

GENERAL PRINCIPLES OF LAW AS GAP-FILLERS

Neha Jain*

Abstract

The general principles of law are a primary mechanism for gap filling in international criminal law. However, their interpretation by tribunals has been fitful, contradictory, and often misguided. Given that the general principles have been used to settle crucial legal issues that greatly impact the rights of the accused, the confusion concerning their application threatens the authority of the enterprise of international criminal justice. This Article takes up the challenge of systematizing the application of general principles, both in traditional public international law, and more specifically in international criminal law, with a view to securing the legitimacy of the international criminal trial. It makes sense of the chaotic jurisprudence on general principles by developing a novel typology based on content-dependent and content-independent reasons for action. The Article applies insights from comparative law literature and criminal law theory to expose

* Associate Professor of Law, University of Minnesota Law School.

the challenges faced by tribunals in deducing both content-dependent and content-independent general principles. The Article concludes by recommending a content-dependent conception of general principles that is mindful of the demands of the legality principle as the best way forward for international criminal tribunals.

I. INTRODUCTION

Imagine that an accused before an international criminal tribunal has been charged with the crime against humanity of murder and admits his guilt. He argues that he has a defense because he acted under duress. The text of the Statute establishing the tribunal is silent and says nothing about the possibility of the defense of duress.¹ How should the matter be resolved?

The international judge has responded thus:² when no clear answer is forthcoming in the legal text, judges can resort to other sources of law to address

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

² The nature and scope of the judicial function in international criminal tribunals, particularly when the law is unclear, is now slowly starting to command scholarly attention. *See, e.g.*, JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL

this lacuna.³ One of the most flexible, but deeply controversial, sources in their arsenal is the “general principles of law”.⁴ This Article problematizes the concept

TRIBUNALS (Shane Darcy and Joseph Powderly eds., 2010); Antonio Cassese, *Black Letter Lawyering v. Constructive Interpretation*, 2 J. INT’L. CRIM. JUST. 265 (2004); William Schabas, *Interpreting the Statutes of the ad hoc Tribunals*, in MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 847 (L Chand Vohrah et al. eds., 2003).

³ On the appropriate sources of international criminal law, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 20, 26 (2003); Dapo Akande, *Sources of International Criminal Law*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 41 (Antonio Cassese ed., 2009); Vladimir Djuro-Degan, *On the Sources of International Criminal Law*, 4 CHINESE J. INT’L. L. 45, 50 (1989)

⁴ International criminal tribunals have also had recourse to customary international law to elucidate new principles, but since much has been written on this issue, I leave this aside for the moment. For detailed analyses of customary international law as applied by international criminal courts, see, e.g., Mia Swart, *Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and “Adventurous Interpretation”*, 70 ZEITSCHRIFT FÜR AÜSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 459, 463-48 (2010)

of general principles to demonstrate how the international criminal judge's reliance on this source of international law as the primary gap-filling mechanism is deeply problematic. Far from yielding a consistent, clear rule, the interpretation and application of general principles has been fitful, contradictory, and often misguided.⁵ The Article makes sense of the chaotic jurisprudence on general principles in international criminal law by developing a novel typology based on content-dependent and content-independent reasons for action. It argues that the content-independent approach to general principles, which has been acclaimed widely in international criminal law scholarship, is incoherent and cannot survive close scrutiny in light of insights from comparative law theory. Similarly, while it may be possible to overcome the state-consent based public international law

(Ger.); GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 13-15 (2005); André Nollkaemper, *The Legitimacy of International Law in the Case Law of the International Tribunal for the Former Yugoslavia*, in AMBIGUITY IN THE RULE OF LAW: THE INTERFACE BETWEEN NATIONAL AND INTERNATIONAL LEGAL SYSTEMS 13, 17 (T.A.J.A. Vadamme & J. Reestman eds., 2001).

⁵ See Ilias Bantekas, *Reflections on Some Sources and Methods of International Criminal and Humanitarian Law*, 6 INT'L. CRIM. L. REV. 121, 126-129 (2006).

orientated challenge to the content-dependent interpretation of general principles, it is more difficult to reconcile the latter with the demands of the legality principle in criminal law. The Article proposes a content-dependent conception of general principles which is limited by and sensitive to the legality principle as the best way forward for international criminal tribunals.

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

The structure of the Article is as follows. Part II briefly describes the distinction between content-dependent and content-independent reasons in analytic legal philosophy and applies this classification to the long standing debate on the nature of general principles in public international law. It argues that content-dependent reasons for action accord with a view of general principles as principles of natural law or objective justice. A content-independent view of

general principles, in contrast, simply takes their presence in the majority of municipal legal systems as the basis for their validity.

Part III analyzes the manner in which general principles have been understood by international criminal tribunals through the lens of the content-dependent and content-independent division. It evaluates the different processes through which general principles have been derived, in particular, by the International Criminal Tribunal for the Former Yugoslavia (ICTY), and criticizes the approach that has characterized this endeavor. It also discusses the lack of any comprehensive treatment of the general principles debate in the Rome Statute of the International Criminal Court (ICC).

Parts IV and V address the challenges that international criminal law will face as it strives to develop a principled method for reliance on general principles. It introduces insights gleaned from comparative law theory to question the conventional wisdom that international criminal tribunals may legitimately draw on general principles as a source of law merely by expanding the range of municipal legal systems under consideration. It puts forward a critique of the pure content-independent approach to general principles, which has dominated international criminal law thinking, by expanding on the debate on legal families and legal transplants developed by comparativists. It also examines the challenges posed to the content-dependent approach by the demands of State sovereignty in international law and the importance of the principle of legality in criminal law.

The article concludes with the recommendation of a content-dependent interpretation of general principles that is mindful of the constraints imposed by the legality principle as the best approach for international criminal law. In doing so, it also contributes to a deeper understanding of one of the most profoundly misunderstood sources of public international law. Additionally, through its engagement with comparative law theory, it brings the hitherto relatively isolated disciplines of public international law and comparative law into conversation⁶ and demonstrates the potential for scholars and practitioners working in these disparate fields to learn from each other.

II. GENERAL PRINCIPLES IN PUBLIC INTERNATIONAL LAW

1 Gaps in the Law and General principles

To adequately comprehend what exactly is at stake in the debate on the true nature of the “general principles of law”, it is important to refer to the function that they are meant to serve. The general principles of law are primarily regarded

⁶ See Teemu Ruskola, *Where is Asia? When in Asia? Theorizing Comparative Law and International Law*, 44 U.C. DAVIS L. REV. 879, 890, 892 (2011) (on the complementarity of international law and comparative law).

as a mechanism to alleviate the problem of legal gaps.⁷ International law is particularly susceptible to gaps: in contrast with domestic legal systems, the international legal regime lacks a supreme legislative authority, suffers from

⁷ By “legal gaps” I mean areas where the law is insufficient, obscure, or imperfect. These are not the typical cases of a mere discord between the abstract rule and the specific facts of the case, which can be resolved through interpretation. Nor are they manifestations of an unsatisfactory legal solution, which are the province of law reform efforts. The law is instead silent, absent, simply unavailable as a means to resolution. For literature on what constitutes a gap in international law, *see generally* HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN INTERNATIONAL COMMUNITY* 70-72 (1966); Stephen C. Neff, *In Search of Clarity: Non Liqueur and International Law*, in, *INTERNATIONAL LAW AND POWER: PERSPECTIVES ON JUSTICE* 63, (K.H. Kaikobad and M. Bohlander eds., 2009); Kati Kulovesi, *Legality or Otherwise? Nuclear Weapons and the Strategy of Non Liqueur*, 10 *FINNISH Y.B. INT’L. L.* 55, 62-63 (1999); LUCIEN SIORAT, *LE PROBLÈME DES LACUNES EN DROIT INTERNATIONAL: CONTRIBUTION A L’ÉTUDE DES SOURCES DU DROIT ET DE LA FONCTION JUDICIAIRE* (1958) (thoroughly examining and categorizing gaps in international law).

imperfect law making procedures,⁸ and often relies on broadly defined laws that are more akin to standards rather than rules.⁹ The issue of a lacuna in international law thus assumes important dimensions on two fronts: a gap in the very system of the law (systemic *non liquet*),¹⁰ and the adjudicator's inability to resolve that gap (decision-making *non liquet*).¹¹

⁸ See Prosper Weil, "The Court Cannot Conclude Definitively..." *Non Liquet Revisited*, 36 COLUM. J. TRANSNAT'L. L. 109, 118 (1998).

⁹ On the distinction between rules and standards, *see generally*, Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-29 (1967); Duncan Kennedy, *Form and Substance in Private Adjudication*, 85 HARV. L. REV. 1685 (1976).

¹⁰ International lawyers are sharply divided on the possibility of a systemic *non liquet* in international law. Scholars such as Hans Kelsen consider *non liquet* a logical impossibility, since every issue is either settled by a specific legal rule, and failing that, by a 'residual negative principle' which states that anything that is not specifically prohibited is lawful: HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 306 (1952); Neff, *supra* note 7, at 64; Weil *supra* note 8, at 112 who cites the celebrated case of *Lotus* as an illustration of this principle by the PCIJ: S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept.

For international lawyers such as Hersch Lauterpacht, the “general principles of law” are one of the tools that the international judge is not only permitted, but obligated, to use to fill in gaps in the fabric of the law as a matter of the law’s completeness.¹² This view of the judicial function, as a creative exercise whereby

7). For a critical view of this interpretation and of the correct reading of Kelsen’s theory, see Jörg Kammerhofer, *Gaps, The Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument Between Theory and Practice*, 80 BRIT. Y.B. INT’L. L. 333, 340-44 (2009).

¹¹ Neff, *supra* note 7, at 64; see also Daniel Bodansky, *Non Liqueur and the Incompleteness of International Law*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, AND NUCLEAR WEAPONS 153, 154-55 (Laurence Boisson de Chazournes and Philippe Sands eds., 1999).

¹² HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW* 166 (1958); Hersch Lauterpacht, *Some Observations on the Prohibition of “Non Liqueur” and the Completeness of the Law*, in SYMBOLAE VERZIJL. PRÉSENTÉES AU PROFESSEUR J.H.W. VERZIJL À L’OCCASION DE SON LXX-IÈME ANNI-VERSAIRE 196, 205 (1958); Iain Scobbie, *The Theorist as Judge: Hersch Lauterpacht’s Conception of the International Judicial Function*, 8 EUR. J. INT’L. L. 264, 273-76 (1997); Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in*

the judge is compelled to avoid a *non liquet*,¹³ is vigorously disputed by scholars such as Julius Stone, who are deeply suspicious of this wide-ranging power granted to judges. Stone recognizes and even endorses a systemic *non liquet* and a decision-making *non liquet* in international law. However, rather than entrusting judges with creating law and risking the imposition of artificial or arbitrary solutions, he considers it preferable to let the gap be filled gradually by evolving state practice and treaty law.¹⁴ He is also critical of Lauterpacht's suggestion of using "general principles of law" which the latter takes to be based on natural law, as providing any clear guidance to the judges on what rule is applicable.¹⁵

The putative content of the general principles of law thus forms a central feature of Stone's criticism. Are the general principles truly an indeterminate

International Law, 8 EUR. J. INT'L. L. 215, 226-27 (1997); Weil *supra* note 8, at 110-12.

¹³ See LAUTERPACHT, *supra* note 7, at 102; Koskenniemi, *supra* note 12, at 227-28.

¹⁴ Julius Stone, *Non Liqueur and the Function of Law in the International Community*, 35 BRIT. Y.B. INT'L. L. 124, 131, 149-53, 159 (1959); Neff, *supra* note 7, at 74-75

¹⁵ Stone, *supra* note 14, at 133-35.

source of law? Are they simply a way for judges to inject their own normative assumptions into the international legal regime? International legal scholarship on the nature of the general principles presents an extremely chaotic picture: they are interpreted variously as principles that are common to all or most domestic legal systems; as general tenets that can be found underlying international legal rules; as principles that are inherent principles of natural law; and as principles that are deduced from legal logic.¹⁶ Article 38(1)(c) of the Statute of the International

¹⁶ See, e.g., Hermann Mosler, *General Principles of Law*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 511, 512-17(1995); Johan G. Lammers, *General Principles of Law Recognized by Civilized Nations*, in ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER 54 (Frits Kalshoven et al. eds., 1980) and references therein; Martii Koskenniemi, *General Principles: Reflexions on Constructivist Thinking in International Law*, in SOURCES OF INTERNATIONAL LAW 122, 125 (Martii Koskenniemi ed., 2000); Michael Akehurst, *Equity and General Principles of Law*, 25 INT'L. & COMP. L. Q. 801, 814-18 (1976); M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 MICH. J. INT'L. L. 768, 770-73 (1990); J.I. Charney, *Sources of International Law*, 271 RECUEIL DES COURS 189, 189-91 (1998); Frances T. Freeman Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations – A Study*, 10 UCLA L. REV. 1041, 1044-78

Court of Justice,¹⁷ which is deemed authoritative of the sources of international law, simply states:

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

a. ...

b. ...

c. the general principles of law recognized by civilized nations

The debate on the true nature and authority of the general principles becomes clearer, however, when viewed through the lens of the content-dependent and content-independent distinction in analytic legal philosophy.

(1963); Jaye Ellis, *General Principles and Comparative Law*, 22 EUR. J. INT'L. L. 949, 953-54 (2011); FABIAN O. RAIMONDO, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS 49-50 (2008); H. Waldock, *The Common Law of the International Community – General Principles of Law*, 106 RECUEIL DES COURS 54, 55-57 (1962).

¹⁷ Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

2 *Content-dependent and Content-independent reasons*

The concept of content-independent reasons for action was introduced by HLA Hart and explicated further by Joseph Raz as a way to explain the authoritative nature and normativity of the law. For Hart, a content-independent command is “intended to function independently as a reason [for performing an action] independently of the nature and character of the actions to be done.”¹⁸ In other words, the fact that a person in authority commands one to do certain actions by itself forms a reason for performance, even if absent the command one would have no reason to perform those actions, or good reason not to perform them.¹⁹ The merits of performing the action as such do not feature into the reasons to do so.²⁰ One of the distinctive features of legal rules (in contrast with moral rules) is that they purport to provide content-independent reasons for action.²¹

¹⁸ H.L.A. HART, *ESSAYS ON BENTHAM* 254 (1982).

¹⁹ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 35 (1986).

²⁰ LESLIE GREEN, *THE AUTHORITY OF THE STATE* 41 (1988).

²¹ Kenneth Einar Himma, *H.L.A. Hart and the Practical Difference Thesis*, 6 *LEGAL THEORY* 1, 26 (2001). For a powerful critique of this position, and of the content-dependent/content-independent distinction, see Paul Markwick, *Law and Content-Independent Reasons*, 20 *OXFORD J. LEGAL STUDIES* 579 (2000).

This does not imply, however, that no other substantive considerations (other than content) may form part of the reasons for action. These could include the fact that the legal requirements are the outcome of a just decision making procedure or that legal authorities are better placed (as compared to private actors) to determine certain outcomes, for instance due to their capacity to solve co-ordination problems.²²

Content-independence can take various forms: the radical version, where content-independent reasons obtain *whatever* the content of the command, and the more modest version, where they cease to obtain if the content falls outside certain content-dependent limits.²³ The law's claim to providing content-independent reasons for action does not preclude situations where the content of the legal rule may also result in a reason to act in accordance with it. Laws prohibiting robbery or murder for instance would seem to meet this standard.

²² Noam Gur, *Are Legal Rules Content-Independent Reasons?*, 5 PROBLEMA 175, 181-195 (2011). Further, as Schauer notes, individuals may take legal rules as content-independent reasons for action for moral as well as prudential reasons: Frederick Schauer, *Critical Notice*, 24 CANADIAN J. PHILOSOPHY 495, 506 (1994).

²³ I am grateful to Antony Duff to drawing my attention to this difference.

However, this coincidence is not a necessary feature.²⁴ In contrast, content-dependent reasons for obeying rules provide that the individual should do so because he can perceive, in light of the reasons offered by the law-makers, that there are legitimate grounds for why the rules proscribe or prohibit the conduct that they do.²⁵

The paper does not propose to enter into the debate on law's normativity or critiques of the Razian view of rules and legal reasoning. The aim of introducing the content-dependent/content-independent distinction is to make sense of the conceptual incoherence surrounding the doctrine of general principles.

²⁴ Himma, *supra* note 21, at 26-27; Gur, *supra* note 22, at 182-83.

²⁵ R.A. Duff, *Inclusion and Exclusion: Citizens, Subjects and Outlaws*, 51 CURRENT LEGAL PROBLEMS 241, 247 (1998). Moore describes content-dependent reasons slightly differently as content-independent reasons "whose independence is in jeopardy". An authority's decision can be content dependent in the weaker sense insofar as it depends on the balance of reasons that already existed for the parties to whom the decision applies. It can be simultaneously content-independent because its own force is independent of the force of the pre-existing reasons: Michael Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827, 852-53 (1989).

3 *General principles and content independence*

A radical content-independent position on the nature of general principles would assert that general principles are tenets that can be found in the majority of municipal legal systems.²⁶ Furthermore, the fact that most, if not all, legal systems adhere to them constitutes a ground for their application in the international sphere. For if international law is based on the consent of States, then the rationale for accepting general principles as a source of law is that their presence in most municipal legal systems serves as a proxy for State consent.²⁷

This position either does not address, or does so only in vague terms, the question of whether there is an implicit assumption that the simple fact of a principle's universality says something about its content. In other words, is the

²⁶ See Lammers, *supra* note 16, at 56-57 (citing Oppenheim, Lauterpacht, Berber, Favre, Cavaré, Guggenheim, Ripert, Sørensen, Schwarzenberger, Ch. de Visscher, Waldock and Bin Cheng as scholars who adhere to the view that general principles are norms underlying national legal systems).

²⁷ See Ellis, *supra* note 16, at 953, 955; see also Marjan Ajevski, *Judicial Law-making in International Criminal Law: The Legitimacy Conundrum*, in SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 127, 137(2012).

commonality across national systems taken as a testament to the value or worth of the principle? There is some suggestion that the reason for deducing general principles from a comparative study of legal systems is more pragmatic: the desire to find some agreement on the legal principles applicable to the case,²⁸ or even to avoid the suggestion of bias or arbitrariness on the part of an international tribunal.²⁹ Scholars also caution against a mechanical importation of domestic principles to relations governing States and advocate that before considering any such transfer, one must take into account the unique features of the international legal system.³⁰ At times, a more modest content-independence seems to be endorsed by scholars who claim that the substance of the municipal concept is used for guidance as to the content of the legal principle that should be adopted at

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

²⁹ Akehurst, *supra* note 16, at 814; H. C. Gutteridge, *Comparative Law and the Law of Nations*, 21 BRIT. Y.B. INT'L. L. 1, 9 (1944).

³⁰ Hugh Thirlway, *The Law and Procedure of the International Court of Justice*, 61 BRIT. Y.B. INT'L. L. 1, 113, 129 (1990); Mosler, *supra* note 16, at 519; Akehurst, *supra* note 16, at 816.

the international level.³¹ Thus, at least some part of the reason for resorting to the domestic concept seems to be its content, suggesting a mixed (modest) content-independent and content-dependent approach. It nevertheless remains ambiguous whether the content of the domestic concept is taken into account because of any inherent worth it possesses, or merely because of its existence in the majority of national systems.

In any event, the content-independent view of general principles, (though it is unclear whether the radical or the modest version is being espoused) appears to command the support of the majority of legal scholars, at least to the extent that it coheres with the position that these are tenets that are common to domestic legal systems. There is some controversy about whether this was in fact the interpretation intended by the Committee of Jurists which drafted Article 38(1)(c) of the ICJ Statute on general principles. The view that has prevailed is that the language in which the provision was first cast – that of principles of objective

³¹ M. Shahabuddeen, *Municipal Law Reasoning in International Law*, in *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings* 90, 99-102 (V. Lowe & M. Fitzmaurice eds., 1996); *contra* F. A. Mann, *Reflections on a Commercial Law of Nations*, 33 BRIT. Y.B. INT'L. L. 20, 36 (1957).

justice - could have suggested an interpretation of general principles that was akin to natural law. The text was expressly amended to clarify that it referred to principles recognized and applied in *foro domestico*.³²

The judgments of the PCIJ and the ICJ are not particularly instructive on how the concept of general principles should be understood. The courts have resorted to general principles infrequently and general principles have not been used exclusively as a basis for any decision.³³ While they have acknowledged that for a norm to be accorded the status of a general principle, it must exist in a sufficiently large number of States,³⁴ this pronouncement has not been

³² Waldock, *supra* note 16, at 56-57; *see also* Antonio Cassese, *The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations*, in *INTERNATIONAL LAW IN THE POST-COLD WAR WORLD: ESSAYS IN MEMORY OF LI HAOPEI* 43, 44-45 (Sienho Yee & Wang Tieya eds., 2001).

³³ *See* Ellis, *supra* note 16, at 950; Cassese, *Contribution of the ICTY*, *supra* note 32, at 45-46; Waldock, *supra* note 16, at 62.

³⁴ *See* South West Africa Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 4, 299 (July 18) (Tanaka, J.,dissenting); North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 101, 229 (Feb. 20) (Lachs, J.,

accompanied by any actual survey of national legal systems to determine its existence.³⁵ It is thus unclear whether, in practice, the courts have actually adopted a content-independent approach to general principles.

4 *General principles and content dependence*

A content dependent view of general principles equates them with principles of natural law or of objective justice.³⁶ They are normative principles that are “grounded in the universality of the human condition”.³⁷ Such postulates have inherent validity and must form part of any legal system.³⁸ This assumes a different relationship between the existence of general principles in domestic legal

dissenting); Bassiouni, *supra* note 16, at 788-89.

³⁵ Cassese, *Contribution of the ICTY*, *supra* note 32, at 45; Charney, *supra* note 16, at 190-91.

³⁶ See Ellis, *supra* note 16, at 953-55; Charney, *supra* note 16, at 191.

³⁷ See Koskinniemi, *supra* note 16, at 125 (referring to the opinions of scholars such as Verdross and Favre).

³⁸ Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in *SOURCES OF INTERNATIONAL LAW* 57, 58 (Matti Koskinniemi ed., 2000) (stating that some general principles involve principles of natural law); Jalet, *supra* note 16, at 1044.

systems and their relevance to the international sphere. It is not the presence in a sufficiently large number of national systems *per se* that elevates them to a source of authority, but the fact that due to their content, they would naturally form part of all legal systems. On this interpretation, “general principles extend the concept of the sources of international law beyond the limits of legal positivism, according to which the States are bound only by their own will.”³⁹

Some legal scholars endorse the natural law view of general principles and posit that the drafting history of Article 38(1)(c) supports this approach. The argument is that the term “general” qualifies “principles” and not their acceptance.⁴⁰ The debates between the members of the Advisory Committee of Jurists which drafted the Article are inconclusive, but at least some remarks by certain members have natural law underpinnings. For instance, Baron Descamps, the President, referred to this area as the realm of objective justice and denies that such principles that are concerned with the fundamental law of justice can differ from nation to nation. They must form part of the “legal conscience of civilized

³⁹ South West Africa Cases, Tanaka J., *supra* note 34, at 298; Christina Voigt, *The Role of General Principles in International Law and their Relationship to Treaty Law*, 31 RETFÆRD ÅRGANG 2/121, 3, 6 (2008).

⁴⁰ Jalet, *supra* note 16, at 1046.

nations”. Dr. Loder of the Netherlands referred to them as “rules universally recognized and respected by the whole world” which are “not yet of the nature of positive law”.⁴¹

If one holds to a natural law conception of general principles, then the worry about whence they may be found is greatly lessened. Since they are foundational and necessary to the functioning of all systems, theoretically, they can be discovered through an inductive process based on the rules of even one legal system, though this method may not always prove the most sound.⁴²

Based as it is on the content of general principles as reflective of a form of universal jurisprudence, the content-dependent conception of general principles is particularly wary of elevating ordinary municipal legal rules to the status of general principles merely because they happen to exist in the majority of domestic legal systems.⁴³ The source of their validity thus lies in their content rather than their near universal acceptance.

⁴¹ Jalet, *supra* note 16, at 1047-56 citing Dr. Loder of the Netherlands, *Proceedings of the Advisory Committee of Jurists, June 16th-July 24th, 1920, with Annexes*, in PROCÈS-VERBAUX 294 (1920).

⁴² Jalet, *supra* note 16, at 1075, 1078.

⁴³ Jalet, *supra* note 16, at 1085.

III. GENERAL PRINCIPLES IN INTERNATIONAL CRIMINAL LAW

The general principles debate takes on an added complexity in the context of international criminal law, where the public international law features of the field are inextricably intertwined with its pure criminal law elements.⁴⁴ There has been no systematic attempt to investigate whether international criminal law's mixed heritage should suggest a different, or at least modified, doctrine of sources from that of classical public international law. There is an acknowledgement that given its relatively nascent character, recourse to international treaties and customary international law is unlikely to be helpful in fleshing out the rudimentary rules of international criminal law or filling in gaps.⁴⁵ The general principles are thus

⁴⁴ On the hybrid identity of international criminal law, *see* Cassese, *supra* note 3, at 18-19; Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT'L. L. 543, 550-51 (2010).

⁴⁵ *See* Fabian Raimondo, *General Principles of Law, Judicial Creativity, and the Development of International Criminal Law*, in JUDICIAL CREATIVITY, *supra* note 2, at 45, 46; Mary Fan, *Custom, General Principles, and the Great Architect Cassese*, 10 J. INT'L. CRIM. JUST. 1063, 1064 (2012); Thomas Weigend, *The Harmonization of General Principles of Criminal Law: The Statutes and*

expected to play an important role, even more so than in other areas of public international law, in the development of international criminal legal rules. At the same time, there is some consciousness that using general principles to avoid a *non liquet* or for the purposes of interpretation may run contrary to the principles of legality and strict construction of penal statutes.⁴⁶ Using domestic law analogies to give more substance to the international legal rule would be in conflict with the general presumption that any ambiguity in the law is to be interpreted in favor of the accused.⁴⁷ The ad hoc tribunals have nonetheless made use of general principles in developing the amorphous structure of international criminal law.

Jurisprudence of the ICTY, ICTR, and the ICC: An Overview, in, INTERNATIONAL CRIMINAL LAW: QUO VADIS? 319, 320 (2004).

⁴⁶ See Degan, *supra* note 3, at 50-51; Ellis, *supra* note 16, at 951; Fan, *supra* note 45, at 1065.

⁴⁷ See Akande, *supra* note 3, at 44-45 (on the *in dubio pro reo* principle in international criminal law).

1 General Principles and the ICTY

While a comprehensive analysis of the ad hoc tribunals' reference to general principles would distract from the focus of this paper,⁴⁸ three cases decided by the ICTY are especially useful for illustrating the ambiguities in the tribunal's jurisprudence.⁴⁹

*Prosecutor v Erdemovic*⁵⁰

In this case, the Appeals Chamber decided, by three votes to two, that duress does not afford a complete defense to a charge of crimes against humanity or war crimes that involves the killing of innocent people.⁵¹ The Separate Opinions

⁴⁸ See Raimondo, *supra* note 16 (for a comprehensive analysis of the jurisprudence of the international criminal tribunals).

⁴⁹ See Cassese, *Contribution of the ICTY*, *supra* note 32, at 47-49; André Nollkaemper, *Decisions of National Courts as Sources of International Law*, in, INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY 277, 286-89 (Gideon Boas & William Schabas eds., 2003); Ellis, *supra* note 16, at 968-70; Raimondo, *supra* note 16, at 105-08, 117-20, 124-29.

⁵⁰ Erdemovic, *supra* note 1.

⁵¹ Erdemovic, *supra* note 1, ¶ 19

appended by the judges present a useful contrast for the determination of general principles.

For Judges McDonald and Vohrah, neither conventional law nor customary international law provided any rule on whether duress could be a complete defense to a charge of killing innocent human beings.⁵² They turned next to the “general principles of law recognized by civilized nations” noting that this did not require a comprehensive survey of the specific legal rules in all domestic systems, but an analysis of those jurisdictions that were practically accessible to the court with a view to deducing general tenets underlying the concrete rules of those jurisdictions.⁵³ The judges thus undertook a “limited survey of... the world’s legal systems”: civil law systems (France, Belgium, Spain, Netherlands, Italy, Germany, Norway, Sweden, Finland, Venezuela, Nicaragua, Chile, Panama, Mexico, Former Yugoslavia; common law systems (England, United States, Australia, Canada, South Africa, India, Malaysia, Nigeria); and the criminal law of “other states” (Japan, China, Morocco, Somalia, Ethiopia). This survey

⁵² Erdemovic, *supra* note 1, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 41-55.

⁵³ Erdemovic, *supra* note 1, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 57-58.

revealed no consistent rule and the variances in the legal systems could neither be reconciled, nor explained as differences between the common law and civil law systems.⁵⁴

The judges then approached the issue in light of policy considerations specific to international humanitarian law and the normative mandate of international criminal law.⁵⁵ In analyzing these policy arguments, the judges drew liberally on the reasoning of domestic courts, in particular those of England and Italy.⁵⁶ In view of the overriding goal of international criminal law to protect the lives of innocent people, and the importance of placing legal limits on the conduct of commanders and soldiers, the judges rejected duress as a complete defense.⁵⁷

⁵⁴ Erdemovic, *supra* note 1, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 59-72.

⁵⁵ Erdemovic, *supra* note 1, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 72.

⁵⁶ Erdemovic, *supra* note 1, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 73-74, 79-82, 85-87.

⁵⁷ Erdemovic, *supra* note 1, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 75-89.

In his Separate and Dissenting Opinion, Judge Stephen also relied on the “general principles of law”.⁵⁸ He referred to the survey of municipal systems carried out by Judges McDonald and Vohrah, stating that the majority of these systems did recognize duress as a defense to murder in one way or another, and it was the common law systems that were the exception.⁵⁹ Were it not for the common law’s exceptional position, duress could certainly be recognized as a defense for all offenses as a general principle of law, not only because of its endorsement in civil law, but also as a matter of “simple justice”.⁶⁰ Judge Stephen went on to examine comprehensively English jurisprudence, concluding that it did not disclose any reasoned basis for excluding duress as a defense for serious crimes, including murder. Further, the common law had only excluded duress as a

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

⁵⁹ Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Stephen, ¶ 25.

⁶⁰ Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Stephen, ¶ 26.

defense when the accused had a choice between saving his life and that of another, and not where both persons would be killed in any case.⁶¹

A general principle of law rests on an enquiry into the rationale behind the existence of the actual rules of the legal systems in question. Duress was recognized as a fundamental concept in all legal systems, including the common law. The common law's exception in the case of murder was based on an understanding that the law may never endorse the accused's choosing his life over the taking of an innocent one. It would thus do no violence to the common law to accept duress as a defense in situations where this choice was wholly absent.⁶²

In his Separate Opinion, Judge Cassese disagreed vehemently with the policy-oriented approach of Judges McDonald and Vohrah, not only because it was contrary to the legality principle, but also because it was based on policy considerations governing the defense of duress in common law systems alone.⁶³

⁶¹ Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Stephen, ¶¶ 29-58.

⁶² Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Stephen, ¶¶ 64, 66.

⁶³ Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Cassese, ¶ 11.

Instead, he argued that international criminal law did have a general rule recognizing the defense of duress for all offenses, and since no additional special rule on duress had developed on the question of killing innocent persons, the general rule must still be applicable.⁶⁴

Judge Cassese relied on national legislation (he cited the penal codes of Austria, Belgium, Brazil, Greece, Italy, the Netherlands, France, Germany, Peru, Spain, Switzerland, Sweden, Federal Republic of Yugoslavia (Serbia and Montenegro), Croatia, Bosnia, and Tanzania)⁶⁵ and the case law of several other States (Germany, Belgium, Israel, France, Italy, Russia, and Serbia) to reject the Prosecution's contention that a special rule had evolved in customary

⁶⁴ Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Cassese, ¶¶ 12, 40-41.

⁶⁵ Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Cassese, ¶ 30.

international law excluding duress as a defense to offenses involving killings.⁶⁶

Thus, the general rule on duress as a defense (to all offences) must apply.⁶⁷

Judge Cassese set out the requirements for duress in light of the value placed on life in domestic case law, and also what the law can reasonably demand of people when faced with a terrible choice: a non-self induced situation of a severe threat to life or limb where the accused lacks the means to escape the threat and acts in a manner that is proportionate to avoid the threat.⁶⁸

Lastly, he argued that even if there was no international legal rule applicable to the case, or if it was ambiguous, the tribunal should resort to the domestic law of the State of which the accused was a national. Since Erdemovic would be

⁶⁶ Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Cassese, ¶¶ 31-39. For criticism on the arbitrary choice of case law by Cassese, see Swart, *supra* note 4, at 474-75.

⁶⁷ Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Cassese, ¶¶ 40-41.

⁶⁸ Erdemovic, *supra* note 1, Separate and Dissenting Opinion of Judge Cassese, ¶¶ 41-45.

expected to know the criminal laws applicable in his own State, the majority should have applied the law of the former Yugoslavia as it related to duress.⁶⁹

Erdemovic has been the subject of heated debate amongst commentators. Critics have questioned the normative analyses undertaken by the Judges, their failure to appreciate the distinctions between justifications and excuses, and the different methodologies used to define the scope of the defense of duress.⁷⁰ Less attention has been paid to the differences in how the Judges conceptualize general principles as a source of law and the impact this has on their decisions.

Judges McDonald and Vohrah appear to endorse a content-independent interpretation of general principles: they conduct a limited survey of the surface

⁶⁹ *Erdemovic*, *supra* note 1, Separate and Dissenting Opinion of Judge Cassese, ¶ 49

⁷⁰ See, e.g., Alexander K.A. Greenwalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063 (2011); Benjamin Perrin, *Searching for Law While Seeking Justice: The Difficulties of Enforcing Humanitarian Law in International Criminal Trials*, 39 OTTAWA L. REV. 367 (2008); Luis E. Chiesa, *Duress, Demanding Heroism, and Proportionality*, 41 VAND. J. TRANSNAT'L L. 741 (2008); Thomas Weigend, *Kill or be Killed: Another Look at Erdemovic*, 10 J. INT'L CRIM. JUST. 1219 (2012).

legal rules on a number of legal systems and are unable to discern any consensus in terms of the extent to which duress is permitted as a defense to murder. Instead, content-dependent reasons in their Opinion take the form of policy and normative considerations that shape the international criminal legal system.

Judge Stephen also undertakes a comparative survey of domestic criminal law systems to support his reasoning, but is more concerned with discovering a general principle that embodies the reasons for the creation of a legal rule and its application.⁷¹ For this reason, he probes deeper into the rationale behind the common law's exceptional position in the case of duress as a defense to murder and examines why this rationale may or may not apply to Erdemovic.⁷² Further, it is unclear from his Opinion whether, even if he had discovered that the reason for excluding duress as a defense to murder would not excuse an accused in the position of Erdemovic, he would nonetheless have allowed the defense as a matter of 'simple justice'.⁷³ Judge Stephen's Opinion thus embodies a mixed content-dependent and content-independent approach: he recognizes duress as a matter of simple justice (pure content-dependence); he also adopts the reasoning behind the

⁷¹ See Raimondo, *supra* note 16, at 107-108.

⁷² See Ellis, *supra* note 16, at 969-70 (approving this methodology).

⁷³ See Raimondo, *supra* note 16, at 107.

acceptance or exclusion of duress in domestic legal systems. However, it is unclear whether he considers the latter an authoritative principle merely because it can be discerned as a principle of positive law (content-independence), or (also) because of its justice (content-dependence).

Judge Cassese's Opinion, in contrast adopts both content-dependence and content-independence. Judge Cassese rejects pure content-dependence in the form endorsed by Judges McDonald and Vohrah (policy considerations). However, his reliance on what the law may reasonably expect of people to set out the elements of duress betrays his own content-dependent leanings. It is unclear why he, in addition, cites the value placed on human life in domestic case law for this purpose. Depending on why he considers this value of human life to be authoritative, he could either be adopting a content-dependent (it is a just principle, or that it renders the domestic case law tolerable), or a content-independent (the value can be discerned in positive case law) view. A content-independence approach (whether in its radical or modest form, it is difficult to state) appears to inform his survey of national case law and legislation which he uses to reject the formation of a customary international law rule excluding duress as a defense to murder (without considering its justice or otherwise). Similarly, in recognizing the applicability of the domestic criminal law of the State (regardless of his content) he is willing to consider a radical content-independent solution to the filling of legal lacunae.

*Prosecutor v Furundzija*⁷⁴

In *Furundzija*, the ICTY Trial Chamber was concerned with the definition of the crime of rape, in particular, whether forced oral penetration would satisfy the *actus reus* for the offence. The Chamber noted that conventional and customary law did not contain a specific definition of rape, and that resort to general principles of international criminal law or general principles of international law was also unhelpful. Thus, the Chamber turned to principles of criminal law common to the majority of the world's legal systems to define rape.⁷⁵

The Chamber's survey of national legislation (it cited the penal laws of Chile, China, Germany, Japan, SFRY, Zambia, Austria, France, Italy, Argentina, Pakistan, India, South Africa, Uganda, New South Wales, Netherlands, England, and Bosnia and Herzegovina for different aspects of the offence) revealed that forced sexual penetration of the human body by the penis or forced insertion of any other object into the vagina or the anus was considered rape by most

⁷⁴ *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment (Int'l Crim. Trib. Former Yugoslavia Dec. 10 1998).

⁷⁵ *Furundzija*, *supra* note 74, ¶¶ 175-177.

systems.⁷⁶ No similar consensus could be discerned on whether forced oral penetration would be classified as rape or as sexual assault. The Chamber then somewhat contradictorily (having earlier found them unhelpful) thought it appropriate to look to general principles of international criminal law, and failing that, general principles of international law, for a solution.⁷⁷

The Chamber found an applicable general principle in the concept of human dignity, which was fundamental to international humanitarian law and human right laws, and which permeated the corpus of international law as a whole. Forcible oral penetration was a severe and degrading attack on human dignity, and it was consonant with the principle to classify it as rape.⁷⁸ Defining forcible oral penetration in this manner as rape rather than sexual assault did not violate the principle of legality since the act would have been criminalized in any case.⁷⁹ Moreover, as long as the accused was sentenced on the factual basis of coercive

⁷⁶ Furundzija, *supra* note 74, ¶¶ 179-181.

⁷⁷ Furundzija, *supra* note 74, ¶ 182.

⁷⁸ Furundzija, *supra* note 74, ¶¶ 183.

⁷⁹ Furundzija, *supra* note 74, ¶ 184.

oral sex, he would not be adversely affected by this categorization except that conviction for rape may have greater stigma attached to it.⁸⁰

While one can sympathize with the Chamber's ultimate conclusions, the methodology it uses in arriving at them is more suspect. Commentators have noted how the Chamber's comparative analysis is insufficient and insensitive to considerations of culture and lacks a proper understanding of the definition of rape in national jurisdictions.⁸¹ It is also not clear whether the Chamber was justified in going beyond its survey of the lack of a consensus on the question of forced oral penetration and extending the definition of rape based on a general principle of law,⁸² rather than applying the principle of *in dubio pro reo*.⁸³

⁸⁰ Furundzija, *supra* note 74, ¶ 184.

⁸¹ See Ellis, *supra* note 16, at 968.

⁸² It bears noting that even if the principle of human dignity could be considered foundational in the sense of constituting a general principle of international law, this did not necessarily support classifying forced oral penetration as rape rather than sexual assault: Bantekas, *supra* note 5, at 126-27.

⁸³ See Bantekas, *supra* note 5, at 126; Swart, *supra* note 4, at 468; Raimondo, *supra* note 16, at 119.

Furundzija also appears to introduce new sources of international criminal law which find support in the writings of Antonio Cassese, namely “general principles of international criminal law” and “general principles of international law”. In Cassese’s terminology, “general principles of international criminal law” are principles that are specific to the criminal law, such as the principle of legality, which have been gradually transposed from domestic legal orders to the international level. “General principles of international law” are principles inherent in the international legal system that can be deduced from the features of the international legal system.⁸⁴ In this sense, these principles are distinct from the “general principles of criminal law recognized by the community of nations” which Cassese labels as a subsidiary source and which are discovered through a comparative survey of domestic legal systems.⁸⁵

The content-dependent/content-independent distinction reveals the lack of clarity in the definition and scope of the various sources of law outlined in *Furundzija* (and by Cassese). The Trial Chamber and Cassese both appear to endorse a content-independent view of “general principles of law” (in the sense of

⁸⁴ Cassese, *supra* note 3, at 31; Cassese, *Contribution of the ICTY*, *supra* note 32, at 52-53.

⁸⁵ Cassese, *supra* note 3, at 32.

Article 38(1)(c)) which are discovered from a survey of positive law in different national criminal law systems (and without reference to their content). The “general principles of international criminal law” present a more complicated picture. If they are identified through the same methodology as the “general principles of law”, that is, by deducing these principles from various positive law sources (whether these are domestic or international legal sources such as treaties and case law), then presumably what gives these principles their authority is not their content, but the fact that they are found in international (criminal) law. This is closer to a content-independent approach. The nature of the “general principles of international law” is even more opaque. *Furundzija* does not cite any positive law source to claim that the principle of human dignity pervades the international legal regime, suggesting an implicit adoption of a content-dependent view. Cassese, on the other hand, considers them inherent to the international legal order, but again, depending on how they are to be deduced (whether from positive law, or natural reason), they could be content-dependent or content-independent in character.

*Prosecutor v. Kupreskic*⁸⁶

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

(i) rules of customary international law; (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles; (iv) general principles of law consonant with the basic requirements of international justice.⁸⁷

The Chamber subsequently relied on general principles of criminal law common to the world's major legal systems charges, to distinguish four legal principles that applied to cumulation of charges: the reciprocal speciality test (Blockburger); the principle of speciality; the principle of consumption; and the principle of protected values.⁸⁸

⁸⁶ *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment (Int'l Crim. Trib. Former Yugoslavia Jan. 14 2000). For a useful summary of the Chamber's use of general principles, see Raimondo, *supra* note 16, at 124-29.

⁸⁷ *Kupreskic*, *supra* note 86, ¶ 591.

⁸⁸ *Kupreskic*, *supra* note 86, ¶¶ 677-695.

The Chamber cited two cases decided by US courts and referred, without further elaboration, to “civil law courts” for recognition of the reciprocal speciality rule, where if an act violates two distinct legal provisions, it constitutes two different offenses only when each provision requires proof of an extra element that the other does not.⁸⁹ If the reciprocal speciality rule is not satisfied and one offense falls entirely within the scope of another, then according to the rule of speciality (citing the penal codes of the Netherlands and Italy) the special provision governing the act takes precedence over the general provision.⁹⁰ The principle of consumption in the civil law, which can be likened to the doctrine of “lesser included offence” in the common law, holds that if all the elements of a less serious offence are present in the commission of a more serious one, then the criminality is fully encompassed by a conviction for the latter. The Chamber relied on the jurisprudence of the Inter-American Court on Human Rights, the European Commission and Court of Human Rights, Austrian and German courts, and English law scholarship for the acceptance of and rationale behind the principle.⁹¹ Finally, the Chamber cited Canadian, French, Austrian and Italian

⁸⁹ Kupreskic, *supra* note 86, ¶¶ 680-682, 685.

⁹⁰ Kupreskic, *supra* note 86, ¶¶ 683-684.

⁹¹ Kupreskic, *supra* note 86, ¶¶ 686-692.

court decisions for the principle of protected values: that if an act infringes upon two legal provisions that protect distinct values, it may be in breach of both provisions and give rise to a double conviction.⁹²

It is interesting to note that the Chamber purported to apply general principles in the traditional sense of principles that are common to the world's major systems, but provided only scant authority for the acceptance of the four principles it articulated.⁹³ It also addressed the reasoning or the logic behind each of the four principles, though not in any depth. This methodology suggests the application of a relatively unscientific content-independent test.

The search for a commonality across systems had to be abandoned when it came to the issue of how a double conviction for the same act should be reflected in sentencing.⁹⁴ Article 24(1) of the ICTY Statute provides that the Chamber should have recourse to the general practice on sentencing in the former Yugoslavia for determining the term of imprisonment. The Chamber opined that the practice of courts in the former Yugoslavia was not exhaustive of the sources

⁹² Kupreskic, *supra* note 86, ¶¶ 693-695.

⁹³ See Raimondo, *supra* note 16, at 128; Nollkapemer, *supra* note 49, at 289.

⁹⁴ Kupreskic, *supra* note 86, ¶ 713.

that the ICTY could rely on.⁹⁵ It noted that differences between the provisions of the SFRY, Croatian, and Italian Criminal Code on the one hand,⁹⁶ and “other legal systems such as Germany” on the other, on this issue. In light of this divergence between national systems, the Chamber opted for a fair solution based on the object and purpose of the ICTY Statute, and the “general principles of justice applied by jurists and practised by military courts” referred to by the Nuremberg Military Tribunal.⁹⁷ Using these criteria, the Chamber held that in the case of two distinct offenses, the sentences for each may be served concurrently with the possibility of an aggravated sentence for the more serious offense if the less serious offense committed by the same act added to its heinous character.⁹⁸

Similarly, the Chamber was unable to find any consistency in the approach various municipal systems took to the question of the consequences of the Prosecutor’s erroneous legal classification of facts (surveying England, the US, Zambia, Nigeria, former Yugoslavia, Croatia, Germany, Spain, France, Italy and

⁹⁵ Kupreskic, *supra* note 86, ¶¶ 716.

⁹⁶ Kupreskic, *supra* note 86, ¶¶ 713-715.

⁹⁷ Kupreskic, *supra* note 86, ¶¶ 716-717

⁹⁸ Kupreskic, *supra* note 86, ¶ 718.

Austria).⁹⁹ Thus, it was compelled to search for a “general principle of law consonant with the fundamental features and the basic requirements of international criminal justice”.¹⁰⁰ In this endeavor, it would be guided by two potentially conflicting considerations: the full protection of the accused’s rights on the one hand, and the ability of the tribunal to exercise all powers necessary to accomplish its purpose efficiently and in the interests of justice on the other.¹⁰¹ Through a careful balancing of these principles and taking into account the nascent state of international criminal law, the Chamber devised a detailed set of rules that would guide its decision on the matter.¹⁰²

Kupreskic seems to have introduced yet another hierarchy in the sources of international criminal law: “general principles of international criminal law”, which it fails to define; largely content-independent general principles of criminal law derived from a cursory comparative survey of national systems; and “general

⁹⁹ *Kupreskic*, *supra* note 86, ¶¶ 693-695.

¹⁰⁰ *Kupreskic*, *supra* note 86, ¶¶ 728-738.

¹⁰¹ *Kupreskic*, *supra* note 86, ¶¶ 724-726, 739.

¹⁰² *Kupreskic*, *supra* note 86, ¶¶ 740-748. For the observation that this is not an application of general principles, but an instance of law-making by the Judges, see Raimondo, *supra* note 16, at 129.

legal principles consonant with the requirements of international justice” which are content-independent to the extent that the Chamber seeks to deduce them from the positive law (the ICTY Statute and the judgment of the Nuremberg Military Tribunal), but also content-dependent in that they appear to be derived from what is required for justice in the international realm (and without any reference to the positive law).

The above analysis of *Erdemovic*, *Furundzija*, and *Kupreskic* reveals a profound confusion surrounding the nature and application of general principles. The ICTY has liberally used general principles to fill in gaps in the ICTY Statute, and in customary international law, to decide difficult and controversial issues that have come up before the tribunal. However, it is far from clear which sense of general principles has predominated – radical and modest content-independence, and weak and strong content-dependence, feature in different Opinions, and under different headings. There is also uncertainty about the hierarchy of their application; at times, content-dependent general principles take precedence, while at other times, they operate as a last resort when no consensus can be reached using the content-independent version of general principles. Further complexity is introduced by the seemingly vague and undefined categories of “general principles of international law”, “general principles of international criminal law”, and “general principles of law consonant with the basic requirements of international justice”, whose relationship to the “general

principles of law” in the sense of Article 38(1)(c) is unclear. There are also few efforts to explain the reasoning behind or the basis for the induction and content of the content-dependent principles, which lends strength to Cassese’s criticism: mere policy reasons masquerading as general principles cannot be an appropriate basis on which to hold the accused criminally responsible.

2 General Principles and the ICC

While the ad hoc tribunals had the formidable task of working on almost a clean slate – there had been no significant developments in international criminal law post the Nuremberg trials – the ICC has the benefit of the rapid strides in the evolution of the law in the past decade or so. Indeed, the Rome Statute of the ICC,¹⁰³ in contrast to the Statutes of tribunals such as the ICTR and the ICTY, is a testimony to the level of sophistication that international criminal law has achieved in a relatively short span of time. The ICC Statute is considerably more detailed than its predecessors and the court may also have recourse to the customary rules of international law laid down by the ad hoc tribunals. At first glance, this suggests a more limited place for the utility of general principles as a

¹⁰³ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

gap filling mechanism.¹⁰⁴ Nevertheless, several parts of the ICC Statute are still relatively unrefined – the provisions on modes of responsibility (Article 25), command responsibility (Article 28), and defenses such as necessity (Article 31) are instances of where considerable uncertainty or gaps still remain. The ICC is likely to resort to general principles of law as one of the means of filling these lacunae.¹⁰⁵ The ICC Statute and jurisprudence to date does not, however, provide any more guidance on what approach to general principles may be valid.

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

¹⁰⁴ See Raimondo, *supra* note 45, at 57.

¹⁰⁵ Claus Kress, *International Criminal Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 40 (2013); see also, e.g., Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L. FORUM 1, 32 (2009).

law.¹⁰⁶ This detailed articulation is in sharp contrast to the Statutes of other international tribunals, including the ICTY,¹⁰⁷ the International Criminal Tribunal for Rwanda (ICTR),¹⁰⁸ Special Court for Sierra Leone (SCSL),¹⁰⁹ Extraordinary Chambers in the Courts of Cambodia (ECCC),¹¹⁰ and the Special Tribunal for

¹⁰⁶ Rome Statute, *supra* note 103, art. 21.

¹⁰⁷ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res. 827, U.N. SCOR, 48th sess., 3217 mtg., U.N. Doc. S/RES/827 (May 25, 1993).

¹⁰⁸ *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th sess., 3453 mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994).

¹⁰⁹ *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, Statute of the International Criminal Tribunal for the Former Yugoslavia*, U.N. SCOR, 55th sess., U.N. Doc. S/2000/915 (2000).

¹¹⁰ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, G.A. Res. 10135, U.N. Doc. A/RES/57/228B/Annex (May 13, 2003); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes

Lebanon (STL)¹¹¹ which do not contain any specific provision dealing with the application of the sources of international law, or their hierarchy.¹¹²

Article 21's listing of the sources is, in some respects, quite different from that contained in Article 38 of the ICJ Statute. In contrast to the latter, Article 21 clearly contains a hierarchy as to their application – the ICC must first look to its own “internal” or “proper” sources (the Statute, Elements, and Rules, and its own case law), then to other treaties and public international law rules, and to the general principles of law only if that still does not yield an answer.¹¹³ Also, the

Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006 (Oct. 24, 2004).

¹¹¹ *Statute of the Special Tribunal for Lebanon*, appended to S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

¹¹² Gilbert Bitti, *Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 285, 286-87 (Carsten Stahn & Göran Sluiter eds., 2009).

¹¹³ Bitti, *supra* note 112, at 287-88; *see also* Allain Pellet, *Applicable Law*, in *II THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1051, 1053-54 (Antonio Cassese et al. eds., 2002).

provision for general principles of law specifically mentions that these are to be derived from national legal systems, including the laws of the State that would ordinarily exercise jurisdiction over the case.¹¹⁴

The Article's formulation can be interpreted to include both a content-dependent and a content-independent approach to general principles. For instance, it is not clear what Article 21(1)(b)'s reference to "principles and rules of international law" encompasses. On one interpretation, it may include the jurisprudence of the ad hoc tribunals as part of "international criminal practice".¹¹⁵ Another possibility is that the phrase is simply a reference to

¹¹⁴ Pellet, *supra* note 113, at 1073.

¹¹⁵ Bitti, *supra* note 112, at 296-98. The ICC has explicitly stated that the jurisprudence of the ad hoc tribunals can have relevance before the ICC only if it falls within the sources recognized in Article 21: *Prosecutor v. Kony et al.*, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification ¶ 19 (ICC Pre-Trial Chamber II, Oct. 28, 2005); *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise

customary international law rules and principles.¹¹⁶ However, nothing in Article 21(1)(b) excludes an interpretation that, in Cassese's terminology, refers to principles inherent in international law that can be deduced from the features of the international legal system.¹¹⁷ As we saw earlier, whether these principles are content-independent or content-dependent in character is contingent on how they are identified, and what lends them their authority,

The drafting history of the Rome Statute does not resolve this issue, but inclines towards a modest content-independent construction. The International Law Commission's (ILC) Draft Statute for an International Criminal Court,¹¹⁸

Witnesses for Giving Testimony at Trial ¶¶ 43-44 (ICC Trial Chamber I, Nov. 30, 2007) [hereinafter *Lubanga*, Decision on Witness Proofing].

¹¹⁶ Pellet, *supra* note 113, at 1070-72; Akande, *supra* note 3, at 50.

¹¹⁷ See Margaret McAullife deGuzman, *Article 21: Applicable Law*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 701, 707-08 (Otto Triffterer ed., 2008) (distinguishing, however, between "rules" and "principles" of international law to argue that "rules" refer to customary international law).

¹¹⁸ Report of the International Law Commission on the Work of Its Forty-Sixth Session, UN GAOR, 49th Sess., Supp. No. 10, at 44, UN Doc. A/49/10 (1994)

which preceded the Rome Statute and greatly influenced it,¹¹⁹ contained a similar provision on Applicable Law in Article 33. The ILC's Commentary to the Draft Article 33 provides that "principles and rules" of general international law includes the "general principles of law" such that the court may refer to the "whole corpus of criminal law" in national as well as international practice.¹²⁰ This is closer to the version of general principles understood as derived from positive law, though it is unclear whether, in addition, the reason for their authority is their presence in the positive criminal law.

Article 21(1)(c) appears to refer more explicitly to the content-independent category of general principles; it clearly mentions that they are derived from municipal legal systems, including, when appropriate, the law of the State that would exercise jurisdiction. This is a curious formulation – the "legal systems of the world" would presumably have included the State with jurisdiction over the case in any case. Conversely, if the emphasis is on the world's major legal systems and the State which would normally exercise jurisdiction is not

¹¹⁹ See generally, Kai Ambos, *Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint*, 7 EUR. J. INT'L. L. 519 (1996).

¹²⁰ II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 51 (1994).

considered one of them, it is not clear why its laws should be relevant, except as a concession to the defendant's ostensible familiarity with the system.¹²¹

The drafting history clarifies, to some extent, why it was considered necessary to mention this specifically. Delegates were divided on the issue of the extent of discretion to be granted to judges to decide on the applicable law. While the majority of States favored judicial discretion in determining and applying general principles of international criminal law, a minority were of the view that any ambiguity must be resolved by applying directly the relevant domestic law (in order of preference, the law of the State where the crime was committed, that of the accused's State of nationality, and that of the custodial State).¹²² Article 21(1)(c) reflects a compromise between the two positions, authorizing the application of general principles derived from municipal legal systems, including

¹²¹ Pellet, *supra* note 113, at 1075.

¹²² DeGuzman, *supra* note 117, at 702-03; Pellet, *supra* note 113, at 1074-75; Per Saland, *International Criminal Law Principles, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS* 189, 214-15 (Roy S. Lee ed., 1999).

the State that would normally exercise jurisdiction.¹²³ This accords with the content-independent approach, albeit one that is modified to take into account the law of the State that would otherwise have jurisdiction over the case. This is subject to the further qualification that the State's law must be in conformity with international law, suggesting that the applicability of any municipal laws is not entirely without reference to their content.

Thus far, the ICC has not dealt with the problem of hierarchy and application of sources in any significant way. The ICC Appeals Chamber has recognized that general principles may be applied to fill gaps in the Statute.¹²⁴ It has also considered the use of general principles in a few cases, but omitted to define what

¹²³ DeGuzman, *supra* note 117, at 702-03; Pellet, *supra* note 113, at 1075; Saland, *supra* note 122, at 215. It is not clear however which States would be counted as normally exercising jurisdiction, for instance, whether this would include universal jurisdiction: J. Verhoeven, *Article 21 of the Rome Statute and the Ambiguities of Applicable Law*, 33 NETHERLANDS Y.B. INT'L. L. 3, 10 (2002).

¹²⁴ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment on the Appeal of Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006 ¶ 34 (ICC Appeals Chamber, Dec. 14, 2006).

they mean. For instance, in a decision concerning the *Situation in the Democratic Republic of Congo*,¹²⁵ the Appeals Chamber denied the Prosecutor's claim that there was a general principle of law that provided for the review of decisions of subordinate courts by higher courts, including decisions disallowing an appeal. The Prosecutor had cited the laws of fourteen civil law countries, five common law countries, and three Islamic law countries in support of this contention, which were dismissed by the Chamber as yielding no uniform or universally adopted general principle of law.¹²⁶

Similarly, in *Lubanga*, Trial Chamber I rejected the practice of witness proofing as a general principle of law.¹²⁷ The Prosecutor had referred to the jurisprudence of the ad hoc tribunals and the laws of a few common law countries (Australia, Canada, England and Wales, and the United States) to assert that

¹²⁵ *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (ICC Appeals Chamber, July 13, 2006).

¹²⁶ *Id.* at ¶¶ 26-32.

¹²⁷ *Lubanga*, Decision on Witness Proofing, *supra* note 115, at ¶ 41.

witness proofing is well established.¹²⁸ The Chamber considered this insufficient to establish a general principle permitting witness proofing, on the basis that the national systems cited by the Prosecution differed on the exact details of the practice and that the Prosecution had moreover not cited any civil law systems.¹²⁹

These decisions tend towards a content-independent application of general principles, but in the absence of any comprehensive analysis of the source, and also failing any discussion of “general principles” of international law stemming from Article 21(1)(b), it is difficult to say what approach the ICC will adopt.

IV. THE CHALLENGES OF THE CONTENT-INDEPENDENT APPROACH

One solution for the international criminal tribunals would be to adopt a purely content-independent approach to general principles, where they conduct an extensive survey of domestic criminal law systems and strive to find commonality across these jurisdictions. The obvious objection to this methodology is its impracticality: given the time, resource, language, and knowledge constraints of the courts, this would be an impossible exercise. The courts may then adopt the majority’s stance in *Erdemovic* and deduce general principles from systems that are “practically accessible” to the judges. As the experience of the ad hoc

¹²⁸ *Id.* at ¶¶ 7-10, 37.

¹²⁹ *Id.* at ¶¶ 39-42.

tribunals bears out, this poses the very real danger that the domestic systems referred to would be heavily biased towards a few “civil law” and “common law” countries.¹³⁰ The way out of this insularity, which has received almost unanimous acclaim in the scholarly community, is to consciously include representatives from other “legal families” notably those that follow Islamic law, and countries from Asia and Africa, in the analysis.¹³¹ However, the legal families approach poses more problems than it solves.

¹³⁰ See Bantekas, *supra* note 5, at 129; Michael Bohlander & Mark Findlay, *The Use of Domestic Sources as a Basis for International Criminal Law Principles*, 1 GLOBAL COMMUNITY Y.B. INT’L L. & JURISPRUDENCE 3 (2002); see also Mirielle Delmas-Marty, *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, 1 J. INT’L. CRIM. JUST. 13, 18 (2003); see also Hermann Mosler, *To What Extent Does the Variety of Legal Systems of the World Influence the Application of the General Principles of Law Within the Meaning of Article 38(1)(c) of the Statute of the International Court of Justice*, in INTERNATIONAL LAW AND THE GROTIAN HERITAGE 173, 182 (1985) (for a similar suggestion in the context of traditional public international law).

¹³¹ See, e.g., Cassese, *supra* note 3, at 32-33; Bantekas, *supra* note 5, at 129; Degan, *supra* note 3, at 81.

1 The Problem with “Legal Families”

Implicit, though unarticulated, in the talk of including representatives of the world’s major legal systems, is the premise that domestic legal systems can be categorized into “legal families”. The difficulties with this assumption become apparent when one pays attention to the passionate debate on the very legitimacy of the concept of legal families. Comparativists have time and again proposed different criteria for classifying the world’s legal systems into families.¹³²

International criminal courts and scholars appear to take for granted the validity of what have undoubtedly proved the two most influential groupings of

¹³² See, e.g., RENÉ DAVID & JAUFFRET SPINOSI, *LES GRANDES SYSTEMES DE DROIT CONTEMPORAINS* (1992); KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (1987); Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, in *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* (Vernon Valentine Palmer ed., 2001); Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems*, 45 *AM. J. COMP. L.* 5 (1997); Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 *AM. J. COMP. L.* 1043 (2012).

legal families.¹³³ The first was proposed by René David David who distinguished four legal families based on the criteria of ideology and legal technique: Romano-Germanic laws, common law, socialist law, and a residual category comprising philosophical or religious systems which included Muslim law, Hindu law, the law of Far Eastern countries, and the law of Africa and Madagascar.¹³⁴ The second is Zweigert and Kötz's classificatory scheme based on legal or juristic style of the legal system comprising its history, mode of thought, institutions, sources, and ideology: Romanistic, Germanic, Nordic, Common Law, Socialist, Far East systems, Islamic systems, and Hindu Law.¹³⁵ However, as comparativists have shown recently, these dominant classificatory schemes were preceded by

¹³³ See Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 676 (2002); John Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 547(1995).

¹³⁴ DAVID & SPINOSI, *supra* note 132; Mattei, *supra* note 132, at 8; Jaakko Husa, *Legal Families*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 491, 496 (Jan M. Smits ed., 2012).

¹³⁵ ZWIEGERT & KÖTZ, *supra* note 132; PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 34, 36 (1999); Pargendler, *supra* note 132, at 1060.

several other attempts at categorization, in which the and the seminal distinctions between the common law and the civil law systems that were championed by David¹³⁶ and by Zweigert and Kötz, were conspicuously absent.¹³⁷ Indeed, the legal scholarship on this distinction seems to now have come full circle, with several prominent academics questioning whether the civil law—common law distinction is coherent or whether it is best abandoned.¹³⁸

¹³⁶ Indeed, as Pargendler notes, in his earlier 1950 treatise, *Traité élémentaire de droit civil compare*, David's classification did not include a civil law-common law distinction. Instead, the main families identified were Western Law, Socialist Law, Islamic Law, Hindu Law, and Chinese Law: Pargendler, *supra* note 132, at 1053.

¹³⁷ Pargendler, *supra* note 132, at 1047-1053; *see also* Husa, *supra* note 134, at 490-96.

¹³⁸ See James Gordley, *Common Law und Civil Law: eine überholte Unterscheidung*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 498 (1993); *see also* the discussion in Hein Kötz, *Abschied von der Rechtskreislehre*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 493, 497-504 (1998).

An analysis of the trajectory of the different families proposed demonstrates the extent to which the classifications are contingent,¹³⁹ not only on the criteria used for categorization, but also on the area of the law under study. The most influential classifications are Euro-centric in nature, an imbalance that is reflected in the uncertain knowledge about legal systems in other parts of the world that are hastily grouped together as “Far Eastern” and “Islamic” families.¹⁴⁰ As Harding remarks in the context of South East Asia, the legal families tradition persists in labeling these legal systems as “confucian” or “authoritarian”,¹⁴¹ while the truth is that the very idea of legal families with its orientation towards the general style of

¹³⁹ For a detailed account, see TP van Reenen, *Major Theoretical Problems of Modern Comparative Legal Methodology (3): The Criteria Employed for the Classification of Legal Systems*, 29 COMP. & INT’L. L.J. S. AFR. 71 (1996).

¹⁴⁰ See Mattei, *supra* note 132, at 10-11; Husa, *supra* note 134, at 499. It is worth noting that, in keeping with the changed geo-political map of the world, at least the independent significance of the “socialist” legal family has largely been eroded: Jaakko Husa, *Classification of Legal Families Today: Is It Time for a Memorial Hymn?*, REVUE INTERNATIONALE DE DROIT COMPARÉ 11, 15-16 (2004).

¹⁴¹ Andrew Harding, *Global Doctrine and Local Knowledge: Law in South East Asia*, 51 INT’L. & COMP. L. Q. 35, 48 (2002).

the legal system is completely ill-equipped to deal with the “nomic din” of South East Asia, where “every kind of legal sensibility is represented except perhaps for African law and Eskimo law”.¹⁴² Similarly, in her critique of the treatment of Islamic law in comparative legal scholarship, Abu-Odeh exposes the unhappy consequences of conflating “Muslim law” with the “law in Muslim countries”. Rejecting this synonymy, she argues persuasively that Islamic law is at best a partial source of law in Muslim countries which have been deeply influenced by and adopted European models of civil law.¹⁴³

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

¹⁴² Harding, *supra* note 141, at 42, 49 relying on CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FACTS AND LAW IN COMPARATIVE PERSPECTIVE 226 (1980).

¹⁴³ Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 813-23 (2004).

law, administrative law, and the criminal law.¹⁴⁴ Moreover, the legal families typology seems better geared towards “macro-comparisons”, that is, the comparison of entire legal systems, rather than “micro-comparison” which involves specific legal issues and institutions.¹⁴⁵ Thus, legal systems that are traditionally grouped into one family based on overarching common characteristics may have very different answers to specific criminal law problems. For instance, if one wants to derive general principles on the distinction between perpetration and accessorial liability in domestic legal systems, the German legal

¹⁴⁴ See Kötz, *supra* note 138, at 494; Husa, *supra* note 134, at 500; Esin Örucü, *What is a Mixed Legal System? Exclusion or Expansion*, 12 ELECTRONIC J. COMP. L. 1, 3 (2008); Åke Malmström, *The System of Legal Systems: Notes on a Problem of Classification in Comparative Law*, 13 SCANDINAVIAN STUD. L. 127, 139-40 (1969).

¹⁴⁵ See Husa, *supra* note 134, at 491. The difference between macro-comparison and micro-comparison is now generally recognized in the literature on comparative law methodology: De Cruz, *supra* note 135, at 227

system strictly distinguishes between principal and secondary responsibility,¹⁴⁶ in contrast to ‘formal unitary systems’ such as Italy which do not recognize this distinction, whereas ‘functional unitary systems’ like Austria formally distinguish between the two but do not consider secondary responsibility to be derivative.¹⁴⁷ Thus, depending on which of these systems is considered “representative” of the civil law family, the answer to the question of how parties to a crime may be distinguished would be very different.

Neither would it be helpful to look to more recent attempts to revise the traditional legal families typology. For instance, Palmer has mooted the category of “mixed jurisdictions”¹⁴⁸ as systems that are based primarily on a fusion of (private) Romano-Germanic law and (public) Anglo-American law and where these dual elements are recognized by both the outside observer and legal actors

¹⁴⁶ See JOHANNES WESSELS WERNER BEULKE, STRAFRECHT, ALLGEMEINER TEIL: DIE STRAFTAT UND IHR AUFBAU (SCHWERPUNKTE) 179 (2008); MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 153 (2009).

¹⁴⁷ HÉCTOR OLÁSULO, THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES 18-19 (2010).

¹⁴⁸ Palmer, *supra* note 132, at 4.

in the systems.¹⁴⁹ This description has, however, been criticized as too narrow, as it simplifies the differences between these legal systems and the different relationships between the various legal elements within each of these systems, as well as the influence of indigenous law in some of these systems.¹⁵⁰

Another novel approach to categorization has been developed by Mattei, who divides legal systems according to the source of social behavior that plays a dominant role in the legal system.¹⁵¹ Systems may be classified as belonging to the rule of professional law, the rule of political law, or the rule of traditional law, depending on the dominant pattern of social incentives and constraints.¹⁵² The rule of professional law is characterized by a separation between law on the one

¹⁴⁹ Palmer, *supra* note 132, at 7-10.

¹⁵⁰ Öricü, *supra* note 144, at 11-15; *see also* Esin Öricü, *Mixed and Mixing Systems: A Conceptual Search*, in *STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING* 344 (Öricü et al. eds., 1996).

¹⁵¹ Mattei, *supra* note 132, at 13-14.

¹⁵² Mattei, *supra* note 132, at 16.

hand and religion/philosophy and politics on the other.¹⁵³ In the rule of political law, political considerations and relationships determine the outcome of the legal process.¹⁵⁴ In the rule of traditional law, there is no secularization of the law, and the dominant legal pattern is a religion or philosophy.¹⁵⁵

While Palmer's taxonomy does not directly challenge or question the traditional legal families approach, Mattei's scheme is a more daring re-configuration of conceptualizing the world's legal systems.¹⁵⁶ Neither of these

¹⁵³ Mattei, *supra* note 132, at 23. This family includes the common law and civil law systems, Scandinavian systems and some mixed systems like Louisiana, Scotland, South Africa, and Quebec: Mattei, *supra* note 132, at 26.

¹⁵⁴ Mattei, *supra* note 132, at 28. Mattei would include in this family, the majority of the ex-Socialist legal family and under developed nations in Latin America and Africa: Mattei, *supra* note 132, at 30.

¹⁵⁵ Mattei, *supra* note 132, at 35-36. This encompasses nations that follow Islamic law, Indian law and Hindu law, and Asian and Confucian conceptions of law: Mattei, *supra* note 132, at 36.

¹⁵⁶ Mattei's classification of "Islamic law" and South East Asian legal systems has invited criticism: Harding, *supra* note 141, at 49; Abu-Odeh, *supra* note 143, at 821-22.

would be of much help though in searching for representatives to derive general principles for international criminal law. In particular, Mattei's approach says fairly little about the content of any particular legal rule in a legal system; it is entirely plausible that criminal law principles and rules could differ within the same legal family, and at the same time be common to different legal families. Given the impracticability of surveying all domestic legal systems, and the difficulty in devising any coherent way to group systems into families which can yield representative systems, it is unlikely that the content-independent approach which depends precisely on such a comparison can be applied legitimately.

2 Legal Formants, Traditions and Cultures

Even if one were somehow able to overcome the problems posed by the adoption of the legal families approach, another challenge lies in being able to correctly identify the legal principle in any particular system through comparative surveys. If one looks to the nature of the surveys done by international criminal courts for deducing content-independent general principles, it is rare to find citations to anything apart from a single statutory rule or an isolated case from the domestic legal system. If the courts are truly relying on national law in the majority of legal systems as a guide to a consensus on the content-independent general principle, merely looking at isolated legal rules may not prove enough. As Sacco's

influential theory of “legal formants” demonstrates, the “living law” is comprised of different formative elements, including statutes, judicial decisions, scholarly opinion, conclusions and reasons in judicial opinions, declamatory statements which may relate to the law, philosophy, religion, or ideology, which must all be consulted together to arrive at a working rule. Indeed, a legal system may have a multiplicity of conflicting legal formants, some that constitute rules of conduct, and others that provide abstract justifications or formulations of the rules.¹⁵⁷

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

¹⁵⁷ Radolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. (1991) 1, 21-34; see also Esin Örüçü, *Developing Comparative Law*, in *COMPARATIVE LAW: A HANDBOOK* 43, 61 (David Nelken and Esin Örüçü eds., 2007).

Even if a detailed comparison is theoretically possible, legal formants alone are scarcely decisive of the matter. The challenge to this view comes from two different sources: the idea of a plurality of legal orders, and the emphasis on legal culture. The plural legal orders approach rejects the exclusive emphasis on top-down State-centric law and posits the existence of a multiplicity of State and non-State legal orders, which operate alongside each other; “official law” and “non-state” law can even occupy equal status within the same political unit.¹⁵⁸

While there are different formulations of the idea of legal culture¹⁵⁹ or tradition¹⁶⁰ what they share in common is an antipathy to the conception of law as a mere set of legal rules in the books. Knowledge of law cannot consist in simply looking at legal doctrine, but must take into account its historical, socio-economic

¹⁵⁸ Örucü, *Developing Comparative Law*, *supra* note 157, at 61 citing BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE* 89 (2002).

¹⁵⁹ See Ralf Michaels, *Legal Culture*, in 2 *THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW* 1059 (Jürgen Basedow et al. eds., 2012).

¹⁶⁰ See, e.g., Glenn’s influential account of legal traditions as ongoing normative information: H. Patrick Glenn, *A Concept of Legal Tradition*, 34 *QUEENS L.J.* 427 (2008).

and ideological context.¹⁶¹ This is expressed in the idea of a legal tradition, which is a set of ‘historically conditioned attitudes’ about the nature of law, its role in society, and its formulation, operation and application.¹⁶² Going still further, the ‘legal culture’ approach argues that a proper understanding of the law requires an ‘understanding of the social practice of its legal community’, which in turn presupposes knowledge of its broader culture.¹⁶³ Comparison of legal systems is not possible without situating these systems in the legal cultures, and the wider societal cultures which gives rise to the legal cultures.¹⁶⁴

¹⁶¹ Mark van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT’L. & COMP. L.Q. 495, 496 (1998).

¹⁶² Örüçü, *Developing Comparative Law*, *supra* note 157, at 59 citing John Henry Merryman, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 2 (1985); *see also* Reenen, *supra* note 139, at 73.

¹⁶³ Örüçü, *Developing Comparative Law*, *supra* note 157, at 59 citing John S. Bell, *English Law and French Law – Not So Different?*, 48 CURRENT LEGAL PROBLEMS 63, 70 (1995) and van Hoecke & Warrington, *supra* note 161, at 498.

¹⁶⁴ Van Hoecke & Warrington, *supra* note 161, at 498.

A similar analysis is conducted by Legrand, who refers to a ‘legal mentalité, or the epistemological foundations of the cognitive structure of a legal culture. Legal rules, on this view, are merely ‘thin descriptions’ or ‘surface manifestations’ of a structure of attitudes and references; they are thus a reflection of a legal culture. The comparativist cannot focus simply on legal rules and concepts, but must take into account the historical, social, and cultural context in which the rules are embedded and gain an appreciation of the cognitive structure of the legal culture.¹⁶⁵

The challenges posed by these difference conceptions - legal formants, legal tradition, legal culture, legal mentalité - of the law that is an appropriate object of comparison point to the same direction: if international criminal tribunals rely on isolated legal rules in various domestic legal systems to identify a consensus which leads to a (content-independent) general principle of law, there is a grave danger that this will lead to a misleading or even incorrect solution. The legal rule contained in a single statutory provision or case may look very different when analyzed against the background of the legal and institutional practices of the system, its ideology, and its legal and non-legal culture. Seemingly similar rules

¹⁶⁵ Pierre Legrand, *European Legal Systems are Not Converging*, 45 INT’L. & COMP. L.Q. 52, 56-61 (1996).

may thus mask vast differences in the operation and application of the rules, making the quest for a consensus ever more elusive, and the rendering content-independence suspect.

3 Transposition and legal transplants

The final challenge to the content-independent approach to general principles comes from the task of transposition. International criminal tribunals have been careful to note that domestic criminal law principles cannot be transplanted helter-skelter to the international plane; one must first establish their appropriateness to the international criminal law sphere.¹⁶⁶ It is doubtful though whether more than lip service has been paid to this admonition. Again, comparative legal theory points to a more nuanced consideration of the transposition debate.

The (ideal) transposition process in public international law, and by extension international criminal law, involves the following steps: identification of the legal rule in the domestic system, abstraction of the legal principle on which the rule is based, and then transposition to the international plane taking

¹⁶⁶ See, e.g., Furundzija, *supra* note 74, at ¶ 178; Kupreskic, *supra* note 86, at ¶ 677.

into account the specificities of the international legal order.¹⁶⁷ Comparative law theory brings into question the very possibility of such transpositions, variously referred to as transplants, transfers, and receptions.¹⁶⁸

The classic debate on this issue revolves around a series of exchanges between Alan Watson and Pierre Legrand.¹⁶⁹ Watson views legal rules as propositional statements that can be borrowed and transported from one legal system to another; indeed, for Watson, the main source of legal change in the Western world has been the borrowing of legal rules, institutions, and doctrines from other systems.¹⁷⁰ Underlying this descriptive claim is the more radical

¹⁶⁷ Ellis, *supra* note 16, at 954; Olufemi Elias & Chin Lim, 'General Principles of Law', 'Soft' Law and the Identification of International Law, 28 NETHERLANDS Y.B. INT'L. L. 3, 23-24 (1997); Raimondo, *supra* note 45, at 52.

¹⁶⁸ See Gianmaria Ajani, *Transplants, Legal Borrowing and Reception*, in ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES (David S. Clark ed., 2007) 1509.

¹⁶⁹ See Ellis, *supra* note 16, at 963-64.

¹⁷⁰ See Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA.. L. REV. 1121(1983); Michele Graziadei, *The Functionalist Heritage*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 100, 121 (Pierre

assertion that there is no necessary functional relationship between law and the society in which it operates.¹⁷¹ Rather, law exhibits an autonomous life and logic of its own, due to the central role of the legal profession in its evolution and operation.¹⁷² The culture of the legal elite, with its adherence to and respect for tradition and authority, accounts for the development of the law through borrowing from other systems.¹⁷³ A highly developed legal system can thus serve as a source or inspiration for another system, even if the latter operates in very

Legrand and Roderick Munday eds., 2003)., P. G. Monateri, “Everybody’s Talking”: *The Future of Comparative Law*, 21 HASTINGS INT’L. & COMP. L. REV. 839 (1998).

¹⁷¹ Graziadei, *supra* note 170, at 121; Monateri, *supra* note 170, at 839-40; Annelise Riles, *Comparative Law and Socio-Legal Studies*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann and Reinhard Zimmermann eds., 2006) 775, 795.

¹⁷² Edward M. Wise, *The Transplant of Legal Patterns*, 38 AM. J. COMP. L. 1, 2-3 (1990).

¹⁷³ Wise, *supra* note 172, at 3-5; *see also* Graziadei, *supra* note 170, at 121; Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 16 (1998).

different societal conditions.¹⁷⁴ It is simply easier and more efficient for the legal elite to borrow from a more mature and accessible legal system as a model instead of fashioning entirely new legal rules.¹⁷⁵

In this borrowing exercise, considerations of the appropriateness of the borrowed rule are not always paramount. Other factors such as the general prestige of the donor legal system, national pride, accessibility, and sheer chance also play a role.¹⁷⁶ Watson is also not particularly concerned about systematic knowledge of the socio-economic context of the donor system for the purposes of

¹⁷⁴ Alan Watson, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95-96 (1974); Alan Watson, THE NATURE OF LAW 110-12 (1977); Wise, *supra* note 172, at 5-6.

¹⁷⁵ Alan Watson, *Aspects of Reception*, 44 AM. J. COMP. L. 335 (1996).

¹⁷⁶ See, Watson, *Legal Change*, *supra* note 170, at 1146-47; Watson, *Aspects of Reception*, *supra* note 175, at 339-40; Wise, *supra* note 172, at 6.

transplantation. The ‘idea’ of the law can still be successfully transplanted,¹⁷⁷ even if the borrowing state is ignorant of this wider cultural background.¹⁷⁸

This thesis is disputed vigorously by Legrand who dismisses the very idea of transplants.¹⁷⁹ Legrand understands rules to be “incorporative cultural forms”¹⁸⁰ which have a determinate content only within the meaning established by the

¹⁷⁷ See, Harding, *supra* note 141, at 45.

¹⁷⁸ Watson, LEGAL TRANSPLANTS, *supra* note 174, at 79; Esin Örüçü, *Law as Transposition*, 51 INT’L. & COMP. L Q. 205, 219 (2002).

¹⁷⁹ Pierre Legrand, *The Impossibility of ‘Legal Transplants’*, 4 MAASTRICHT J. EUR. & COMP L. 111, 116-118 (1997); David Nelken, *Comparatists and Transferability*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS, *supra* note 170, at 437, 441.

¹⁸⁰ Legrand, *supra* note 165, at 57.

languages and cultures that they inhabit.¹⁸¹ Thus, any attempt to transfer a legal rule is futile; all that is being transplanted is a “meaningless form of words”.¹⁸²

Legrand’s account is a useful reminder of the embedded nature of legal rules, and a cautionary tale against surface comparisons of textually similar rules which can give rise to misleading conclusions.¹⁸³ He has, however, been criticized for overstating his case. For instance, his insistence that rules will not survive translation into another language and culture implicitly assumes the unity and insularity of both. Cultures, pace Legrand, are not uniquely distinct whole entities; they are fragmented, constantly evolving and open-textured, and themselves constituted by borrowings.¹⁸⁴

One way to reconcile the two positions is by employing Teubner’s theory of

¹⁸¹ Legrand, *supra* note 165, at 56-61; Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 171, at 441, 467; Riles, *supra* note 171, at 797.

¹⁸² Legrand, *Impossibility*, *supra* note 179, at 120; Graziadei, *supra* note 181, at 470.

¹⁸³ Nelken, *supra* note 179, at 441.

¹⁸⁴ Riles *supra* note 171, at 798-99; Graziadei, *supra* note 181, at 468-70; Teubner, *supra* note 173, at 14-15.

‘legal irritants’: when a domestic legal system borrows a foreign rule, the latter does not get transplanted; rather it serves as an “irritation” that unleashes a series of changes in the domestic system. The foreign rule is not domesticated, but irritates the domestic legal discourse and the social discourse to which it is attached, thus leading to an evolution in the meaning of the external rule and its internal context.¹⁸⁵ Yet another alternative is suggested by the “IKEA theory of legal transplants” developed by Frankenberg¹⁸⁶ whereby the transfer between domestic legal systems is mediated through a global marketplace of ideas and concepts. The domestic legal rule goes through various stages of transformation: the domestic rule found in a particular socio-legal culture is decontextualized and turned into a marketable commodity in the form of an abstract design or set of information. In this commodified form, it is transferred as a formal rule to another domestic system, where it is in turn recontextualized.¹⁸⁷ This last stage can yield

¹⁸⁵ Teubner, *supra* note 173, at 12, 28; Örucü, *supra* note 178, at 209-10.

¹⁸⁶ Günter Frankenberg, *Constitutional Transfer: The IKEA Theory Revisited*, 8 J. INT’L. CONST. L. (2010) 563.

¹⁸⁷ Ralf Michaels, “One Size Can Fit All” – *On the Mass Production of Legal Transplants*, in ORDER FROM TRANSFER – STUDIES IN COMPARATIVE (CONSTITUTIONAL) LAW (Günter Frankenberg ed., 2013) 6-7 (forthcoming),

different results: the rule may be successful, it may produce “irritants”, or it may be rejected by the domestic system.¹⁸⁸

No matter which position one takes in the Watson/Légrand debate, the discussion surrounding transplants challenges the premise of the content-independent approach to general principles. If the legal principle that is abstracted from domestic legal rules truly does not survive its transposition to the international sphere (even Watson claims that it is the “idea” of the law that is transplanted), but evolves, adapts, irritates, and transforms, then this calls into question the legitimacy of the content-independent approach as a proxy for state-consent.

The above analysis shows that international criminal law tribunals and commentators ignore the insights of comparative law methodology at their peril. In contrast with public international law, general principles are widely expected to play a pivotal role in the development of international criminal law, but the method for their derivation remains opaque. Scholars have uncritically endorsed

available at
http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5449&context=faculty_scholarship

¹⁸⁸ Michaels, *supra* note 187, at 7.

the content-independent conception of general principles, recommending only that the universe of legal systems be expanded to prevent a neo-colonialist imposition of the domestic laws of predominantly Western nations onto other countries through the agency of international criminal legal rules. Though the charge of exclusivity has merit, the proposed solution of including “Islamic law” and the laws of Asian and African countries in the analysis, gives rise to more problems than it solves.

The critique of the concept of legal families in comparative law methodology brings into question the legitimacy of “representative” legal systems that ostensibly belong to different families, and that may appropriately be taken as reflecting the majority of the world’s municipal criminal law systems. Even if this objection is brushed aside as a pragmatic compromise given the time and resource challenges facing international criminal courts, the worry about isolated legal rules that paint a misleading picture of the domestic legal provision considered in its context still remains. Any consensus achieved by isolating the rule and ignoring its relationship to other parts of the legal systems and how it operates in practice is likely to be illusory and open to criticism. Finally, it remains controversial whether the domestic criminal law rule can truly be transplanted to the international legal regime without at least undergoing a transformation in its function and identity, which casts the state-consent based rationale for content-independent general principles in doubt.

The pure content-independent approach to general principles thus seems to have little to recommend it in the context of international criminal law, especially in light of the fact that international criminal tribunals are unlikely to be able to devote the effort and resources it would take to tackle the problems that arise from a serious consideration of comparative law scholarship.

V. PROBLEMATIZING THE CONTENT-DEPENDENT APPROACH

The above survey suggests that the pure content-independent conception of general principles, which has been championed widely as a way of developing the amorphous structure of international criminal law, is not only unlikely to be successful, but may well suffer from a crisis of legitimacy. If the basis for accepting principles derived from the municipal laws of a majority of States is that they reflect State consent, then a small sample of domestic legal rules that are unrepresentative of a majority consensus, distorted by virtue of their isolation from context, and transformed through the act of transposition, contradicts that rationale.

The unworkability of the content-independent version of general principles should speak in favor of the content dependent view, where international criminal law adopts a tenet as a general principle, not so much because it claims to exist in the majority of the world's legal systems, but because its content has some independent value which makes it an inherent part of the international (criminal)

legal system. This is a deceptively simple solution, which also faces significant challenges.

1 State sovereignty and consent

The most serious challenge to the content-dependent conception of general principles is the centrality of State sovereignty and consent in traditional public international law.¹⁸⁹ The entire discipline of international criminal law is, to some extent, already considered an assault on this established understanding.¹⁹⁰ In the

¹⁸⁹ E.g., Duncan B. Hollis, *Why Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 142 (2005); Lawrence R. Helfer, *Nonconsensual International Lawmaking*, U. ILL. L. REV. 71, 72 (2008); Matthew Lister, *The Legitimizing Role of Consent in International Law*, 11 CHI. J. INT'L L. 663, 664 (2010).

¹⁹⁰ See the discussion in Bernhard Graefarth, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 EUR. J. INT'L L. 67, 74-75 (1990) 74-75; Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?*, 16 EUR. J. INT'L L. 979 (2005); Kristen Hessler, *State Sovereignty as an Obstacle to International Criminal Law*, in INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY 39 (Larry May and Zachary Hoskins eds., 2010); Frédéric Mégret,

case of a treaty-based institution such as the ICC, at least some of this criticism can be overcome by arguing that States have consented to the criminal regime established by the ICC, and the legal rules embodied in the Rome Statute. Thus, the ICC should not be conceived of as a limitation on the conventional exercise of criminal jurisdiction by States, but rather as a vehicle through which they either collectively exercise criminal jurisdiction or delegate its operation over a specific category of cases.¹⁹¹

The Creation of the International Criminal Court and State Sovereignty: The “Problem of An International Criminal Law” Re-Examined, in INTERNATIONAL HUMANITARIAN LAW: PROSPECTS, VOL. III 47, 49-50, 109-111 (John Carey et al. eds., 2006)

¹⁹¹ Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT’L CRIM. JUST. 618, 622-634 (2003); Michael P. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 103-116 (2001); Jordan Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT’L. L. 1, 3-5 (2000); *Contra* Ruth Wedgwood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 199-200 (2001); Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-*

However, this consent-based justification is potentially compromised if the legal regime established by the Rome Statute is significantly incomplete and any lacunae that arise are filled at the discretion of ICC judges, without any reference to pre-existing domestic laws,¹⁹² and based simply on their own notions of which

Party States, 64 LAW & CONTEMP. PROBS. 13, 27-52 (2001); Madeline Morris, *The Jurisdiction of the International Criminal Court over Nationals of Non-Party States*, 6 ILSA J. INT'L. & COMP. L. 363, 366 (2000);

¹⁹² Yuval Shany, *Seeking Domestic Help: The Role of Domestic Criminal Law in Legitimizing the Work of International Criminal Tribunals*, 11 J. INT'L CRIM. JUST. 5, 10 (2013) (arguing that reference to domestic law can increase the “source legitimacy” of an international criminal court). A different, but related, concern is that the evolution of an international criminal regime that is independent of municipal laws will lead to inconsistent and different norms being developed by national and international criminal tribunals to adjudicate the same kinds of cases. Thus, the accused could find himself answerable to entirely different legal norms depending on whether he finds himself before a domestic court (whether that is the State of territoriality or nationality, or a State exercising universal jurisdiction), or before the ICC. The existence of two parallel regimes at the domestic and international level that can be implicated concurrently to

criminal law principles exemplify some ideal of objective justice. Wide-ranging judicial discretion in decision-making is controversial even in the context of domestic courts; the problem becomes far more acute in institutions such as international criminal tribunals, where judges are perhaps even less answerable to any immediate political community and there may be fewer avenues for correcting unchecked exercises of judicial power.¹⁹³

An obvious, though somewhat cursory, response to this concern is to argue that in consenting to a legal order which includes the validity of general principles

adjudicate cases arising out the same conflict may also result in cases of unequal treatment between various accused.

¹⁹³ See Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 13-14, 56 (2005) (arguing that in contrast with domestic courts, international tribunals are not subject to political control) *Contra* Laurence Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 942-54 (2005); Tom Ginsburg, *Bounded Discretion in International Judicial Law-Making*, 45 VA. J. INT'L. L. 631, 656-73 (2005) (for persuasive counter-arguments).

as a source of law, States have implicitly indicated their willingness to abide by a regime where there is significant gap-filling by judges.¹⁹⁴ This interpretation of their acquiescence is bolstered by the deliberate preference for a creatively ambiguous treaty text, in particular for controversial legal issues over which it was difficult to achieve consensus during the drafting process.¹⁹⁵ Such an “other-binding” delegation of decision-making authority to the courts only minimally compromises sovereignty.¹⁹⁶

One does not, however, need to resort to treacherous reconstructions of State

¹⁹⁴ See Andreas Paulus, *International Adjudication*, in THE PHILOSOPHY OF INTERNATIONAL LAW 207, 222 (Samantha Besson and John Tasioulas eds., 2010).

¹⁹⁵ See, e.g., Michael Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L. L. J. 507, 521-22 (1999).

¹⁹⁶ See Karen J Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMP. PROBS. 37 (2008) (Alter, however, regards the delegation of decision-making authority to the ICC as “self-binding” due to its explicit enforcement function and the nature of its compulsory jurisdiction. Delegations to ad hoc tribunals, on the other hand, are “other-binding, since the actors who constituted these courts would not be subject to their jurisdiction).

intent to reject a consent based objection to the content-dependent view of general principles; it suffices to consider the deeply controversial status of consent in classical public international law.

The first set of challenges to the importance of consent questions its role as the basis of state obligation in international law. As Fitzmaurice states, “it is not consent, as such, that creates the obligation, though it may be the occasion of it. It is a *method* of creating rules... consent could not, in itself, create obligations unless there were already in existence a rule of law according to which consent had just that effect.”¹⁹⁷ Indeed, various alternatives to consent have been canvassed as the bases of international obligation, including natural justice, social necessity, rules of recognition, the will of the international community, effectiveness, and sanctions.¹⁹⁸ Nevertheless, none of these has succeeded in providing a normatively coherent account of international law, and consent has

¹⁹⁷ See G G Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 9 (1956).

¹⁹⁸ Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L. L. 300, 301 (1968).

emerged as a temporary placeholder almost by default.¹⁹⁹

This does not imply, however, that the consensualist paradigm of international law and obligation has survived unscathed; it has come under renewed attack in recent scholarship which holds that State will and consent is being sidelined increasingly in practice, if not in the letter of the law. Law-making is no longer considered the exclusive province of States, even in the context of treaty obligations, where sub-state and supranational actors may have independent authority to conclude treaties, and extra-national actors may have considerable autonomy to interpret and modify treaty commitments.²⁰⁰ Similarly, the requirement of specific and express State consent to the jurisdiction of international tribunals has gradually given way to a compulsory adjudicative paradigm where consent to the jurisdiction of a tribunal is implicit and locked-in at the time of entry into a treaty, or its importance is diminished in the manner in

¹⁹⁹ See Martii Koskenniemi, *Introduction*, in *SOURCES OF INTERNATIONAL LAW* xii (Martii Koskenniemi ed., 2000).

²⁰⁰ Hollis, *supra* note 189, at 155, 160, 165, 171.

which jurisdiction is exercised in the face of explicit State resistance.²⁰¹ Consent-based international law is also being circumvented in light of its inefficiency in providing global public goods, and global rule-making is turning more towards non-consensual mechanisms such as “delegated majority rule-making, unilateral action or informal processes”.²⁰²

Further, the surface acceptance of State voluntariness has always been especially vulnerable when confronted with the sources of international law. Treaties, which are considered to exemplify the consensual nature of international legal obligations, may only embody State will or consent at the time of entry; once having entered into a treaty commitment, States may find themselves bound and able to extricate themselves only through processes that do not depend on

²⁰¹ Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 NYU J. INT’L. L. & POL. 791, 793-95, 834 (2007).

²⁰² Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT’L. L. 2014 (forthcoming) 1, 36 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335938

their will or consent.²⁰³ This is even more true of rules of customary international law, the “Achilles’ heel of the consensualist outlook”,²⁰⁴ which, at best, require general and widespread, rather than universal, State practice and *opinion juris*. Customary international rules may come into being on the basis of a vague consensus, and constitute binding norms for a State even if it has indicated no express acceptance, or has been largely ignorant of the rule’s formation, or even if it has voiced its dissent.²⁰⁵ The consent based paradigm of international law is also unable to account for the category of *jus cogens* obligations, which are peremptory norms of general international law that arise regardless of the will and consent of States and take precedence over treaty and other voluntary State commitments.²⁰⁶

There have been numerous attempts to reconcile these sources of law with

²⁰³ Alain Pellet, *Will and Consent in International Law-Making*, 12 *AUS. Y.B. INT’L. L.* 22, 33-35 (1998).

²⁰⁴ Prosper Weil, *Towards Relative Normativity in International Law*, 77 *AM. J. INT’L. L.* 413, 433 (1983).

²⁰⁵ Weil, *supra* note 204, at 433-38; Pellet, *supra* note 203, at 36-38; Andrew T. Guzman, *Against Consent*, 52 *VA. J. INT’L. L.* 747, 775-77 (2011).

²⁰⁶ *See* Weil, *supra* note 204, at 423, 425-28; Pellet, *supra* note 203, at 38.

the requirement of consent, which rely primarily on diluting the consent standard. For instance, it is urged that customary international law is based on the inferred consent of States, such that unless a State is a “persistent objector” – i.e., it consistently and clearly objects to a rule before it is recognized as customary international law – it is deemed to have consented to the rule. This justification controversially equates a failure to object with an affirmative consent, and fails to address the reason why the practice of objections that post-date the formation of the customary international law rule are considered without effect.²⁰⁷ Some of the scholarship on human rights likens general principles to *jus cogens* norms, where peremptory principles that are accepted and recognized as obligatory by the “international community of States as a whole” give rise to general principles of law as a source of human rights obligations.²⁰⁸ Thus, the “general acceptance and recognition” by States grounds the general principles in a consensualist conception of international law. This general acceptance does not, however, need to be demonstrated through State practice; rather, it may be “effected on the international plane”, in a “variety of ways in which moral and humanitarian

²⁰⁷ Guzman, *supra* note 205, at 776-77.

²⁰⁸ Bruno Simma and Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *AUS. Y.B. INT’L L.* 82, 104 (1998).

considerations find a more direct and spontaneous “expression in legal form” and then percolate down to the domestic level.²⁰⁹ The consensualist outlook does not, however, explain where the principle originates in the first place so as to possess this inherent authority, and how it acquires the moral persuasiveness to gain general acceptance and recognition.²¹⁰

Given the tenuous status of the principle of State consent as the basis of international legal obligations, and in particular, its uncomfortable relationship with the sources of public international law, the consensualist paradigm does not appear to pose an insurmountable barrier to the content-dependent view of general principles.

2 Criminal responsibility and the principle of legality

The focus on State sovereignty and consent is the classic international law objection to a content-dependent conception of general principles. A further twist is added by the criminal nature of the adjudicative process. Since international criminal law is generally thought of as a branch of public international law, it is

²⁰⁹ Simma and Alston, *supra* note 208, at 102, 105.

²¹⁰ D W Greig, *Reflections on the Role of Consent*, 12 *AUS. Y.B. INT’L. L.* 125, 142, 146 (1998).

easy to lose sight of the fact that an international criminal trial ultimately has vital consequences for the accused, which immediately implicates the principle of *nullum crimen sine lege* (the principle of legality).

The principle of legality has various aspects, which apply to a greater or lesser degree, depending on the legal system: the prohibition against *ex post facto* criminal law; the rule favoring strict construction of penal statutes; the prohibition or limitation of analogy as a tool for judicial construction; and the requirement of specificity and clarity in penal legislation.²¹¹ The principle is widely regarded as performing three main functions: preventing arbitrary exercise of the government's punitive power; upholding popular sovereignty by the preserving the legislature's prerogative to define punishable conduct and determine sanctions; and providing the accused with fair notice of the range of permissible

²¹¹ Aly Mokhtar, *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, 26 STATUTE L. REV. 41, 51 (2005); Roelof Haveman, *The Principle of Legality*, in, SUPRANATIONAL CRIMINAL LAW: A SYSTEM *SUI GENERIS* 39, 40 (Roelof Haveman et al. eds., 2003); see also M. Cherif Bassiouni, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 182-95 (2003); Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937).

conduct.²¹²

The legality principle poses serious concerns for the content-dependent conception of general principles: if there is a gap in the law, there is a strong argument that the law's silence should be interpreted to favor the accused. The legitimacy of using general principles to fill any gaps, particularly if this exercise results in a conviction (as in *Erdemovic*), is controversial by itself.²¹³ If these general principles are based on widely accepted domestic rules, especially the criminal laws of the States that would normally exercise jurisdiction over the case, then there may be some basis for arguing that the accused had adequate notice of the wrongfulness of his conduct.²¹⁴ This is a harder claim to support if

²¹² John Calvin Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L.REV. 189, 201 (1985); see also David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 569, 581 (Samantha Besson and John Tasioulas eds., 2010); Beth van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 (2008).

²¹³ See Greenwalt, *supra* note 70.

²¹⁴ Shany, *supra* note 192, at 10, 13-14; H.G. Van der Wilt, *A Small but Neat Utensil in the Toolbox of International Criminal Tribunals*, 10 INT'L. CRIM. L.

the content-dependent approach to general principles is adopted. It is also difficult to apply the notice rationale to gap-filling exercises which extend to other procedural or substantive rules that have little bearing on the wrongfulness of the conduct, but impact the nature of the trial process.

The principle of legality has always been a thorny issue for international criminal law; the difficulty of reconciling legality with a legitimate and effective international criminal law regime has pervaded the work of international criminal tribunals ever since Nuremberg. There are three possible responses that may serve to accommodate the demands of legality with the nature of international criminal law, and with a content-dependent interpretation of general principles.

REV. 209, 238 (2010). *Prosecutor v. Milutinovic*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise* ¶¶ 40-41 (Int'l Crim. Trib. Former Yugoslavia May 21 2003) (stating that tribunal may have recourse to domestic law, in particular the law of the country of the accused, to establish that he had notice that his conduct was punishable).

The first is a normative argument based on the nature of legality as a principle of justice.²¹⁵ In this sense, legality is not an absolute requirement which trumps all other considerations of substantive justice but must be balanced against them.²¹⁶ If the reason for an insistence on the *nullum crimen* maxim is to provide

²¹⁵ A more extreme view is that legality is not even a principle of justice, but only a rule of policy designed to protect the citizens against arbitrary legislature and judges. This rule is not necessarily applicable at the international level and may be disregarded if circumstances dictate otherwise. *United States v. Araki et al.*, Separate Opinion of Judge Röling, in 21 THE TOKYO MAJOR WAR CRIMES TRIAL 44-45A (R. John Pritchard & Sonia Magbanua Zaide eds., 1981). *See also*

²¹⁶ *See, e.g.*, Judgment, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 November 1945-1 October 1946, at 462 (1948) (note however, that the French text of the judgment does not speak of legality as a “principle of justice”, but merely states that it is a rule which does not limit State sovereignty. Guido Acquaviva, *At the Origins of Crimes Against Humanity: Clues to a Proper Understanding of the Nullum Crimen Principle in the Nuremberg Judgment*, 9 J. INT’L. CRIM. JUST. 881, 890 (2011); L.C. Green, *The Maxim Nullum Crimen Sine Lege and the Eichmann*

the accused with adequate notice of the wrongfulness of his conduct, this condition is more than satisfied in the case of international criminal law even if the offense is not strictly defined or codified beforehand, for an accused who commits the kinds of heinous acts which international criminal tribunals adjudicate cannot possibly have been unaware of their wrongful nature.²¹⁷ The

Trial, 28 BRIT. Y.B. INT'L. L. 457, 461 (1962); van Schaack, *supra* note 212, at 140-41.

²¹⁷ Nuremberg Judgment, *supra* note 216, at 462; Luban, *supra* note 212, at 584-85; van Schaack, *supra* note 212, at 156. *See also* Milutinovic, *supra* note 214, ¶ 42 (stating that the atrocious character of the acts may refute the claim that the accused was unaware of its criminality). As Robert Cryer notes, however, there is still some reluctance by tribunals to endorse a completely natural reason or morality justification for circumventing the strictures of the *nullum crimen* maxim, and even the Nuremberg judgment ultimately sought to bolster its decision by arguing in positivist terms through an unconvincing interpretation of international legal instruments as creating criminal liability. Cryer, *The Philosophy of International Criminal Law*, in RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW 232, 241-42 (Alexander Orakhelashvili ed., 2011).

notice requirement is in any case a fiction since even in domestic criminal law systems, ignorance of the law is generally not excused and the accused is presumed to be aware of the law by virtue of the fact of its official publication, though he may in fact have no knowledge of it.²¹⁸ This fiction of constructive notice applies even more strongly to war crimes or crimes against humanity, where “the more egregiously awful the conduct is intrinsically, the more it signals its own probable legal prohibition.”²¹⁹ Arguably, a more logical conceptualization of the “notice” standard even in the context of domestic criminal law would require only that citizens are aware of what kinds of acts are regarded by their political community as sufficiently intruding on the interests of others so as to warrant punishment.²²⁰ If the retroactive application of the law (whether by the legislature or through judicial lawmaking) merely results in the criminalization of conduct that conscientious members of the community would (at the time of

²¹⁸ Luban, *supra* note 212, at 585; Jeffries, *supra* note 212, at 207-08.

²¹⁹ Luban, *supra* note 212, at 585.

²²⁰ Peter K. Westen, *Two Rules of Legality in Criminal Law*, 26 *LAW & PHIL.* 229, 264 (2007).

commission) have regarded as deserving of punishment, then it does not violate the legality principle.²²¹

In the same vein, the specter of an all-powerful State against the might of which the citizen's rights have to be jealously guarded simply does not apply at the international level, where the institutions that apply and enforce ICL are weak and decentralized.²²²

Though the argument from substantive justice is intuitively appealing, there are considerable problems in its application. It does not give much guidance as to what conduct or prohibition rightfully falls within its domain such that it warrants a displacement of the legality principle.²²³ Neither is it obvious that the accused must be deemed to have notice that the kinds of acts which international law criminalizes could not but be wrongful. As the differences in the Opinions in *Erdemovic* demonstrate, it is far from clear whether duress should have been unavailable to Erdemovic as a matter of substantive justice, that Erdemovic could not but have known this from the nature of the act of mass murder, or that

²²¹ Westen, *supra* note 220, at 269, 272-74.

²²² Luban, *supra* note 212, at 583; *see also* van Schaack, *supra* note 212, at 147.

²²³ Darryl Robinson, *A Cosmopolitan Liberal Account of International Criminal Law*, 26 LEIDEN J. INT'L L. 127, 148-49 (2013).

conscientious members of the (international criminal law) community would have regarded his conduct as undeserving of excuse or mitigation.

The second set of responses to the requirements of the *nullum crimen* maxim is conceptual in nature, and treats legality as a more flexible concept that has special characteristics in the context of international criminal law.²²⁴ For instance, the element of *lex scripta* or written/codified law is treated as incidental rather than central to the principle; indeed, it has never been properly recognized as fundamental to the common law version of *nullum crimen* in any case.²²⁵ In the international criminal law context, international instruments such as the International Covenant on Civil and Political Rights (ICCPR)²²⁶ and the European

²²⁴ See Bruce Broomhall, *Article 22: Nullum Crimen Sine Lege*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 713, 717-718 (Otto Triffterer ed., 2008); van Schaack, *supra* note 212, at 134-37.

²²⁵ Haveman, *supra* note 211, at 41, 53; see also Robinson, *supra* note 223, at 148-49 (describing *lex scripta* as a contextually contingent technique rather than an elementary requirement of legality).

²²⁶ International Covenant on Civil and Political Rights art. 15, Dec. 19, 1966, 999 U.N.T.S. 171.

Convention on Human Rights (ECHR)²²⁷ provide for recognition of non-written international law sources such as the “general principles of law” as valid bases for the imposition of criminal sanctions.²²⁸ Similarly, there is support for a more flexible canon of interpretation,²²⁹ whereby progressive development of the elements of an offense meets the requirements of legality as long as the alleged acts are within the “very essence” of the original crime,²³⁰ and is foreseeable.²³¹ It

²²⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222.

²²⁸ See also Susan Lamb, *Nullum Crimen, Nulla Poena Sine Lege in Internatioanl Criminal Law*, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 733, 749-50 (Antonio Cassese et al. eds., 2002) (discussing the compatibility of customary international law as a source of international criminal law with the principle of legality).

²²⁹ The application of the canon of strict interpretation seems to be far from uniform even in domestic jurisdictions. Jeffries, *supra* note 212, at 198-99; Westen, *supra* note 220, at 249.

²³⁰ Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. INT’L. CRIM. JUST. 1007, 1013, 1017 (2004).

is important to note that this line of reasoning does not dispute the importance or the validity of the principle of legality for international criminal tribunals, but argues for a more nuanced interpretation of the principle in the international criminal legal context.

Similarly, the pragmatic counter to objections based on the *nullum crimen* principle also recognizes its legitimating function in international criminal law, but stresses the importance of effectiveness (in attaining the object of ending impunity) as an equally important goal for international criminal tribunals, which must be weighed against these legitimacy concerns.²³² Given the embryonic nature of international criminal and the relatively incomplete and vague drafting of international criminal law statutes, judges have no choice but to exercise creative interpretation to fill these lacunae.²³³ Some commentators view this as a

²³¹ van Schaack, *supra* note 212, at 173, 178-82 (discussing the jurisprudence of the European Court of Human Rights).

²³² Salvatore Zappalà, *Judicial Activism v. Judicial Restraint in International Criminal Justice*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 216, 217 (Antonio Cassese ed., 2009)

²³³ Zappalà, *supra* note 232, at 217. The Special Tribunal for Lebanon has expressly recognized the impermissibility of a *non liquet* in international criminal

temporary state of affairs, and prophesize that as the international criminal legal regime matures, international criminal rules will increasingly be codified and leave little scope for judicial creativity.²³⁴ Others regard this as a less desirable development, and argue that in the circumstances in which international tribunals operate,²³⁵ involving matters of extreme legal complexity, factual circumstances

law. Ayyash et al., Case No. STL-11-01/I, Interlocutory Decision of the Applicable law: Terrorism. Conspiracy. Homicide, Perpetration, Cumulative Charging ¶23 (Special Trib. Lebanon Feb. 16 2011).

²³⁴ See, e.g., Héctor Olsáolo, *A Note on the Evolution of the Principle of Legality in International Criminal Law*, 18 CRIM. L. FORUM 301, 318 (2007); van Schaack, *supra* note 212, at 191.

²³⁵ In other areas of public international law, scholars have argued that judicial lawmaking through the vehicle of customary international law is appropriate, and even desirable, in situations when conflicting State interests fail to achieve efficient outcomes and the tribunal is the only institution that can act to promote efficient norms. Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, in, THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL CO-OPERATION: THEORETICAL PERSPECTIVES 85, 86-87 (Eyal Benvenisti and Mosche Hirsch eds., 2004).

that would invariably pose ever-new legal conundrums, and with the aim of providing justice to victims (instead of securing the rights of defendants against arbitrary State power), judicial lawmaking will be necessary to secure their effectiveness.²³⁶

The analysis above reveals that though the public international law oriented challenge to a content-dependent interpretation of general principles can be overcome, it is more difficult to deny the criminal law based objection. State sovereignty and consent have increasingly been revealed to possess an uncertain status in public international law, and while the illusion of consent has been maintained, the sources of international law continue to expose its fragile foundation. If the general principles of law were interpreted in a content-dependent manner where state consent manifested in the form of positive domestic law that is transposed to international criminal law was no longer required, this would not unduly compromise their legitimacy. Alternatively, if the State consent objection is taken seriously, then we would also need to rethink our commitment to other sources of international law such as customary international law and *jus cogens* norms.

The legitimacy concern highlighted by the legality principle cannot be

²³⁶ Zappalà, *supra* note 232, at 221-22.

denied equally easily. Normative arguments in favor of the displacement of the *nullum crimen* maxim due to the heinous nature of the conduct that forms the subject of international criminal law, while persuasive, are ultimately found wanting. Conceptual and pragmatic compromises with the legality principle only serve to reveal its importance. The legality principle thus presents a proper and true dilemma for international criminal law, and at the very least, cautions against an uncritical adoption of the content-dependent interpretation of general principles.

VI. CONCLUSION

Problematizing the concept of general principles through the lens of the content-dependent and content-independent distinction reveals serious concerns as to their legitimacy as a source of international criminal law. Since they were invoked only infrequently by international courts such as the PCIJ and the ICJ and never used as the sole legal source for an international decision, the indeterminacy surrounding their nature, content, and application did not influence greatly the integrity of international legal proceedings. Their increasing relevance for the evolution of international criminal law poses a more complicated picture: as decisions such as *Erdemovic*, *Furundzija*, and *Kupreskic* demonstrate, general principles are being pressed into service where there are gaps in the definition and scope of offenses and defenses and in legal principles governing trial procedures

and sentencing. Legal rules derived from the general principles can thus make a crucial difference in the substantive and procedural law applied by the tribunals, and to the acquittal or conviction of the accused. If there is no coherent methodology to sustain the content-independent interpretation of general principles, and the content-dependent conception runs contrary to the principle of legality, what must an international judge faced with the gap do?

One solution is to adopt Stone's skeptical stance towards the validity and application of general principles: the international judge is not, and should not be, a legislator. Thus, if a gap in the law exists, that is, if nothing in the text of the Statute or in conventional or customary international law is available as a means to resolution, it is better to not give the judge unbridled discretion to fill this lacuna. Instead, the law's silence should be interpreted in favor of the accused.²³⁷ Any significant gaps in the law are better filled through gradual state practice, or even through amendments to the text of a treaty such as the Rome Statute.

²³⁷ Rome Statute, *supra* note 103, art. 22(2); Prosecutor v. Tadic, Case No. IT-94-I-A, Judgment, ¶ 662 (Int'l. Crim. Trib. Former Yugoslavia July 15, 1999); Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment, ¶ 114 (Int'l. Crim. Trib. Former Yugoslavia July 29, 2004); Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment ¶¶ 415-18 (Int'l. Crim. Trib. Former Yugoslavia Nov. 16, 1998).

This solution does not sit too well though with the self-image of international criminal justice. The hybrid identity of international criminal law embodies within itself contradictions and distortions that result from a mix of principles of criminal law on the one hand and assumptions stemming from human rights and humanitarian law on the other.²³⁸ International criminal law is self-consciously victim-centric, in that victim protection is seen as a central, and even dominant, aim of the enterprise.²³⁹ If we harken back to decisions like *Erdemovic* and *Furundzija*, as a matter of interpretation, an avowedly victim-protective regime is unlikely to allow an unrestricted defense of duress or hold that grave violations of sexual autonomy are not encompassed within the definition of rape.

The way out of this dilemma then is to recognize that judicial law-making that relies on general principles to fill in gaps is inescapable at this stage of international criminal justice. Once the truth of this statement is acknowledged, the question then becomes how best the application of general principles may be systematized so as to maintain the legitimacy of international criminal justice.

²³⁸ Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L. L. 925, 927-29 (2008).

²³⁹ Robinson, *supra* note 238, at 935-38.

While it is difficult to rescue the content-independent interpretation of general principles from the inadequacies in its methodology revealed by comparative law theory, the content-dependent conception may prove more promising, provided it can be reconciled with the demands of legality.

Such an attempt at reconciliation is not without appeal; indeed several versions of legality may be compatible with the content-dependent approach. For instance, if the emphasis is on the unfairness to the accused caused by convicting him without adequate notice, then this would primarily exclude the general principles being used as a basis for the creation of new offenses; presumably, they could still be applied to exculpate the accused (through recognizing a defense), to clarify procedural issues, and even to interpret existing offenses. This may lead one to worry that the limited scope of general principles would imply a fracture in the sources of international criminal law, where there are no accepted sources of law that apply to the entire regime but only sources that may be valid depending on the legal issue. However, one can still argue that the general principles apply as a source to the international criminal law regime as a whole, and are merely overridden by considerations pertaining to legality in certain instances.

If the content-dependent approach to general principles is adopted (while being mindful of legality considerations), would this mean that the international judge can run amok, inserting whatever he or she wishes into the content of international criminal law, limited only by his conception of objective justice?

There is good reason to think that this fear is somewhat exaggerated. The judge, who is thus called upon to “optimiz[e]... the rationality of the system”²⁴⁰ is always constrained by the obligation to give reasons for his decisions, which limits arbitrary decision-making.²⁴¹ Moreover, this reasoned decision is then open to the scrutiny of the stakeholders²⁴² in the international law community, including lawyers, defendants, victims, civil society representatives, and scholars. Given the close attention that pronouncements of international criminal courts typically invite, in particular on controversial questions, it is unlikely that judges can renounce attempts at transparent and reasoned deliberation that yield applicable general principles. The practical working of the international criminal law regime also serves as a check on judicial discretion. Since international criminal tribunals lack any police or enforcement powers and depend on States to secure funding, they function with the awareness that decisions which lack legitimacy would place considerable strain on much needed State co-operation and support.²⁴³ International courts must thus deduce general principles of law

²⁴⁰ Paulus, *supra* note 194, at 214.

²⁴¹ Jeffries, *supra* note 212, at 214-15.

²⁴² Jeffries, *supra* note 212, at 214-15.

²⁴³ See Cryer, *supra* note 217, at 256.

that have the “potential for explanatory clarity”,²⁴⁴ that is, they should be fashioned in terms that can be explained to and comprehended by the accused, and the larger international criminal law community. The ultimate test of their legitimacy may well lie in the extent to which they are ultimately accepted and adopted as valid principles of international criminal law by all its stakeholders.

²⁴⁴ Jeremy Horder, *Criminal Law and Legal Positivism*, 8 *LEGAL THEORY* 221, 236 (2002).

