial Chambers declared that it has the power to resort to this source when conventional or customary rules of international law cannot settle a particular legal issue.[746]

Article 21, paragraph 1(c) of the ICC Statute reflects this concept of general principles of law. As we saw earlier, this provision authorizes the ICC to have recourse to this source if the sources listed in paragraphs 1(a) and (b) of that provision fail to regulate the legal issue at stake.

It is worth recalling that general principles of law have played an important gap-filling function in the decisions of international criminal courts and tribunals, as we saw in the last chapter. For this reason, even if

[746] *Prosecutor v. Kupreskić et al., Judgment*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 591.

subsidiary in nature, general principles of law have not been unimportant in the practice of international criminal courts and tribunals. Consider, for example, the issues of whether duress, diminished mental responsibility, and self-defence constituted valid grounds for excluding criminal responsibility under general international criminal law.[747]

International criminal courts and tribunals have also settled other significant legal issues by resorting to general principles of law as a means of interpretation of legal rules. In interpreting legal rules on that basis, international criminal courts and tribunals have not been the mere *'bouche qui prononce les paroles de la loi'*, paraphrasing Montesquieu's idea of the judiciary.[748] In fact, they have sometimes interpreted legal provisions in accordance with value-oriented general principles. Such a method of proceeding led to some law-creation, to a kind of *praetorian* law. Think, for example, of the principle of human dignity as applied by the ICTY in order to define the crime of rape under international criminal law. The application of that principle in the interpretation of Article 3 of the ICTY Statute led to a *precise* and detailed definition of the objective and subjective elements of this crime.[749] By relying on value-oriented general principles, international criminal courts and tribunals base their legal findings not on mere speculation but on influential legal arguments. This has the capacity to neutralize a 'charge' of arbitrary interpretation.[750]

In fact, the decisions examined in the last chapter show that general principles of law have occupied a prominent place in the legal reasoning of international criminal courts and tribunals. The latter have resorted to general principles of law not just to choose one interpretation over another, but also to make certain legal arguments more powerful. In such situations, the invocation of general principles of law may purport to reinforce the legal reasoning of a decision primarily based on a particular legal rule.[751] Or, what is more, to lay down the foundations of a given legal argument, even if the principle in question is one already embodied in a particular legal provision of the statute of the court or tribunal concerned. Not every general legal principle has played this 'foundational' role; this was reserved for those principles which are at

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[747] See subsections 3.3.1.2.5, 3.3.1.2.13, and 3.3.1.2.15, respectively.

[748] Montesquieu, Charles, *De l'esprit des lois*, Paris, Garnier frères, 1868, livre XI, chapitre VI.

[749] See subsections 3.3.1.2.7 and 3.3.1.2.14, respectively.

[750] See generally Kolb, Robert, *op. cit.* 6, *passim*.

[751] See subsections 3.3.1.2.11 and 3.3.1.2.14, respectively.

the same time general principles of international criminal law. Examples of such principles are the principles of individual criminal responsibility and proportionality in sentencing.[752]

True, it is not always crystal-clear whether a given general principle of law is playing a gap-filling, interpretative, or supplementary function in a decision. This is due to the fact that the functions sometimes overlap. In any event, the judicial decisions examined in sections 3.2 and 3.3 make it clear that, notwithstanding the subsidiary nature of general principles of law as a source of international criminal law, the principles derived therefrom have played an important normative role in the decisions of international criminal courts and tribunals.

4.3. The Determination of General Principles of Law

Leaving aside the general principles of international criminal law, international criminal courts and tribunals have often ascertained the existence, content, and scope of general principles of law by having recourse to their decisions and scholarly writing, or by means of comparative law.

4.3.1. *Recourse to Judicial Decisions and Scholarly Writing*

International criminal courts and tribunals have turned to the usual auxiliary means for the determination of rules of international law, to settle the following principles among others: impartiality of the judiciary,[753] *nullum crimen nulla poena sine lege*;[754] courts have the power to take judicial notice of facts of common knowledge,[755] an accused should be tried in his presence,[756] and no recourse lies unless conferred by statute.[757]

De Hemptinne has observed that the ICTY refers less and less to sources external to the Statute while, conversely, it relies more and more on its own decisions.[758] Gradoni found in De Hemptinne's words

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[752] See subsections 3.3.1.2.8 and 3.3.1.2.11, respectively.
[753] See subsection 3.3.1.2.12.
[754] See subsection 3.3.1.2.16.
[755] See subsection 3.3.4.2.2.
[756] See subsection 3.3.4.2.3.
[757] See subsection 3.3.3.2.1.
[758] See intervention of De Hemptinne, Jérôme, in round-table presided by Tulkens, Françoise (s.l., s.d.), in Cassese, Antonio and Delmas-Marty, Mireille (eds.), *Crimes internationaux et juridictions internationales*, Paris, Presses Universitaires de France, 2002, pp. 134–135.

a confirmation of the thesis whereby general principles of law are 'recessive' in nature as a source of international law, given that conventional and customary rules are prone to absorbing the general principles of law after some time.[759]

It should be noted that when international criminal courts and tribunals referred to their own decisions or to those of another such body to determine the existence, content, and scope of general principles of law, they did not apply jurisprudential rules. They applied conventional or customary rules, or general principles of law as previously determined by themselves or another other court or tribunal. Therefore, the fact that the ICTY (or any other international criminal court or tribunal) refers more and more to its own jurisprudence does not necessarily mean that it applies less and less often general principles of law (and, by the same token, conventional and customary rules). It means only that it turns more and more to its own decisions as a subsidiary means of determination of rules and principles of international law. Thus, for example, when the SCSL determined the limits to the right of an accused to be tried in his presence by referring to decisions of the ICTR, actually it applied a general principle of law as interpreted by the ICTR.[760]

Finally, it is worth observing that scholarly writing has also played a role –albeit a little one if compared with judicial decisions- as a means for the determination of general principles of law in the practice of international criminal courts and tribunals. In fact, such bodies have resorted to the writing of scholars in order to ascertain the existence, content, and scope of principles such as those of consumption or lesser included offence[761] and impartiality of the judiciary.[762] Yet, it appears that no general principle of law has been ascertained on the sole basis of this subsidiary means; for such a purpose, scholarly writing has typically been coupled with an analysis of relevant legislation and judicial decisions.

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[759] Gradoni, Lorenzo, 'L'exploitation des principes généraux de droit dans la jurisprudence des Tribunaux internationaux pénaux *ad hoc*', in Fronza, Emanuela et Manacorda, Stefano (eds.), *La justice pénale internationale dans les décisions des tribunaux ad hoc/Études des Law Clinics en droit pénal international*, Dalloz, Paris, Giufrè, Milano, 2003, p. 12, footnote 10.

[760] See subsection 3.3.4.2.3.

[761] See subsection 3.3.1.2.9.

[762] See subsection 3.3.1.2.12.

4.3.2. *The 'Vertical Move'*

It is apparent from the decisions examined in sections 3.2 and 3.3 that general principles of law have in particular been derived from national laws (constitutions, legislation, and judicial decisions). The ICC has even looked at deontological professional codes.[763] As far as legislation is concerned, they have examined not just legislation enacted by a national parliament or congress, but also that passed by the parliaments or congresses of federated States, regions, etc.

Such a course of action is correct. For long, the national sources of criminal law have been custom, legislation, and judicial decisions. At present, national constitutions are also an important source of criminal law in many countries.[764] On the other hand, the role of custom has decreased. Therefore, in general, one may find the criminal law of the national legal systems of the main legal families of the world in national constitutions, legislation, and judicial decisions.[765]

As explained in subsection 2.6.1, general principles of law should be derived from national laws in force. This requirement is particularly important as far as criminal law is concerned, because of the prohibition on the application of retroactive criminal laws *in malam partem*. Thus, there is no doubt that the law to be examined in order to derive general principles of law pertaining to criminal law should be the law in force at the time of the commission of the crime. Whether international criminal courts and tribunals have respected this condition is unclear, as, with the exception of one case,[766] they have never stated that they were examining criminal laws in force. Considering that they often limit their comparative research to information that is immediately accessible, especially via the Internet,[767] and, given that such information normally consists of the law in force at the time of the research, there is a risk that the data thus obtained are not the law in force at the time of the commission of the crime. In short, the examination of national criminal laws that were not in force at the time of the commission of the crimes charged against the accused in order to derive from them general principles of law,

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[763] See subsection 3.3.3.2.3.

[764] For example, Article 18 of the Constitution of the Argentine Republic lays down the principle *nullum crimen nulla poena sine lege*, the right against self-incrimination, etc.

[765] See Pradel, Jean, *op. cit*. 15, pp. 53–113.

[766] See subsection 3.3.1.2.14.

[767] See Delmas-Marty, Mireille, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law', *JICJ*, Vol. 1, No. 1, 2003, p. 18.

may infringe the prohibition of the application of retroactive criminal laws to the detriment of the accused.

Furthermore, the decisions examined in sections 3.2 and 3.3 also show that international criminal courts and tribunals have resorted to general principles relating to both substantive and procedural criminal law.

With respect to substantive criminal law, they have had recourse to principles such as that there is no criminal responsibility without moral choice,[768] personal culpability (individual criminal responsibility),[769] that the conditions for the application of the defences of duress, state of necessity, and superior orders are particularly strict,[770] that the severest penalties apply to crimes against humanity,[771] that duress is a mitigating factor in sentencing,[772] and proportionality in sentencing.[773]

As far as procedural criminal law is concerned, international criminal courts and tribunals have turned to the following principles among others: *non bis in idem,*[774] *res iudicata,*[775] that the burden of proof rests upon the Prosecutor,[776] *in dubio pro reo*,[777] the impartiality of the judiciary,[778] that no recourse lies unless conferred by statute,[779] that courts have the power to take judicial notice of facts of common knowledge,[780] and that an accused should be tried in his presence.[781]

It is not surprising that general principles of substantive criminal law have been invoked several times, for the reason that the general part of international criminal law has many gaps.[782] In addition, it is worth noting the equally important number of general principles of procedural criminal law invoked by international criminal courts and tribunals, notwithstanding the apparently fully-fledged sets of rules of procedure and evidence adopted by these courts and the historical substantial

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[768] See subsection 3.2.1.2.2.
[769] See subsections 3.2.1.2.3, 3.3.1.2.11, and 3.3.2.2.1.
[770] See subsection 3.3.1.2.3.
[771] See *ibid*.
[772] See subsection 3.3.1.2.5.
[773] See subsection 3.3.1.2.11.
[774] See subsections 3.3.1.2.2 and 3.3.1.2.8.
[775] See subsection 3.3.1.2.6.
[776] See *ibid*.
[777] See *ibid*.
[778] See subsection 3.3.1.2.12.
[779] See subsections 3.3.1.2.1 and 3.3.3.2.1.
[780] See subsection 3.3.4.2.2.
[781] See subsection 3.3.4.2.3.
[782] See for example, Ambos, Kai, *op. cit*. 14, p. 38.

differences between the inquisitorial and adversarial models of criminal procedure. In fact, the convergences between these two models are greater than has hitherto been believed.[783] Such convergences result from the impact of international law (the ICCPR and the different regional human rights treaties) on national criminal procedure,[784] which imposes respect for certain procedural rights on all States party to those treaties, regardless of the model of criminal procedure which such States have adopted. This is, for example, the case for the principles that courts must be established by law and that an accused should be tried in his presence.[785]

Finally, it should be noted that not all determinations of general principles of law made by international criminal courts and tribunals have been entirely persuasive. Sometimes, the 'principle' derived does not really reflect the legal principle underlying the national legal systems examined, such as that determined by the ICTY whereby courts have the inherent power to deal with contempt.[786] At other times, the principle derived by a court or tribunal lacks the necessary level of abstraction inherent in general principles of law, and it thus looks more like a *praetorian* legal rule than a general legal principle, as for example the principle of reciprocal speciality with respect to the issue of cumulation of offences.[787] And, at other times, the principle is not generally recognized in national laws, or at least the court or tribunal has not demonstrated its general recognition by nations; an example of these principles is that of speciality, also with regard to the issue of cumulation of offences.[788]

4.3.3. *The 'Horizontal Move'*

Now the issue arises how international criminal courts and tribunals have verified that a given legal principle is generally recognized in national law. They have employed different techniques in order to assert

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[783] See Pradel, Jean, *op. cit*. 15, p. 125, § 89. See also Vogler, Richard, *op. cit*. 15, *passim*.

[784] Delmas-Marty holds a similar opinion. See Delmas-Marty, Mireille, 'L'influence du droit comparé sur l'activité des Tribunaux pénaux internationaux', in Cassese, Antonio and Delmas-Marty, Mireille (eds.), *Crimes internationaux et juridictions internationales*, Paris, Presses Universitaires de France, 2002, pp. 98–99.

[785] See, e.g., Article 14, paragraphs 1 and 3(d) of the ICCPR, respectively.

[786] See subsection 3.3.1.2.10.

[787] See subsection 3.3.1.2.9.

[788] See *ibid*.

the requirement of general recognition. Such techniques oscillated from merely referring to recognition by 'most nations' or other similar formula to undertaking a comparative law study.

4.3.3.1. *The 'Civilized Nations'*

International criminal courts and tribunals have rarely employed in their decisions the expression 'general principles of law recognized by civilized nations', which appears only in some separate opinions or declarations.[789] The reference to the full wording of Article 38, paragraph 1(c) of the ICJ Statute there was merely aimed at individualizing the source of international law in question and not at identifying the States the legal systems of which ought to be examined in order to derive general principles of law. Put differently, no international criminal court or tribunal has pretended that there are civilized and uncivilized or barbaric nations, and that only the legal systems of the former should be taken into account in determining the existence, content, and scope of general principles of law.

4.3.3.2. *Tests for Establishing General Recognition*

International criminal courts and tribunals have referred to (i) 'general principles of law recognized by all nations';[790] (ii) 'general principles of law recognized by the community of nations',[791] (iii) 'general principles of law recognized by the nations of the world';[792] or (iv) 'general principles of law common to the major legal systems of the world'.[793]

As explained above,[794] expressions such as the four referred to in the last paragraph do not say much about the national legal systems that

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[789] For example, see *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, §§ 56–57; *Barayagwiza v. Prosecutor, Decision (Prosecutor's request for review or reconsideration), Declaration of Judge Nieto-Navia*, Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000, § 20.

[790] *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T, T. Ch. I, 29 November 1996, § 26; *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-A, App. Ch., 20 February 2001, § 583.

[791] *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T, T. Ch. I, 29 November 1996, § 40.

[792] *Prosecutor v. Tadić, Judgment,* Case No. IT-94-1-A, App. Ch., 15 July 1999, § 225.

[793] *Prosecutor v. Kupreskić et al., Judgment*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 591.

[794] See subsection 2.6.2.2.

ought to be included in any comparative research. For this reason, the question arises what international criminal courts and tribunals mean by 'all nations', 'community of nations', 'the nations of the world', or 'major legal systems of the world'.

4.3.3.3. *The Main Legal Families of the World*

The decisions examined in chapter 3 show that whatever the expression chosen, in general international criminal courts and tribunals mean the main legal families of the world, i.e., the Romano-Germanic and the Common Law.[795] On one occasion they also referred to the 'criminal law of other States',[796] and on another to the 'Marxist legal systems'.[797] The former category indicates that international criminal courts and tribunals sometimes have trouble deciding into which of the two main legal families they should place a given national legal system.[798] This reveals the shortcomings of relying exclusively on the classification of national legal systems into legal families.

The question arises whether the classification of national legal systems into legal families is appropriate as far as criminal law is concerned.

At the outset, it is worth observing that the reference to the Marxist legal family is entirely inappropriate for deriving general principles of law at present, as that family no longer exists.[799] Perhaps it is for this reason that the criminal laws of the States invoked as representative of the Marxist legal family (the SFRY and China) in that decision are usually invoked as representative of the Romano-Germanic legal family in the practice of the same international tribunal.[800]

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[795] International criminal courts and tribunals prefer the expression 'Civil Law systems' to 'Romano-Germanic'. For the reasons given in footnote 222, I think the latter term is more appropriate.

[796] *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 61.

[797] *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997, § 538.

[798] See Gradoni, Lorenzo, *op. cit*. 759, p. 17.

[799] See David, René and Jauffret-Spinozi, Camille, *op. cit*. 11, p. 19, § 20.

[800] With respect to China, see, for example, *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-AR77, App. Ch., 31 January 2000, § 16–17. As regards the SFRY, see, for instance, *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998, §§ 180–181.

One has the impression that the classification of national legal systems into legal families is somewhat unsuitable as far as criminal law is concerned. The classification of national legal systems into legal families concerns in particular the theory of the sources of law.[801] In the past, it was suitable for identifying the sources of criminal law within the various national legal systems. Thus, generally, in the Romano-Germanic legal systems the criminal law was found in codes, whereas in the Common Law systems it was found in judgments. The current state of affairs is different. For instance, in England and Wales – a Common Law jurisdiction- most of criminal law is found in statutes (statutory offences) rather than in judgments (common law offences).[802]

Furthemore, the classification of national legal systems into legal families is somewhat irrelevant with respect to procedural criminal law. The reason is that comparative criminal procedure studies have often bee undertaken on the basis of the model of criminal procedure (adversarial or inquisitorial) adopted by States.[803] Yet, the classification of criminal procedure into adversarial and inquisitorial models is inappropriate for discovering general principles of law pertaining to procedural criminal law, notwithstanding that, historically, the Romano-Germanic legal systems have adopted the inquisitorial and the Common Law systems the adversarial model. This is due to the fact that, at present, national criminal procedures reflect a convergence between the two models.[804] Therefore, neither the classification of national legal systems into legal families nor the classification of procedures into inquisitorial and adversarial seems to be entirelly apt for deriving general principles of law pertaining to substantive and procedural criminal law respectively.

Even so, international criminal courts and tribunals have heavily relied upon the classification of national legal systems into Romano-Germanic and Common Law legal families. Thus, the question arises which methodology – if any- they have employed to choose the representative samples of each of those legal families.

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[801] See David, René and Jauffret-Spinozi, Camille, *op. cit*. 11, p. 15, § 16; Pradel, Jean, *op. cit*. 15, p. 51, § 38.

[802] Ashworth, Andrew, *op. cit*. 435, p. 6.

[803] See for example Vogler, Richard, *op. cit*. 15, *passim*, who additionally investigates the 'popular justice tradition'.

[804] See Pradel, Jean, *op. cit*. 15, p. 125, § 89. On the impact of adversariality on the criminal procedural laws of Europe and Latin America see Vogler, Richard, *op. cit*. 15, p. 157 *et seq*.

4.3.3.4. *The Representative National Systems*

International criminal courts and tribunals have not adopted any particular methodology for choosing the national legal systems to be examined in order to derive from them general principles of law. The following reasons may explain why.

First, personal knowledge;[805] that is, the research usually includes national legal systems with which the judges are acquainted. This explains why many judges include in their research the legal system of the States of which they are nationals. For example, in the *Erdemović* case,[806] the research undertaken by Judges McDonald and Vohrah included the laws of the USA and Malaysia, that is, those judges' respective countries of origin. Another example is the *Furundžija* case;[807] here the research included the laws of Zambia, England, and Italy, i.e., the countries of origin of the three members of the Trial Chamber. Likewise, the personal knowledge of the judges' legal officers is also relevant, as they are normally the people who gather the data to be analysed by the judges.

The second reason is accessibility.[808] As Judges McDonald and Vohrah said before undertaking comparative research on the issue of duress, the research would include national legal systems the case law of which 'was, as a practical matter, accessible' to them.[809] However, while this reason could justify why certain national legal systems are included in the research, it does not explain why other accessible systems are not.

Thirdly, international criminal courts and tribunals are prone to taking account of the national legal system where the crimes they are trying took place. This is why the ICTY often scrutinizes the laws of the SFRY, Bosnia Herzegovina, and Croatia, and the ICTR the laws of Rwanda. Such reasonable behaviour seems to be provoked by the concern to respect the *nullum crimen nulla poena sine lege* principle when the issue at stake is one of substantive criminal law.

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[805] See Delmas-Marty, Mireille, *op. cit*. 767, p. 18.

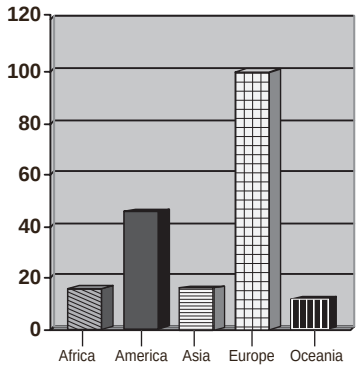
[806] *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997.

[807] *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998.

[808] See Delmas-Marty, Mireille, *op. cit*. 767, p. 18.

[809] *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 57.

The decisions examined in sections 3.2 and 3.3 demonstrate that international criminal courts and tribunals have been excessively inclined to select European national legal systems in order to derive general principles of law. The chart below illustrates the number of times that national legal systems of the five continents have been cited in those decisions.



It is worth noting that the legal systems of Germany, Australia, France, England and Wales, the USA, Italy, and Canada, in this order, have been the most frequently invoked systems in research (15, 14, 14, 13, 12, 10, and 8 times each, respectively). Taken together, they represent 43% of the national legal systems examined, while the remaining 59 national legal systems represent the other 57%. Reference to those seven national legal systems is definitely systematic.

Curiously enough, although the great majority of the national legal systems of the American continent belong to the Romano-Germanic legal family, the two most invoked national criminal laws of that continent are those of the USA and Canada, which historically were based on the Common Law and the adversarial model of criminal procedure. This reveals that international criminal courts and tribunals have not often taken into account the national legal systems of Latin America in order to derive general principles of law.

Finally, the chart also shows that the national legal systems of Africa and Asia have also not often been examined by international criminal courts and tribunals in the search for general principles of law. The excessive focus on European national legal systems runs counter to a pluralist conception of international criminal law.

4.3.4. *Last Observations on the Issue of Determination*

Despite the fact that the unfortunate expression 'civilized nations' has had very little use in the practice of international criminal courts and tribunals, the national legal systems most frequently examined for the purpose of deriving general principles of law are, with the exception of the Australian and the Canadian, still nearly the same as those of what were once called 'civilized nations'. That is, a handful of European national legal systems and that of the USA. In short, it seems that though the formula has changed, the essence remains the same.

The decisions examined in sections 3.2 and 3.3 also reveal that comparative law has played a minor role as a method for determining general principles of law. As Gradoni rightly pointed out, the display of national legal systems in the practice of international criminal courts and tribunals has at best mimicked the comparative law method.[810] Additionally, it seems that it aims at legitimating judges' decisions.[811]

For these reasons, recourse to comparative law as a method of ascertaining general principles of law would be a safeguard against legal imperialism, i.e., the prevalence of a given legal tradition or concept of law over others. It would also contribute to the consolidation of a pluralist concept of international criminal law.[812]

4.4. The Transposition of General Principles of Law

The question in this section is whether international criminal courts and tribunals have transposed and applied general principles of law directly or whether, in contrast, they have found legal obstacles hindering the transposition and subsequent application of general principles of law at the international level.

Subsection 4.4.1 submits that national and international criminal law are substantially analogous and that this circumstance facilitates the transposition of general principles of (criminal) law into the international setting and their subsequent application by international criminal courts and tribunals. Then, subsection 4.4.2 examines the issue whether, notwithstanding the analogies between national and international

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[810] Gradoni, Lorenzo, *op. cit*. 759, p.16.
[811] Delmas-Marty, Mireille, *op. cit*. 767, p. 18.
[812] *Ibid*., *passim*.

criminal law, there may be problems hampering the transposition of general principles of law from the former into the latter.

4.4.1. *Substantive and Procedural Criminal Law Analogies*

Like other international judicial bodies, international criminal courts and tribunals apply general principles of law by analogy. They have thus discovered answers to problems arising in the field of international criminal law by referring to similar problems and their solution in national criminal law.

The decisions examined in sections 3.2 and 3.3 indicate that, generally, international criminal courts and tribunals apply general principles of law because they take for granted the existence of analogies between the foundations of individual criminal responsibility at the national and at the international levels, and between national and international criminal proceedings. Those decisions also demonstrate that both substantive and procedural criminal law have been important as sources of analogies.

International as well as national criminal law purports to regulate the prosecution and trial of individuals suspected of having committed or otherwise participated in the commission of a crime, and, if they are found guilty, the imposition of a penalty on them. In other words, international criminal law obtains its legitimacy as criminal law from the purposes of punishment –especially retribution and deterrence-, which have been transposed from national criminal law.[813] Plainly, this is a basic analogy between substantive national and international criminal law.[814]

It is thus not suprising that, generally, international criminal courts and tribunals (i) have not refused to transpose and apply general principles of law to international criminal law, and (ii) have transposed general principles of law from national to international criminal law

[813] See Werle, Gerhard, *op. cit*. 290, p. 30, § 85. Yet, criminal law and international criminal law aim to protect different values; see Flectcher, George, 'Parochial versus Universal Criminal Law', *JICJ*, Vol. 3, No. 1, pp. 20–34. On the recognition of retribution and deterrence as the main purposes of punishment at the international level see Raimondo, Fabián, 'La individualización de las penas de prisión en las sentencias de los Tribunales Penales Internacionales *ad hoc* de las Naciones Unidas', *Relaciones Internacionales*, No. 21, 2001, pp. 143–159.

[814] See Gil y Gil, Alicia, *Derecho penal internacional: especial consideración del delito de genocidio*, Madrid, Tecnos, 1999, p. 20; Pastor, Daniel, 'El sistema penal internacional del Estatuto de Roma. Aproximaciones jurídicas críticas', in Baigún, David *et al*., *Estudios sobre justicia penal. Homenaje al Profesor Julio B. J. Maier*, Buenos Aires, Editores del Puerto, 2005, pp. 701–702.

without any adjustments, as evidenced by the decisions referred to in sections 3.2 and 3.3.[815]

The general principles of law applied by international criminal courts and tribunals without any adjustments demonstrate that with respect to substantive criminal law there are analogies between national and international criminal law as regards, *inter alia*, the following issues: (i) the foundations of criminal responsibility (there is no criminal responsibility without moral choice; personal culpability; the establishment of criminal culpability requires an analysis of the objective and subjective elements of the crime;); (ii) grounds for excluding criminal responsibility (the conditions of application of the defences of duress, state of necessity, and superior orders are particularly strict; self-defence); (iii) the fixing of the term of imprisonment (proportionality in sentencing; the severest penalties apply for crimes against humanity; duress and diminished mental responsibility are mitigating factors in sentencing); and (iv) the definition of crimes (such as murder and rape).

Furthermore, the application of general principles of law pertaining to procedural criminal law without any transformation of their content shows that there are relevant analogies with respect to matters such as: (i) evidence (the burden of proof rests upon the Prosecutor; *in dubio pro reo*; courts have the power to take judicial notice of facts of common knowledge); (ii) fair trial (presumption of innocence; courts must be established by law; an accused should be tried in his presence); and (iii) appellate proceedings (no recourse lies unless conferred by Statute).

4.4.2. *The Problems of Transposition*

Judge Cassese has formulated the most eloquent argument against the automatic transposition of national law concepts – general principles of law are a type of such concepts-into international criminal law.[816] Judge

[815] The existence of analogies between national and international criminal law is apparent by reason not only of the application of general principles of law by international criminal courts and tribunals, but also the crystalization of general principles of law and other national criminal law concepts into conventional rules (e.g., Articles 22 to 25 of the ICC Statute) and rules of procedure and evidence of international criminal courts and tribunals (e.g., Rule 94 of the ICTY's RPE, Rule 94 of the ICTR's RPE, and Rule 94 of the SCSL's Statute). All these are examples of the importance of general principles of law as a material source of international law in general and international criminal law in particular.

[816] *Prosecutor v. Erdemović, Judgment, Separate and Dissenting Opinion of Judge Cassese*, Case No. IT-96-22-A, App. Ch., 7 October 1997.

Cassese's opinion was a reaction to Judges McDonald and Vohrah's recourse to 'practical policy considerations' – a doctrine peculiar to the Common Law- in order to settle the issue of whether Erdemović's guilty plea was equivocal.[817]

In Judge Cassese's opinion, 'legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings.'[818] He gave the following reasons to support his contention: (i) international (criminal) courts and tribunals should investigate all the means available at the international level before resorting to national law;[819] (ii) international criminal law is a mixture of Romano-Germanic and Common Law systems, which makes it unique, and it possess a legal logic that is substantially different from that of each of those two legal families;[820] and (iii) international trials are to some extent different from national criminal proceedings.[821]

According to Pellet, Judge Cassese's opinion is 'absolutely convincing'.[822] While it is true that national law concepts (including general principles of law) should not be automatically applied at the international level, it is also true than the second and third arguments put forward by Judge Cassese may not be fully persuasive.

Thus, it is correct to contend that international criminal courts and tribunals should look at international before turning to national law. The exploration should include the primary and secondary sources of international law, that is, international conventions, binding resolutions of the UN Security Council (such as the Statutes of the ICTY and the ICTR), and customary law (including the general principles of international criminal law and those of international law).

However, the mixture of Romano-Germanic and Common Law systems is not peculiar to international criminal law and international trials. As Pastor pointed out, national criminal procedures are (to different

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[817] See *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, §§ 73–91.

[818] *Prosecutor v. Erdemović, Judgment, Separate and Dissenting Opinion of Judge Cassese*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 2.

[819] *Ibid*., § 3.

[820] *Ibid*., § 4.

[821] *Ibid*., § 5.

[822] Pellet, Alain, *op. cit*. 10, p. 1076. Also see Simma, Bruno and Paulus, Andreas, *op. cit*. 12, p. 67, § 20.

extents) hybrid everywhere; 'pure' criminal procedures – if they have ever existed- are of the past but not of the present.[823] Furthermore, the mixture of Romano-Germanic and Common Law elements would not necessarily prevent the application of general principles of law for the reason that, by definition, these are legal principles common to both legal families as well as to other concepts of law.

As far as the 'special features' of international trials are concerned, it is worth observing that neither Judge Cassese nor the ICTY chambers that endorsed his opinion specified what such special features are. In contrast, it should be noted that, as stated above, the essence of national and international trials is the same, i.e. determining whether a crime has been committed, and, if so, establishing the size, quality, and modality of the penalty to be imposed on the person found guilty.

To sum up, although it is correct that the transposition of general principles of law into the international setting must not be automatic, it is also correct that international criminal courts and tribunals have rarely rejected the application of general principles of law in international criminal law because of their incompatibility with the structure of the latter. Moreover, the decisions examined in sections 3.2 and 3.3 show that on those rare occasions on which some incompatibility arose, the court or tribunal concerned adjusted the contents of the general principle of law at stake to the features of international law and applied it to the case.

Notwithstanding the above considerations, the transposition of general principles of law into international criminal law is not always free of difficulties. Even if the ICTY's voices of caution against automatic transpositions sometimes seem to have been overstated or misplaced, it is right that the transposition of general principles of law to the international realm should be done carefully. In fact, there may be two types of difficulties hampering the transposition, namely the lack of analogous institutions between national and international criminal laws and the differences in structure and enforcement mechanisms between national legal systems and international law.

From the outset it should be noted that while the first difficulty is more a barrier to transposition, the second may be overcome by means of adjustment or adaptation of the contents of the general principle of law concerned to the particular features of the international arena.

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[823] Pastor, Daniel, *op. cit*. 814, p. 702.

The impediment consists of looking for analogies in a field of national criminal law that has no counterpart in international criminal law, such as the law of extradition. A case in point is *Mejakic et al*., before the ICTY.[824] In this case, the Appeals Chamber confirmed the Trial Chamber's finding that the customary law governing the institution of extradition does not apply to the issue of the transfer of the accused to the ICTY. The reason given by the Appeals Chamber is that 'their transfer … is not the result of an agreement between the State and the International Tribunal',[825] as is the case with respect to extradition from one State to another. As the Appeals Chamber rightly went on to explain, 'the obligation upon States to cooperate with the International Tribunal and comply with its orders arises from Chapter VII of the United Nations Charter. Accordingly, a State cannot impose conditions on the transfer of an accused, or invoke the rule of speciality or non-transfer concerning its nationals'.[826] Despite the fact that this example concerns the application of customary law and not of general principles of law, it is relevant to this study because it makes it clear that national criminal law is not always a source of analogies for international criminal law.

The difficulty referred to above concerns the structural differences between national legal systems and international law, as well as the different nature of their enforcement mechanisms. The ICTY's practice provides an appropriate example of this. In the *Blaškić* case, the issue arose whether the ICTY has the power to issue binding orders to State officials. While Croatia submitted that the ICTY does not have such a power under customary law, the Prosecutor submitted the contrary, *inter alia*, because 'Otherwise its powers would be wholly inferior to those of the national criminal courts over whom it has primacy'.[827] The Appeals Chamber rejected the Prosecutor's 'domestic analogy', because

> It is well known that in many national legal systems, where courts are part of the State apparatus and indeed constitute the judicial branch of the State apparatus, such courts are entitled to issue orders to other (say administrative, political, or even military) organs, including senior State

[824] *Prosecutor v. Mejakic et al., Decision on Joint Defence Appeal Against Decision on Referral under Rule 11bis*, Case No.: IT-02-65-AR11bis.1, App. Ch., 27 April 2006.

[825] *Ibid*., § 31.

[826] *Ibid*.

[827] *Prosecutor v. Blaškić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95-14-AR108 bis, App. Ch., 29 October 1997, § 39.

> officials and the Prime Minister or the Head of State. … The setting is totally different in the international community. It is known *omnibus lippis et tonsoribus* that the international community lacks any central government with the attendant separation of powers and checks and balances. In particular, international courts, including the International Tribunal, do not make up a judicial branch of a central government. The international community primarily consists of sovereign States; each jealous of its own sovereign attributes and prerogatives, each insisting on its right to equality and demanding full respect, by all other States, for its domestic jurisdiction. Any international body must therefore take into account this basic structure of the international community. It follows from these various factors that international courts do not necessarily possess, *vis-à-vis* organs of sovereign States, the same powers which accrue to national courts in respect of the administrative, legislative and political organs of the State. Hence, the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension. In addition to causing opposition among States, it could end up blurring the distinctive features of international courts.[828]

For these reasons, but above all because of the relevant customary law and the provisions of the Statute, the Appeals Chamber concluded that the ICTY does not have the power to issue orders binding on State officials.[829]

In fact, there are two aspects of the decentralized structure of international society that may hamper the transposition of general principles of law into international law. These are the absence of an international legislature and the fact that international courts and tribunals are not the judicial power of a central government.

Given the absence of an international legislature, there is no legislation *stricto sensu,* i.e., laws directly binding on all international legal subjects. As a result, general principles of law based on the idea of legislation cannot automatically be applied at the international level. However, one should not make a mountain out of a molehill, as international criminal courts and tribunals may have the ability to adapt the general principle of law at stake to that particular feature of the international setting. The principle that courts must be established by law is the best example of this. As illustrated in section 3.3, the ICTY did not reject the application of this principle; it adjusted its contents and applied it to the case.

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[828] *Ibid*., § 40.
[829] *Ibid*., §§ 41–45.

The fact that international courts and tribunals are not the judicial power of a central government may result in them being unable to transpose general principles of law that do not take account of the immunities of States and States officials under general international law as if they were individuals in national legal systems. The *Blaškić* case referred to above, where the ICTY declared that it does not have the power to issue orders binding on State officials, is the best example of this.

Yet, as far as international criminal law is concerned, the argument that 'the international community primarily consists of sovereign States' and the special position of States under international law should not be exaggerated. As Degan rightly pointed out, legal relations between the parties and other participants in international criminal trials are different from those among sovereign States.[830] Thus, even if is true that in some particular circumstances the structural differences between national legal systems and international law may be an obstacle to the transposition of general principles of law from the former into the latter, it is also true that, in general, it is not. The decisions investigated in sections 3.2 and 3.3 are evidence of this.

4.5. Concluding Remarks

In summary, a rich jurisprudence on general principles of law has emerged from the decisions of international criminal courts and tribunals. These principles have played a very significant role in international criminal proceedings by filling the gaps left by the absence of applicable legal rules. Moreover they fulfilled important functions as means of interpretation of imprecise legal rules and to enhance legal reasoning.

International criminal courts and tribunals have ascertained the existence, content, and scope of general principles of law, not only by having recourse to the usual subsidiary means of determination of rules of international law, i.e. decisions of international courts and tribunals and scholarly writing, but also by deriving them directly from national legal systems. Their derivation has normally encompassed two moves, one vertical and the other horizontal. While the first move aims at abstracting a legal principle from national legal rules, the second purports to find out whether the legal principle thus derived is generally recognized by nations.

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[830] Degan, Vladimir, *op. cit.* 13, p. 50.

As far as the transposition of general principles of law from national legal systems into international law is concerned, the practice of international criminal courts and tribunals shows that, generally, the transposition has been effected without any adjustments. When the particular features of international law hampered the direct application of a given general principle of law in the international arena, the international criminal court or tribunal concerned has adjusted the principle so as to make it compatible with international law and applicable to the case.

Finally, it is worth observing that general principles of law are not just a formal source of international criminal law, but also a material source of great importance for the development of international criminal law. Evidence of this contention is the fact that several general principles of law applied by international criminal courts and tribunals were later transformed into conventional and customary rules of international criminal law.

Chapter Five

CONCLUSIONS

Provocatively speaking, general principles of law were a dormant source of international law, which was revived in international criminal law because there were legal gaps to fill and imprecise legal rules to interpret.

International criminal courts and tribunals have been quite innovative in applying general principles of law, in comparison with the PCIJ and the ICJ. Only the former in fact had frequent recourse to general principles of law to fill gaps. As evidenced by the *Erdemović* case,[831] the entire outcome of an international trial may depend on the existence or not of a general principle of law. General principles of law are particularly relevant with respect to the grounds for excluding criminal responsibility,[832] as the conviction of an accused may depend on the existence or not of a given defence under general principles of law. Hence, even though general principles of law are a subsidiary source of international law (in that they usually come into play to fill legal gaps), they are certainly important in respect of general international criminal law because this is still undeveloped.

It is worth noting that the gap-filling function has not been the only frequently used function of the general principles of law in the decisions of international criminal courts and tribunals. These have also often relied upon general principles of law to interpret legal rules and to reinforce legal reasoning. International criminal courts and tribunals have repeatedly turned to these principles as a means of interpretation of provisions of their Statutes and RPE, as well as of rules of customary law.[833] General principles of law played an important interpretative role, *inter alia*, for ascertaining the elements of the crime of rape.[834] In their confirmative role, they have been the starting point for legal arguments touching upon the basics of criminal law, such as the principle

[831] See subsection 3.3.1.2.5.
[832] See subsections 3.3.1.2.5, 3.3.1.2.13, and 3.3.1.2.15.
[833] See section 4.2.
[834] See subsections 3.3.1.2.7 and 3.3.1.2.14.

of culpability or individual criminal responsibility,[835] the *nullum crimen nulla poena sine lege* principle,[836] and the presumption of innocence.[837] Yet, the invocation of general principles of law does not always make arguments more convincing, as the *Delalić et al*. case indicates.[838]

Unlike the PCIJ and the ICJ, international criminal courts and tribunals have made clear their methodology for ascertaining the existence, content, and scope of general principles of law. If the principle is a basic human right guaranteed by international treaties, such as that courts must be established by law, *nullum crimen nulla poena sine lege*, the presumption of innocence, and that an accused should be tried in his presence, the courts point to the relevant provisions of the treaties,[839] or invoke the principles directly without any concrete legal reference.[840] These kinds of principles are not derived directly from national laws, even if they are generally recognized in national law. Traditional general principles of law such as *res iudicata* and *iura novit curia*, in their turn, are usually identified by relying on international jurisprudence.[841] Finally, other general principles of criminal law are normally distilled by means of comparative law.

The national legal systems that are most frequently examined are, by far, those of Western Europe; and, within this group, those of Germany, France, and England and Wales.[842] International criminal courts and tribunals also frequently invoke the legal systems of Australia, the USA, Italy, and Canada. Referring almost systematically to more or less the same national legal systems is a simplistic way to choose the 'samples', and it runs counter to a pluralist concept of international law.[843]

This does not mean that those national legal systems are not representative of the Romano-Germanic or the Common Law legal family, i.e., the main legal families of the world, but it means that many other national legal systems are often neglected in the search for general principles of law. If international law is the law of international society,

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[835] See subsections 3.2.1.2.3, 3.3.1.2.8, 3.3.1.2.11, and 3.3.2.2.1.
[836] See subsections 3.2.1.2.1, 3.2.2.2, 3.3.1.2.6, 3.3.1.2.16, and 3.3.4.2.1.
[837] See subsections 3.3.1.2.6 and 3.3.1.2.14.
[838] See subsection 3.3.1.2.13.
[839] See subsection 3.3.1.2.1.
[840] See subsections 3.2.1.2.1, 3.2.2.2, 3.3.1.2.6, 3.3.1.2.16, and 3.3.4.2.1, with regard to the *nullum crimen nulla poena sine lege* principle.
[841] See 3.3.1.2.6, 3.3.2.2.2, and 3.3.2.2.3.
[842] See subsection 4.3.3.4.
[843] See subsection 4.3.4.

and international society is the society of all societies,[844] general principles of law should be conceived of not as being the legal principles common to a handful of States, but as common to all humanity, that is, to all societies. Therefore, it would be a positive sign if international criminal courts and tribunals were to choose in a more balanced manner the national legal systems examined in the search for general principles of law. An appropriate way of doing so could be selecting the national legal systems in accordance not only with 'historical titles', but also with a geographically equitable distribution. Even if the inclusion of other national legal systems in the research does not necessarily change its outcome, the legal principles thus derived will enjoy greater legitimacy because of the effective demonstration of their worldwide recognition by nations.

Furthermore, international criminal courts and tribunals have transposed general principles of law into international criminal law without great difficulty, despite the differences between national legal systems and international law on structure, legal sources, subjects, and enforcement mechanisms. As follows from a global assessment of the decisions examined in sections 3.2 and 3.3, the great majority of the general principles of law applied by international criminal courts and tribunals have been transposed to the international arena without more. The reason is no other than the basic analogies between national criminal laws and international criminal law.

This study demonstrates, first, that the ascertainment and application of general principles of law by international criminal courts and tribunals has contributed to the development of international criminal law by shedding light on issues unregulated by conventional and customary international rules. It should be noted that the Statute and the RPE of the ICC now reflect many of those principles.[845]

Secondly, in spite of their subsidiary nature, general principles of law are a meaningful source of general international criminal law

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[844] See Allot, Philip, *The Health of Nations: Society and Law beyond the State*, Cambridge, Cambridge University Press, 2002, *passim*.

[845] For instance, the following principles: (i) Article 25, paragraph 2 of the Statute sets out the principle of individual criminal responsibility; (ii) Article 36, paragraph 3(a) of the Statute reflects that of the impartiality of the judiciary; (iii) Article 66, paragraph 2 of the Statute lays down the principle that the burden of proof rests upon the Prosecutor; (iv) Rule 69 reflects the principle that courts have the power to take judicial notice of facts in common knowledge; (v) Rule 145 lays down the principles that diminished mental responsibility and duress may be mitigating factors in sentencing.

because this contains many legal gaps. It is not a mere coincidence that international criminal courts and tribunals resorted first and foremost to general principles of law to fill such gaps.[846]

Thirdly, in a manner unlike that employed by early international arbitral tribunals and the PCIJ and ICJ, international criminal courts and tribunals have not relied just upon decisions of international courts and tribunals (and, to a minor extent, upon scholarly writing) as subsidiary means of determining general principles of law, but also upon comparative law research. Nonetheless, the comparative law method as employed by international criminal courts and tribunals may need some improvement, particularly with regard to the selection of the national legal systems to be examined.

Finally, the differences between national legal systems and international law on structure, legal sources, subjects, and enforcement mechanisms have not been a major barrier to the application of general principles of law in the field of international criminal law. If occasionally a difficulty arose, international criminal courts and tribunals solved the problem during the transposition process. They did so by adjusting the content of the principle at stake to the specificities of the international arena.[847]

[846] See, for example, subsections 3.3.1.2.1, 3.3.1.2.3, 3.3.1.2.15, 3.3.2.2.3, and 3.3.3.2.2.
[847] See for instance, 3.3.1.2.1.

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