General principles of law in the decisions of international criminal courts and tribunals

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

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FABIAN O. RAIMONDO

To Mercedes and Julia, the light of my eyes.

Preface

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

This thesis is part of the research programme 'Diversity of Legal Systems and Global Order' of the Amsterdam Centre for International Law. I wrote a great deal of it during my three-year stay at the University of Amsterdam as a research fellow.

Many people have helped writing this thesis. I would like to thank Professor Hortensia Gutiérrez Posse for having encouraged me to write on this topic. Special thanks are due to Professors André Nollkaemper and Erika de Wet for their supervision, advice, interest, and support of the thesis. I am grateful to Professors Delmas-Marty, Lambert-Abdelgawad, and Fronza, who gave me the excellent opportunity to present my preliminary findings at the *College de France* and the University of Bologna in the context of their research project *'Les sources du droit international pénal'*. I am thankful to my former colleagues of the Amsterdam Centre for International Law, in particular Nwamaka Okany, for their fellowship and constructive views on earlier drafts. The very kind librarians at the Faculty of Law of the University of Amsterdam have helped me a lot with my research; thanks so much to them too. I am indebted to Professor Jaap van den Herik for aiding to put together the whole thesis. Special thanks are also due to the members of the thesis' reading committee, Professors Ambos, Brus, Van Genugten, Swart, and Van der Wilt, for their very useful comments. Finally, many thanks to Larissa van den Herik for her invaluable help in many forms.

Contents

Abbreviations

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

MJIL	Michigan Journal of International Law
NEP	*Nouvelles Études Pénales*
NILR	Netherlands International Law Review
NYIL	Netherlands Year Book of International Law
NYJHR	New York Law School Journal of Human Rights
NYJIL	New York University Journal of International Law and Politics
OZOR	*Österreichische Zeitschrift für öffentliches Recht*
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RCADI	*Recueil des cours de l'Académie de droit international*
REDI	*Revista Española de Derecho Internacional*
RP	Rules of Procedure
RPE	Rules of Procedure and Evidence
RGDIP	*Revue générale de droit international public*
SCSL	Special Court for Sierra Leone
SFRY	Social Federal Republic of Yugoslavia
TICLJ	Temple International and Comparative Law Journal
TLR	Tulane Law Review
UCLAR	University of California in Los Angeles Law Review

Arbitral awards and judicial decisions

International arbitral tribunals

GREAT BRITAIN - PORTUGAL

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

GREAT BRITAIN - PERU

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

GREAT BRITAIN - ARGENTINA

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

BRAZIL - SWEDEN, NORWAY

- *Affaire du Queen sentence du 26 mars 1872*

RUSSIA - TURKEY

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

PCIJ

- *Jaworzina, Advisory Opinion, 1923, PCIJ, Series B, No. 8*
- *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, PCIJ, Series A, No. 2*
- *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, PCIJ, Series B, No. 12*
- *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No. 9*
- *Lotus, Judgment No. 9, 1927, PCIJ, Series A, No. 10*
- *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, PCIJ, Series B, No. 16*
- *Brazilian Loans, Judgment No. 15, 1929, PCIJ, Series A, No. 21*
- *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, PCIJ, Series A, No. 23*
- *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, PCIJ, Series A, No. 22*

- *Lighthouses case between France and Greece, Judgment, 1934, PCIJ, Series A/B/, No. 62*
- *Lighthouses in Crete and Samos, Judgment, 1937, PCIJ, Series A/B, No. 71*

ICJ

- *Corfu Channel, Merits, Judgment, ICJ Reports 1949*, p. 4
- *International Status of South West Africa, Advisory Opinion, ICJ Reports 1950*, p. 128
- *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, ICJ Reports 1952*, p. 93
- *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1954*, p. 47
- *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, ICJ Reports 1955*, p. 67
- *Application of the Convention of 1902, Governing the Guardianship of Infants, Judgment, ICJ Reports 1958*, p. 55
- *Right of Passage over Indian Territory, Merits, Judgment, ICJ Reports 1960*, p. 6
- *Temple of Preah Vihear, Merits, Judgment, ICJ Reports 1962*, p. 6
- *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p. 6
- *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p. 3
- *Continental Shelf (Tunisia / Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, ICJ Reports 1981*, p. 3
- *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America, Merits, Judgment, ICJ Reports 1986*, p. 14
- *Elettronica Sicula S.p.A. (ELSI), Judgment, ICJ Reports 1989*, p. 15
- *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992*, p. 240
- *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, ICJ Reports 1992*, p. 351
- *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996,* p. 226

- *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p. 7
- *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Counter Claim, Order of 10 March 1998, ICJ Reports 1998,* p. 190
- *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, Merits, ICJ Reports 2003*

IMT

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

IMTFE

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

ICTY

- *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case No. IT-94-1-AR72, App. Ch., 2 October 1995
- *Prosecutor v. Tadić, Decision on the Defence Motion on the Principle of Non Bis in Idem*, Case No. IT-94-1-T, T. Ch. II, 14 November 1995
- *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T, T. Ch. I, 29 November 1996
- *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997
- *Prosecutor v. Erdemović, Judgment*, Case No. IT-96-22-A, App. Ch., 7 October 1997
- *Prosecutor v. Blaškić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95-14-AR108*bis*, App. Ch., 29 October 1997
- *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T *bis*, T. Ch. II*ter*, 5 March 1998
- *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998
- *Prosecutor v. Furundžija, Judgment*, Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998
- *Prosecutor v. Tadić, Judgment*, Case No. IT-94-1-A, App. Ch., 15 July 1999

- *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000
- *Prosecutor v. Tadić, Judgment in Sentencing Appeals*, Case No. IT-94-1-A and IT-94-1-Abis, App. Ch., 26 January 2000
- *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-R77, App. Ch., 31 January 2000
- *Prosecutor v. Blaškić, Judgment,* Case No. IT-95-14-T, T. Ch. I, 3 March 2000
- *Prosecutor v. Aleksovski, Judgment,* Case No. IT-95-14/1-A, App. Ch., 24 March 2000
- *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-A, App. Ch., 21 July 2000
- *Prosecutor v. Delalić et al., Judgment*, Case No. IT-96-21-A, App. Ch. 20 February 2001
- *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23-T & IT-96-23/1-T, T. Ch. II, 22 February 2001
- *Prosecutor v. Kordić & Čerkez, Judgment,* Case No. IT-95-14/2-T, T. Ch. T. Ch. III, 26 February 2001
- *Prosecutor v. Tadić, Appeals Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin,* Case No. IT-94-1-A-AR77, App. Ch., 27 February 2001
- *Prosecutor v. Milutinović et al., Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction –Joint Criminal Enterprise-*, Case No. IT-99-37-AR72, App. Ch., 21 May 2003
- *Prosecutor v. Aleksovski, Judgment on Appeal by Anto Nobilo against Finding of Contempt,* Case No. IT-95-14/1-AR77, App. Ch., 30 May 2001
- *Prosecutor v. Jelisic, Judgment,* Case No. IT-95-10-A, App. Ch. 5 July 2001
- *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23 & IT-96-23/1-A, App. Ch., 12 June 2002
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- *Prosecutor v. Banović, Sentencing Judgment,* Case No. IT-02-65/1-S, T. Ch. III, 28 October 2003
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- *Prosecutor v. Deronjić, Sentencing Judgment,* Case No. IT-02-61-S, T. Ch. II, 30 March 2004
- *Prosecutor v. Krstić, Judgment*, Case No. IT-98-33-A, App. Ch., 19 April 2004
- *Prosecutor v. Brdanin, Judgment*, Case No. IT-99-36-T, T. Ch., 1 September 2004
- *Prosecutor v. Kordić et al., Judgment*, Case No. IT-95-14/2-A, App. Ch., 17 December 2004
- *Prosecutor v. Nikolić, Judgment on Sentencing Judgment*, Case No. IT-94-2-A, App. Ch., 4 February 2005
- P*rosecutor v. Mejakic et al., Decision on Joint Defence Appeal Against Decision on Referral under Rule 11bis,* Case No.: IT-02-65-AR11*bis*.1, App. Ch. 27 April 2006
- *Prosecutor v. Milutinović et al., Decision on Ojdanić Motion to Prohibit Witness Proofing,* Case No. IT-05-87-T, T. Ch., 12 December 2006

ICTR

- *Prosecutor v. Akayesu, Judgment,* Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998
- *Prosecutor v. Kayishema and Ruzindana,* Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999
- *Barayagwiza v. Prosecutor, Decision*, Case No. ICTR-97-19-AR72, App. Ch., 3 November 1999
- *Prosecutor v. Musema, Judgment and Sentence,* Case No. ICTR-96-13-T, T. Ch. I, 27 January 2000
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- *Prosecutor v. Karemera et al., Decision on Interlocutory Appeal Regarding Witness Proofing*, Case No. ICTR-98-44-AR73.8, App. Ch., 11 May 2007

ICC

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

- *Prosecutor v. Norman et al., Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment),* Case No. SCSL-04-14-AR72(E), App. Ch., 31 May 2004
- *Prosecutor v. Norman et al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-14-PT, T. Ch., 2 June 2004
- *Prosecutor v. Sesay el al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-15-PT, T. Ch., 24 June 2004
- *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days*, Case No. SCSL-04-15-T, T. Ch., 12 July 2004

- *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Accused, Sesay and Kallon to Appear for their Trial*, Case No. SCSL-04-15-T, T. Ch., 12 January 2005
- *Prosecutor v. Brima et al., Judgment,* Case No. SCSL-04-16-T, T. Ch. II, 20 June 2007

Chapter 1 Introduction

The introduction consists of three sections. Section 1.1 formulates the problem statement of this thesis. Section 1.2 sets out the sequence of discussion throughout the thesis. Section 1.3 explains how this thesis comports with the literature available in the field.

1.1 Problem statement

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

While I adhere to the majoritarian opinion, I deem it important to make the following two clarifications. First, general principles of law are legal principles recognized in the domestic law of the generality of nations (see section 2.6) that are apt to be transposed into international law (see section 2.7). Second, once they have crystallized in conventional and customary rules of international law or once they have been repeatedly applied by international courts and tribunals, it is obvious that at that point in time they are recognized in all sorts of legal relations, national and international, such as the *res iudicata* principle; this is why the majoritarian opinion and the third scholarly conception of the general principles of law mentioned above are not contradictory but complementary to each other.

The subject of this thesis is general principles of law in the decisions of international criminal courts and tribunals. The decisions examined in the thesis do not only cover instances of the effective application of general principles of law, but also those

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

instances where the categorization of a given legal principle as a general principle of law or the applicability of general principles of law not followed by effective application were at stake. The justification for this choice is clear. Such instances are relevant for this thesis because they may shed light in respect of the issues of the determination of general principles of law and their transposition into international law. These issues are, as explained below, the subject-matter of the two research questions leading the thesis.

1.1.1 Focus and goal

General principles of law have played an important role in the development of international criminal law, as the decisions of international criminal courts and tribunals discussed in chapter 3 demonstrate.

The issue of the applicability of general principles of law by international criminal courts and tribunals has raised several major complex questions that this thesis addresses. The questions can be brought together under the following problem statement:

> *How do international criminal courts and tribunals determine general principles of law and transpose these from national legal systems into international law in order to apply them to a case?*

The goal of the thesis is to establish whether international criminal courts and tribunals have developed some methodology regarding the application of general principles of law at the international level.

1.1.2 Two research questions

To reach that goal and to answer the problem statement, the thesis envisages investigating the following two research questions:

- How do international criminal courts and tribunals determine general principles of law?
- Are there structural differences between national criminal law and international criminal law that would hinder the transposition and application of general principles of law from the former into the latter?

The two research questions are important because, as explained in chapter 2, (i) the application of general principles of law by international courts and tribunals may require their

previous determination at the level of national legal systems and, (ii) their subsequent transposition into international law may be restricted.

1.1.2.1 The first research question: determination

As indicated in chapter 2, the determination of general principles of law (the first research question) may consist of two separate moves, which I call the 'vertical move' and the 'horizontal move', respectively. The vertical move consists in an abstraction of legal rules from national legal systems aimed at deriving an underlying legal principle. The horizontal move consists in a comparison of national legal systems aimed at verifying whether the generality of States recognizes the legal principle thus obtained.

The discussion starts at the vertical move. Given that by definition general principles of law are *abstractions* of legal rules from national legal systems, they are not as precise as the legal rules at their origin.[5] Thus, general principles of law derived at a very high level of abstraction may be unsuitable for settling particular legal issues because of their vagueness.[6]

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

Consider, for example, Article 15 of the ICCPR.[8] This

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

[6] See subsection 2.6.1.2, below.

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

[8] Article 15 of the ICCPR reads as follows: '1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a

provision does not prohibit criminalization of conduct by unwritten legal rules, such as custom and general principles of law. However, pursuant to that legal provision States must define exactly all crimes and punishments by law, in the interest of legal certainty.[9] Thus, even though the ICCPR permits criminalization of conduct by means of unwritten legal norms, criminalization by general principles of law may conflict with the requirement of *lex certa* because the existence of such norms may be uncertain and the elements of crimes imprecise.

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

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criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.'

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

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

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

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

Whereas for some scholars[13] Islamic law should be examined for such purpose, for others a comparative research encompassing both the Romano-Germanic and the Common Law legal families is sufficient.[14] Yet, it seems that having recourse to the classification of national legal systems in legal families may be pointless for deriving general principles of law pertaining to criminal law. The reason is that in connection with criminal law, such classification is somewhat irrelevant. For instance, a national legal system such as the Italian system, which is rooted in the Romano-Germanic legal tradition, now has a criminal procedure based on some of the principles of the adversarial model, i.e., a model that originated in the Common Law legal tradition.[15] As a result, mixed criminal procedures cannot be included neither in the Romano-Germanic nor in the Common law legal families because the distinction between adversarial and inquisitorial criminal procedures is not always completely clear.[16] Thus, having recourse to the dichotomies Romano-Germanic/Common Law or inquisitorial/adversarial for deriving general principles of law pertaining to criminal law seems to be rather futile. Consequently, it is worth investigating whether there might be some other criterion appropriate to select the national legal systems to be examined in the search for general principles of law concerning criminal law. So far, no scholar has dealt with this issue.

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

These queries and points of debate constitute the rationale for an investigation as to how international criminal courts and

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

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

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

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

tribunals have determined general principles of law.

1.1.2.2 The second research question: transposition

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

Indeed, international criminal courts and tribunals, as well as some of their members, have sometimes recalled those legal obstacles. In particular, they affirmed that the differences existing between national legal systems and international law (differences on structure, subjects, sources, and enforcement mechanisms) would prevent a mechanic transposition of legal principles from the former into the latter.[18]

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

1.1.3 Methodology

Given that this thesis is about the application of general principles of law by international criminal courts and tribunals, it is understood that the main object of study is judicial decisions. Of course, the relevant scholarly writing is examined

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[17] See Simma, Bruno and Paulus, Andreas, *op. cit.* 12, pp. 63-64, § 15; Cassese, Antonio, *op. cit.* 10, p. 33; Rivello, Roberto, 'Les principes généraux de droit et le droit international pénal', in Chiavario, Mario (ed.), *La justice pénale internationale entre passé et avenir*, Milano, Giuffrè, 2003, p. 96.

[18] See section 4.4.

as well. In this respect it is worth noting that it is generally accepted that judicial decisions and scholarly writing are subsidiary means for the determination of rules and principles of international law.[19]

This thesis examines awards of early international arbitral tribunals, judgments and advisory opinions of the PCIJ and the ICJ, and decisions (including judgments) of international criminal courts and tribunals. An overview of the awards of early international arbitral tribunals will lead to an understanding of the manner in which general principles of law began to be applied in international law. The judgments and advisory opinions of the PCIJ and the ICJ are extremely relevant because of the authority and prestige of these international courts (the ICJ is the principal judicial organ of the UN, according to Article 92 of the UN Charter). Thus, the awards of early international arbitral tribunals and the judgments and advisory opinions of the PCIJ and the ICJ serve as an appropriate reference for evaluating the manner in which international criminal courts and tribunals have dealt with general principles of law in their decisions.

An examination of the decisions of international criminal courts and tribunals is at the core of this research. The decisions chosen for examination encompass those of the IMT, the IMTFE, the ICTY, the ICTR, the ICC, and the SCSL. However, the decisions of the ICTY constitute the main raw material, as this international criminal tribunal has dealt with general principles of law much more often than the others and, thus, it has developed jurisprudence on this matter.

1.2 The sequence of discussion

The discussion of the topic investigated in this thesis is presented in a deductive sequence; that is, the conclusions of the thesis were reached by reasoning from general to particular.

Accordingly, the thesis envisages the resolution of the two above-mentioned research questions by investigating, first, the rather broad topic of general principles of law as a source of international law (chapter 2) and, subsequently, the more specific topic of general principles of law as a source of international

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

criminal law (chapters 3 and 4).

The discussion is presented in this manner because it enables the reader to appreciate the contribution made by international criminal courts and tribunals to the determination, transposition, and application of general principles of law.

Chapter 2 (General principles of law: A source of international law) consists of eight sections. Section 2.1 introduces that chapter of the thesis. Section 2.2 illustrates the emergence of general principles of law in international law, by examining awards of early international arbitral tribunals. Section 2.3 shows that the adoption of the PCIJ Statute, as well as the subsequent practice of the PCIJ and the ICJ, confirmed the role of general principles of law as a source of international law. The sequence of discussion of sections 2.1 and 2.3 is chronological, i.e., the judgments and advisory opinions therein examined are presented from the oldest to the most recent ones. Then, section 2.4 examines the autonomy of general principles of law as a source of international law in the light of both the international practice described and scholarly writing. Section 2.5 discusses the subsidiary nature of general principles of law as a source of international law. Section 2.6 explains the process of determination of general principles of law. Section 2.7 explicates the transposition of general principles of law from national legal systems into international law. Section 2.8 formulates some concluding remarks as regards this part of the thesis.

Chapter 3 (General principles of law in the decisions of international criminal courts and tribunals) is structured in three sections. Section 3.1 introduces the chapter. Section 3.2 illustrates the emergence of general principles of law as a source of international criminal law by giving an overview of the judgments of the early international criminal tribunals, namely the IMT and the IMTFE. Section 3.3 reveals the significant role played by general principles of law in the decisions of contemporary international criminal courts and tribunals. This section is subdivided into subsections and each subsection deals with decisions of a particular international criminal court or tribunal. In each subsection, the decisions are presented in a chronological order, so that one may rather precisely observe the evolution of the methodology developed by the international criminal courts and tribunals (if any) in order to determine, transpose, and apply general principles of law.

Chapter 4 is divided into five sections. Section 4.1 is

about the autonomy of general principles of law as a source of international criminal law, in the light of the decisions previously scrutinized and scholarly writing. Section 4.2 postulates that despite their subsidiary nature, general principles of law have been an important source of international criminal law. Section 4.3 pays particular attention to the determination of general principles of law by international criminal courts and tribunals. Section 4.4 scrutinizes their transposition into international criminal law. Section 4.5 formulates the concluding remarks as regards this chapter of the thesis.

Finally, chapter 5 presents the conclusions of the thesis as a whole.

1.3 Literature available in the field

From the outset, it is worth noting that the literature available in the domain of the topic of this thesis is rather scarce.

So far I have not found any book dealing exclusively with the subject of general principles of law in the decisions of international criminal courts and tribunals. The literature dealing with this topic consists of some book chapters or sections, and one article published in an international legal journal.[20]

Owing to this limited amount, the literature cited does not always thoroughly address the problems related to the topic in a comprehensive manner. In general, the literature covers one of the three following issues: the global issue of general principles of law as a source of international criminal law;[21] the particular issue of general principles of law as applicable law of the ICC;[22] or the role of the general principles of law in early ICTY and ICTR's decisions.[23]

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[20] The subsequent three footnotes give the specific references.

[21] Simma, Bruno and Paulus, Andreas, *op. cit.* 12, pp. 55-69; Cassese, Antonio, *op. cit.* 12, pp. 32-35; Rivello, Roberto, *op. cit.* 17, pp. 89-111; Ambos, Kai, *op. cit.* 14, pp. 36-44; Degan, Vladimir, *op. cit.* 13, pp. 44-83.

[22] McAuliffe de Guzmán, Margaret, 'Article 21–Applicable Law', in Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Baden-Baden, Nomos, 1999, pp. 435-446; Pellet, Alain, *op. cit.* 10, pp. 1051-1084; Verhoeven, Joe, 'Article 21 of the Rome Statute and the Ambiguities of Applicable Law', in *NYIL*, Vol. XXXIII, 2002, pp. 3-22.

[23] Cassese, Antonio, 'The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations', in Yee, Sienho and Tieya, Wang (eds.), *International Law In The Post-Cold World*, London, Routledge, 2001, pp. 43-55; Gradoni, Lorenzo, 'L'exploitation des principes généraux de droit dans la jurisprudence des Tribunaux internationaux pénaux *ad hoc*', in Fronza, Emanuela et Manacorda, Stefano (eds.), *La justice pénale internationale dans les décisions des*

While scholars do not challenge that general principles of law are a source of international criminal law, they point out some controversial issues of their legal regime.[24]

To sum up, the rapid development of international criminal law in recent years and the significant role that general principles of law played in this development stimulated my motivation to investigate the decisions of international criminal courts and tribunals dealing with this source of international (criminal) law.

In addition, so far such decisions have not provoked much scholarly writing. Hence, the research questions formulated in the framework of this thesis are unanswered or at best have a partial answer, most of the times given in passing and formulated rather inadequately. The main reason for undertaking the work exhibited in the present thesis is to contribute in an essential way to an internationally accepted formulation of general principles of law as applied by international criminal courts and tribunals.

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tribunaux ad hoc/Études des Law Clinics en droit pénal international, Dalloz, Paris, Giufrè, Milano, 2003, pp. 10-40; Raimondo, Fabián, 'Les principes généraux de droit dans la jurisprudence des tribunaux *ad hoc*: Une approche fonctionnelle', in Delmas-Marty, Mireille *et al.* (eds.), *Les sources du droit international pénal*, Paris, Société de législation comparée, 2004, pp. 75-95.

[24] See subsections 1.1.2.1 and 1.1.2.2, above.

Chapter 2 General principles of law: A source of international law

2.1 Preliminary remarks

It may happen that a given legal issue cannot be settled in conformity with specific legal rules, simply because the rules needed for a decision do not exist. In such circumstances several national legal systems allow the application of legal principles derived from consolidated branches of law, such as private law, and from law in general, i.e., Law.[25] In this manner, the legal principles fill the gap left by the absence of specific legal rules applicable to the issue at stake.

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

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

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

As the relations between subjects of international law are to some extent analogous to the relations between subjects of national law, legal principles derived from national legal systems may be suitable for regulating international legal issues. Therefore, international courts and tribunals have

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

resorted to such principles where necessary and possible. In fact, some legal institutions are common to all legal systems, national and international, such as the acquisition of legal personality and the conclusion of an agreement.

The application of general principles of law occurred rather frequently in the early international arbitral practice[26] and continues in many respects.[27] However, since international law, analogously to national legal systems, has increasingly developed, the need for international courts and tribunals to resort to general principles of law to decide issues of now well-established branches of international law, such as State responsibility,[28] has clearly decreased.[29] Yet, international courts and tribunals still may often turn to general principles of law when they are dealing with less-developed branches of international law, such as international institutional law and international criminal law.[30] The reason is that these branches of law do not consist of a fully-fledged set of legal rules sufficient to regulate all the legal issues that may arise in judicial practice.

2.2 Early international arbitral tribunals

Three empires –the Carolingian, the Byzantine, and the Islamic empires- ruled Europe in the High Middle Ages, the formative period of international law. At different times these empires split up in a large number of kingdoms, princedoms, feuds, and other political entities. The political entities that emerged from the Carolingian and the Byzantine empires were the most involved in contributing to the creation of international law. Roman law was

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[26] Plenty of examples concerning recourse to private law during the formative period of international law are found in the following works: Lauterpacht, Hersch, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)*, London, Longman, Green and Co., 1927, *passim*; Cheng, Bin, *op. cit.* 25, *passim*.

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

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

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

[30] For general principles of law applied by international administrative tribunals, see Charney, Jonathan, *op. cit.* 27, pp. 226-228, and Amerasinghe, Chattharanjan, *Principles of the Institutional Law of International Organizations*, 2nd edition, Cambridge, Cambridge University Press, 2005, pp. 288-290.

the law applied within those entities, as well as in their reciprocal relations.

At the same time, scholars such as Bartolus of Saxoferrato and Baldus of Ubaldi deemed that Roman law was universal and formulated general principles of law in terms of legal maxims, which they derived from the opinions given by Roman lawyers. Since the 12th century, Roman law was frequently applied in international relations, above all in international arbitration. Consequently, from a historical perspective, international law extensively relied on general principles of Roman law.[31]

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

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

2.2.1 The formulation of applicable law

States set out the applicable law of international arbitral tribunals in treaties, but the formulation of the applicable law has varied from time to time. For example, international arbitral tribunals were bound to apply 'justice, equity and the law of nations',[32] or 'the principles of justice, the law of nations and the stipulations of the treaty',[33] or they had to decide the cases 'on the basis of

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[31] See Sorensen, Max, *op. cit.* 28 p. 16; Barberis, Julio, *op. cit.* 10, pp. 222-223.

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

[33] Article 4, Convention for the Adjustment of Claims of Citizens of the United States against Mexico, 11 April 1839. Text in Bancroft Davis, John, *Treaties and*

respect of law'.[34]

Hence, States gave early international arbitral tribunals the power to apply not only conventional law ('the stipulations of the treaty') and customary law ('the law of nations'), but also other sorts of rules and principles, such as 'equity' and 'justice'. These examples suggest, on the one hand, that in the view of States, conventional and customary rules of international law were insufficient to settle all international legal disputes; on the other, that a further kind of legal rules and principles could be applied as international law.[35] Definitely, general principles of law stood among them. This is because expressions such as 'general principles of law', 'principles of justice', and 'principles of equity' were employed in arbitration treaties as denoting legal rules, in contradistinction to decisions taken *ex aequo et bono*.[36]

2.2.2 Five examples before the adoption of the PCIJ Statute

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

2.2.2.1 Affaire Yuille, Shortridge et Cie

The first example regards the award of the *Affaire Yuille, Shortridge et Cie*. In this case the arbitral tribunal dealt with a claim for interest whose total amount largely exceeded the principal amount due. In the award, the arbitral tribunal recognized rates for an amount equal to the capital, on the basis of '*droit commun*'. This was, according to the arbitral tribunal, the

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Conventions Concluded Between the United States of America and Other Powers Since July 4, 1776, Washington, Government Printing Office, 1889, p. 678 *et seq*.

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

[35] See Lauterpacht, Hersch, *op. cit.* 26, pp. 60-62.

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

only law applicable to the case.[37]

The principle applied by the arbitral tribunal is the Roman law principle *alterum tantum*, i.e., accumulated interest cannot exceed the original principal.[38] The tribunal turned to it because conventional and customary international law lacked a specific rule regulating the extinctive prescription of interests. By applying the principle *alterum tantum*, the tribunal filled the gap left by the absence of specific rules of international law applicable to the case.

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

2.2.2.2 Affaire du Capitaine Thomas Melville White

The second example relates to the *Affaire du Capitaine Thomas Melville White*. The case arose from the arrest and imprisonment of an English citizen in Peru, which was illegal in the view of the British Government. In the award, the arbitral tribunal observed that the rules of criminal procedure to be respected by the courts in any State are to be judged exclusively in accordance with the legislation in force there. Consequently, it found no fault on the part of Peru.[39]

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

[38] See Lauterpacht, Hersch, *op. cit.* 26, pp. 269-270.

[39] '[T]he British Government ... proceeds on the erroneous supposition that the rules of criminal procedure in England are to be held good and applied in the criminal proceedings in Peru; but, little doubt as there can be that the rules of procedure to be observed by the courts in any country are to be judged solely and alone according to the legislation in force there, it is quite as certain that in the proceedings in White's case no fault can be found with the Peruvian courts of justice, or with the Peruvian Government, since they were fully justified according to the Peruvian procedure.' *Décision de la commission, chargée, par le Sénat de la Ville libre hanséatique de Hambourg, de prononcer dans la cause du capitaine Thomas Melville White, datée de Hambourg du 13 avril 1864*. In La Fontaine, Henri, *Pasicrisie internationale, 1794-1900, Histoire documentaire des arbitrages*

In this example the arbitral tribunal decided the legal issue at stake on the basis of the *lex fori* principle.[40] In so doing, it filled the gap left by the lack of conventional and customary rules applicable to the issue at hand. Although it did not express how it determined the existence and scope of application of the principle in question, it is likely that it drew upon Roman law and the national legal systems that had incorporated the principle into their rules and principles.

In this award the arbitral tribunal also declared that no general principle of law prevented a judge to hold arrested persons *incommunicado*.[41] In other words, had such a principle existed, the arbitral tribunal would have deemed the incommunication of Captain Melville White illegal. In short, general principles of law were considered as being binding norms of international law.

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

In this case one of the legal issues examined by the arbitrator concerned the interpretation of the words 'and other losses' that were employed in an international treaty relevant to the case. The arbitrator interpreted these words in accordance with the object and purpose of the treaty. Then, he confirmed the interpretation thus done following the ordinary meaning of the words 'and other losses', which were also employed in another international treaty relevant to the case.[42]

In brief, the arbitrator applied the principles of teleological

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internationaux, The Hague/Boston/London, Martinus Nijhoff Publishers, 1997, p. 48.

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

[41] 'It would be unjust to deny the judge [the power to hold an arrested person *incommunicado*] on the general principles of law; it ought rather to be taken for granted that, when a person has been arrested on suspicion of a serious crime, the judge can often only secure the necessary disclosures by preventing all communication with the prisoner, and thus avoid the danger of collusion, by which the investigation might be prejudiced.' *Décision de la commission, chargée, par le Sénat de la Ville libre hanséatique de Hambourg, de prononcer dans la cause du capitaine Thomas Melville White, datée de Hambourg du 13 avril 1864*. In La Fontaine, Henri, *op. cit.* 39, p. 50.

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

and literal interpretation of treaties, respectively. Whle according to the former a treaty should be interpreted in the light of its object and purpose, according to the latter words and phrases are to be given their usual and natural meaning in the context in which they occur.[43]

In this example the principles were not applied in order to fill a legal gap, but to interpret a conventional rule of international law.

The arbitrator did not clarify how he identified the principles of teleological and literal interpretation of treaties. It is highly probable that he drew upon Roman law and its principles of interpretation of contracts, for the reason that their application as general principles of law by arbitral tribunals was then frequent.[44]

Subsequently, in the same award, the arbitrator applied the principle that 'a person who exercises his proper right harms no one'.[45] The principle originated in Roman law and is reflected by the maxim *qui iure suo utitur, nemini facit iniuriam.*[46] This principle was one of the six legal grounds upon which the arbitrator based his decision. Thus it was not applied to fill legal gaps or to interpret legal rules but simultaneously with other legal rules, apparently as a means for reinforcing the legal reasoning underlying the decision.

2.2.2.4 Affaire du Queen

In this award the arbitral tribunal applied the 'principle of universal jurisprudence' that places the burden of proof upon the

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

[44] 'Neither is there any cogent reason for maintaining that Roman private law constitutes an exception to the principle that rules and technicalities of particular systems of private law must not be advanced for the purpose of interpretation and constructions of treaties. … In addition, international arbitration is rich in examples showing that the conception of Roman law as the *ratio scripta* is by no means a totally abandoned habit of mind.' See Lauterpacht, Hersch, *op. cit.* 26, p. 178.

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

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

claimant.[47] In other words, it applied the principle *onus probandi actori incumbit.*[48]

The arbitral tribunal determined the existence of this general principle of law by pointing out that 'the legislation of all nations' recognizes it. This is thus one of those rare awards in which it was made clear that the legal principle at stake was a principle derived from national legal systems rather than from Roman law directly.

2.2.2.5 The Russian Indemnity Case

This case involved Russia and Turkey and concerned the issue of State responsibility for the non-payment of pecuniary debts; in particular, the question of the obligation to pay interest damages arising from non-payment of such debts. Russia demanded Turkey interest for the delayed payment of certain compensation sums stipulated in the Treaty of Constantinopla of 1879. On the other side, Turkey submitted that the status of a State is not identical to that of ordinary debtors under national law, that the resources at their disposal limit its responsibility, and that it decides itself the manner of satisfying its creditors.[49] However, Turkey did not vacillate in basing its argument on private law.[50]

Because of the lack of conventional and customary laws regulating the legal issue at stake, the PCA transposed into the international arena rules of private law governing analogous relations between individuals and made clear that it was applying public international law. In this vein, the PCA denied that States have a right to assert a privileged status with respect of monetary debts because of their sovereign character.[51] After having made a broad analogy with the legal relations between individuals, the PCA concluded, 'the general principle of the responsibility of States implies a special responsibility in the matter of delay of payment of a money debt, unless the existence of a contrary

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[47] '[D]ans l'examen de cette question, on doit suivre, comme règle générale de solution, le principe de jurisprudence, consacré par la législation de tous les pays, qu'il appartient au réclamant de faire la preuve de sa prétention.' *Sentence du 26 mars 1872 (Affaire du Queen).* De la Pradelle, Albert and Politis, Nicolas (eds.), *op. cit.* 37, p. 708.

[48] See Cheng, Bin, *op. cit.* 25, pp. 327-328.

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

[50] See Lauterpacht, Hersch, *op. cit.* 26, p. 256.

[51] *The Russian Indemnity Case (Russia and Turkey), PCA, Award, 11 November 1912.* In Scott, James (ed.), *op. cit.* 49, p. 311. See also Lauterpacht, Hersch, *op. cit.* 26, p. 257.

custom is proven'.[52] Turkey could not prove the existence of such custom. As for the form of that special responsibility, the PCA declared:

> All the private legislation of the States forming the European concert admits, as did formerly the Roman law, the obligation to pay at least interest for delayed payments as legal indemnity when it is a question of the non-fulfilment of an obligation consisting in the payment of a sum of money fixed by convention, clear and exigible, such interest to be paid at least from the date of the demand made upon the debtor in due form of law.[53]

From the foregoing passage of the award, it follows that the PCA determined the existence of a general principle of law whereby debtors must pay interest for delayed payments as legal indemnity. The PCA determined, transposed, and applied this principle to the case because, as pointed out by Lauterpacht, 'positive international law was silent on the issue' at hand.[54] To summarize, the principle was applied to fill the legal gap left by the absence of relevant conventional and customary law.

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

This award is of much interest with regard to the issue of transposition of principles derived from national laws into international law. The interest resides in that the PCA refused to recognize the 'special position' of the State as an impediment to the application in the settlement of inter-States legal disputes of a legal principle derived from the law regulating relations between individuals. The PCA found a relevant analogy between both kind of relations and therefore deemed the principle applicable to the case.

Positivist scholars, such as Strupp and Anzilotti, criticized the award on the ground that no analogy gave good reason for having tranposed that general principle of law into international law, as no conventional or customary law reflected the principle.[55] Other scholars, such as Lauterpacht, held the

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[52] *The Russian Indemnity Case (Russia and Turkey), PCA, Award, 11 November 1912*. In Scott, James (ed.), *op. cit.* 49, p. 312 *et seq.*. See also Lauterpacht, Hersch, *op. cit.* 26, pp. 257-258.
[53] *The Russian Indemnity Case (Russia and Turkey), PCA, Award, 11 November 1912*. In Scott, James (ed.), *op. cit.* 49, p. 316.
[54] Lauterpacht, Hersch, *op. cit.* 26, p. 257.
[55] Ibid., p. 260.

opposite view. According to this international lawyer, the analogy made by the PCA was consistent with earlier arbitrations and in crucial agreement with the needs of international relations. Additionally, when submitting their legal disputes to arbitral tribunals, States must accept that they are subject to a legal rule whose provisions, if not found in treaties and custom, may be searched in private law because this also governs the relations of co-ordinated entities.[56] It is clear that the arbitral tribunal was on this particular point more akin to the view of Lauterpacht than to the view of Anzilotty and Strupp, as it did not hesitate to apply in the settlement of an inter-States legal dispute the principle that debtors must pay interest for delayed payments as legal indemnity.

2.2.3 A brief analysis of the international practice

Th arbitral awards referred to above are part of a much broader international practice on the matter. Scholars have demonstrated that this practice was general and constant.[57]

In those awards filling legal gaps was the most important function played by general principles of law. These were also useful for interpreting legal rules and for reinforcening the legal reasoning underling the awards. In the last situation they were applied simultaneously with other legal rules or principles.

Arbitral tribunals derived general principles of law from Roman law directly, as in the *Affaire Yuille, Shortridge et Cie*, or from national laws that reflected Roman law principles. Such a way to proceed was frequent because such principles were part of the arbitrators' legal culture. Given that the large majority of the legal systems of the States of the European concert was grounded on Roman law and many arbitrators were nationals of such States, it was almost natural that in case of necessity they had recourse to their common legal heritage, namely Roman law. It is apparent from those awards that general principles of law were not applied as legal principles of one particular national legal system, let alone as national legal rules. Hence, it is possible to conclude by way of implication that arbitral tribunals conceived of general principles of law as being legal principles originating from Roman law and common to various national legal systems (especially those of the European concert).

In those awards it is also noticeable that arbitral tribunals

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[56] Ibid., p. 261.

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

applied general principles of law pertaining not only to private law (*alterum tantum*; teleological interpretation of treaties, etc.) but also to public law (such as *lex fori* and *onus probandi actori incumbit*).

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

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

2.3 The PCIJ and the ICJ

The examples given in the preceding subsection adequately illustrated that, well before the adoption of the PCIJ Statute in 1920, there was already an international practice of applying general principles of law in the settlement of inter-States legal disputes. Article 38 of the PCIJ Statute (on the applicable law of this court) confirmed this practice, as it empowered the PCIJ to apply conventional law, customary law, *and* general principles of law. The present section provides some background information on the adoption of Article 38 in subsection 2.3.1. Subsequently, subsection 2.3.2 examines the scope of application of this provision as regards general principles of law. Subsection 2.3.3 explains how to discover general principles in the judgments and advisory opinions of the PCIJ and the ICJ. The core of this section is subsection 2.3.4, which discusses eight judgments and advisory opinions involving the applicability of general principles of law by those international courts. Finally, subsection 2.3.5 provides an analysis of those judgments and advisory opinions.

2.3.1 The adoption of the PCIJ Statute

Early in the year of 1920, the Council of the League of Nations appointed a group of legal experts –the ACJ-[58] to prepare a report

[58] The ACJ was composed of ten members: Adatci (Japan); Altamira (Spain); Bevilaqua (Brazil; in the course of the proceedings he was replaced by Fernandes, from the same country); Descamps (Belgium); Hagerup (Norway); De la Pradelle (France); Loder (the Netherlands); Phillimore (United Kingdom); Ricci-Busatti (Italy); and Root (USA). See Permanent Court of International Justice/Advisory

on the establishment of the PCIJ. The ACJ submitted a report containing a draft scheme to the Council of the League of Nations, in August 1920. The Council examined and amended the report and transmitted it to the Assembly of the League of Nations, which opened in November 1920. The Assembly instructed its Third Committee to examine the question of the PCIJ's constitution. In December 1920, after a careful study of the report undertaken by a sub-committee, the Third Committee submitted the revised draft that the Assembly adopted unanimously somewhat later. This was the Statute of the PCIJ.[59]

In the preparation of the report, the ACJ discussed the place of the general principles of law in international law when it addressed the issue of the applicable law of the PCIJ.[60] The debate started with the proposal of the President of the ACJ, Descamps. He was of the opinion that the PCIJ had to apply conventional law, international custom, 'the rules of international law as recognized by the legal conscience of civilized nations', and international jurisprudence, in that order.[61] This proposal led to a debate on the functions of the court, as is set out below.

According to Root, the PCIJ should not have the power to legislate. He deemed it inconceivable that States would have accepted the jurisdiction of a court basing its sentences on subjective conceptions of justice or general principles.[62]

Phillimore arrived at the same point as Root. In his view, international law is created only by universal agreement of all States; therefore, no international court should have the power to create international law. Furthermore, international custom encompasses both the rules of international law 'as recognized by the legal conscience of civilized nations' and international jurisprudence.[63] For these reasons, he considered it needless to declare that the 'rules of international law as recognized by the legal conscience of civilized nations' and international jurisprudence are part of the applicable law of the PCIJ.

Hagerup pointed to the necessity of stipulating an appropriate legal rule aimed at avoiding the possibility of the PCIJ

Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee*, June 16th – July 24th, The Hague, Van Langenhuysen Brothers, 1920, preface.

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

[60] Permanent Court of International Justice/Advisory Committee of Jurists, *op. cit.* 58, p. 293 *et seq.*

[61] Ibid., pp. 306, 318.

[62] Ibid., p. 309.

[63] Ibid., pp. 295, 311.

declaring itself incompetent (*non liquet*) where relevant conventional and customary rules applicable to the case are absent.[64] Loder and De la Pradelle were of the same opinion.[65] Descamps, at his turn, affirmed that a judge should never fail to administer justice because of the lack of conventional and customary rules applicable to the case. He furthermore stated that 'the fundamental law of justice and injustice' (or 'the law of objective justice', as he later called it) has its most authoritative expression in the legal conscience of civilized nations, which a judge cannot not disregard.[66]

Against that background and with the aim to reach an agreement on the issue of the applicable law of the PCIJ, Root proposed the formula 'general principles of law as recognized by civilized nations', which was eventually accepted, as an alternative to the original proposal of Descamps.[67]

Further in this regard, Phillimore stated that the general principles of law are part of international law and that they consist of legal principles accepted by all nations *in foro domestico*, such as the principles of *res iudicata,* good faith, and 'certain principles of procedure'.[68] He also declared that by 'general principles of law' he meant legal maxims.[69] No member of the ACJ objected to these statements of Phillimore, and ultimately Root's proposal was accepted.

In addition the ACJ considered whether there was a hierarchy among the sources of applicable law. Descamps' proposal directed the PCIJ to apply conventional rules, international custom, and the 'rules of international law as recognized by the legal conscience of civilized nations', in that sequence.[70] Ricci-Busatti and Hagerup disagreed on this point and requested the suppression of the words '*dans l'ordre successif*'. In their view, pursuant to the fundamental legal principle of *lex specialis derogat legi generali*, such reference would have been superfluous because conventional and customary rules are *lex specialis* and general principles of law, *lex generalis*. Moreover, the expression '*dans l'ordre successif*' failed

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[64] Ibid., p. 296.
[65] Ibid., p. 312.
[66] Ibid., pp. 310-311, 324.
[67] Ibid., p. 344.
[68] By legal principles recognized *in foro domestico*, Phillimore meant legal principles generally recognized in national law. See Simma, Bruno, 'The Contribution of Alfred Verdross to the Theory of International Law', *EJIL,* Vol. 6, No. 1, 1995, p. 49.
[69] Permanent Court of International Justice/Advisory Committee of Jurists, *op. cit.* 58, pp. 316, 335.
[70] Ibid., p. 306.

to recognize that the PCIJ could apply simultaneously all the three sources.[71] Ricci-Busatti's argument prevailed and, as a result, Article 38 of the PCIJ Statute did not establish any hierarchy among the sources of applicable law. This legal provision reads as follows:

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

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

2.3.2 The scope of Article 38

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

In fact, the issue of the scope of application of Article 38, paragraph 3 of the PCIJ Statute provoked a large amount of literature and debate.[72] The most debated issue was whether this

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[71] Ibid., pp. 337-338.

[72] Between 1921 and 1934 appeared the following publications among others: Del Vecchio, Giorgio, *Sui principi generali del diritto*, Modena, Società Tipografica Modenese (Antica Tipografica Soliani), 1921, 62 pp.; Lauterpacht, Hersch, *op. cit.* 26; Balladore-Pallieri, Giorgio, *I 'principi generali del diritto riconosciuti dalle nazioni civili' nell'articolo 38 dello Statuto della Corte permanente di Giustizia internazionale*, ("Serie II, Memoria XI"), Torino, Istituto Giuridico della R. Università, 1931, 89 pp.; Wolff, Karl, 'Les principes généraux du droit applicables dans les rapports internationaux', *RCADI*, Vol. 36 (1931-II), pp. 479-553; Verdross, Alfred (rapporteur), 'Les principes généraux de droit comme source du droit des gens', *AIDI*, Bruxelles, Librairie Falk et Fils, Paris, Pedone, Vol. 37, 1932, pp. 283-

legal provision describes the then existing general international law, or rather the particular international law applicable by the PCIJ.[73] The debate ended in the decade of 1930, when many scholars concluded that Article 38 described the existing general international law.[74]

Subsequent international practice has confirmed the view that Article 38 of the PCIJ Statute is the correct description of the then existing general international law.[75] Ultimately, the inclusion of a *chapeau* in Article 38 of the ICJ Statute,[76] which reads, 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply …', reaffirmed that general principles of law are part of general international law.

By introducing that *chapeau* in Article 38, the drafters of the ICJ Statute stated clearly that international law consisted of the legal rules and principles indicated in that legal provision, among which stand general principles of law. Finally, it is worth noting that still today international legal scholars agree that Article 38 of the ICJ Statute reflects general international law.[77]

2.3.3 How to discover general principles of law

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

The PCIJ and the ICJ have also resorted to general

328; Le Fur, Louis, 'La coutume et les principes généraux du droit comme sources du droit international public', in Appleton, Charles *et al.*, *Recueil d'études sur les sources du droit en l'honneur de François Gény,* Paris, Sirey, 1934, T. III, pp. 363-374.

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

[74] For instance, see Lauterpacht, Hersch, *op. cit.* 26, p. 71; Balladore-Pallieri, Giorgio, *op. cit.* 72, pp. 49 *et seq.*; Wolff, Karl, *op. cit.* 72, p. 483; Verdross, Alfred (rapporteur), *op. cit.* 72, pp. 287-289.

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

[76] The ICJ is some sort of successor of the PCIJ, and its Statute reproduces the PCIJ Statute almost entirely.

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

principles of law in judgments and advisory opinions, as early international arbitral tribunals had done so far. On those occasions, they did not always clarify that they were applying Article 38 paragraph 3/Article 38, paragraph 1(c) of their Statutes. The ICJ referred only once to Article 38, paragraph 1(c), and it did it to rule out the application of a particular legal principle rather than to apply a general principle of law.[78] In contrast, in separate and dissenting opinions, members of the PCIJ and the ICJ and judges *ad hoc* have often referred to the relevant paragraph of Article 38.[79]

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

2.3.4 Eight judgments and advisory opinions

The following eight judgments and advisory opinions furnish relevant examples of the role played by the general principles of law in the practice of the PCIJ and the ICJ. The judgments and advisory opinions are ordered chronologically. The main line is that general principles of law have played a marginal role in the practice of the PCIJ and the ICJ, in that they did not base any ruling exclusively on these principles. Generally, the PCIJ and the

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

[79] For instance, see *Lighthouses in Crete and Samos, Judgment, 1937, PCIJ, Series A/B, No. 71, Separate Opinion by Judge Séfériadès*, pp. 137-138; *International Status of South West Africa, Advisory Opinion, Separate Opinion by Sir McNair, ICJ Reports 1950*, p. 148; *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, Dissenting Opinion of Judge Levi Carneiro, ICJ Reports 1952*, p. 161; *Application of the Convention of 1902, Governing the Guardianship of Infants, Judgment, Separate Opinion of Judge Moreno Quintana, ICJ Reports 1958*, p. 107; *Right of Passage over Indian Territory, Merits, Judgment, Separate Opinion of Judge Wellington Koo, ICJ Reports 1960*, pp. 66-67; *Temple of Preah Vihear, Merits, Judgment, Dissenting Opinion of Judge Alfaro, ICJ Reports 1962*, pp. 42-43; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Declaration of Judge Fleischhauer, ICJ Reports 1996*, pp. 308-309; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, Merits, Separate Opinion of Judge Simma, ICJ Reports 2003*, §§ 66-74.

ICJ have not explained how they determined the existence of the general principles of law that they invoked. Also, the issue of the suitability of general principles of law for regulating international law issues normally does not arise in judgments and advisory opinions but in separate opinions. If the issue has come up during the deliberations of both international courts is uncertain, given that these are private and are to remain secret.[80]

2.3.4.1 Jaworzina

The *Jaworzina* advisory opinion provides us the first example relevant to our discussion.[81] In these advisory proceedings the PCIJ gave an opinion on the question whether the issue of the delimitation of the frontier between Poland and Czechoslovakia was still open.[82]

The Allied Powers had decided to settle the legal dispute by directly dividing the concerned territories between Poland and Czechoslovakia. To this end, they set up a Conference of Ambassadors, whose task consisted in undertaking the division of territories.[83] According to the preamble of the Decision of the Conference of Ambassadors, the Conference intended to carry out the terms of the resolution adopted by the Allied Powers conclusively and definitively.[84] However, Poland submitted that the Decision of the Conference of Ambassadors did not decide the entire legal dispute, as it did not fix the territory of Jaworzina. Poland quoted a letter from the Conference of Ambassadors, where this stated that the frontier concerning the Jaworzina sector had not been fixed by the Decision that it had adopted.[85] Poland deemed the letter relevant to its case, pursuant to the principle *eius est interpretare legem cuius condere*.[86]

The PCIJ dismissed Poland's argument because the letter referred to by this State could not outweigh the plain language of the Decision of the Conference of Ambassadors. It held that the Decision had a double legal nature: it had much in common with arbitration and it had the force of a contractual obligation.[87] Moreover, the requirements for the application of the 'traditional principle' *eius est interpretare legem cuius condere* had

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[80] See Article 54, paragraph 3, ICJ Statute.
[81] *Jaworzina, Advisory Opinion, 1923, PCIJ, Series B, No. 8.*
[82] Ibid., p. 10.
[83] Ibid., pp. 25-26.
[84] Ibid., p. 28.
[85] Ibid., pp. 34-36.
[86] According to this principle, 'It is that person's to interpret whose it is to enact.' See Garner, Bryan (ed.), *op. cit.* 40, p. 1715.
[87] *Jaworzina, Advisory Opinion, 1923, PCIJ, Series B, No. 8*, pp. 28, 30, 36.

not been met.[88] For this reason among others,[89] the PCIJ was of the opinion that the Decision of the Conference of Ambassadors, which was definitive, had settled the issue of the delimitation of the frontier between Poland and Czechoslovakia.[90]

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

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

The PCIJ did not explain how it determined the existence and applicability of the principle of textual interpretation. Such a way to proceed is understandable as early international arbitral tribunals had repeatedly applied the principle in their awards;[91] the principle of interpretation of treaties was a well-known general principle of law.

Furthermore, as far as the transposition process is concerned, the example makes clear that the applicability of general principles of law at the international level depends on the existence of a relevant analogy between the legal issue at stake at the international level and a given institution of national law. In this particular case the PCIJ accepted as relevant the analogy existing between national legislation and contracts (the source of the analogy) and the Decision of the Conference of Ambassadors (the target of the analogy). Yet it did not apply the principle *eius est interpretare legem cuius condere*, because the conditions for its

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[88] 'Without success it has been maintained ... that the letter ... from the Conference of Ambassadors ... is the most authoritative and most reliable interpretation of the intention expressed at that time, and that such an interpretation, being drawn from the most reliable source, must be respected by all, in accordance with the traditional principle: *eius est interpretare legem cuius condere*. Even if it was possible to accept the assimilation between this decision and internal legislation (an assimilation on which this contention is based) to be well founded, it will suffice, in order to reduce this objection to its true value, to observe that it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it. Now ... the Conference of Ambassadors did not retain this power.' Ibid., p. 37.

[89] Ibid., pp. 37-58.

[90] Ibid., p. 57.

[91] See subsection 2.2.2.3, above.

application had not been met in the case at hand.

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

This advisory opinion provides another example germane to the thesis.[92] It concerned the question of the frontier between Turkey and Iraq by application of Article 3, paragraph 2, of the Treaty of Lausanne. The Council of the League of Nations had requested the PCIJ to give an advisory opinion on the following three questions: (i) what is the character of the decision to be taken by the Council by virtue of Article 3, paragraph 2, of the Treaty of Lausanne? (ii) Must the decision be unanimous or may a majority take it? And, (iii) may the representatives of the interested Parties take part in the vote?[93]

With respect to the first question, the PCIJ was of the opinion that the decision to be taken by the Council pursuant to Article 3, paragraph 2, of the Treaty of Lausanne is binding on the parties to the dispute and a definitive determination of this dispute.[94]

As for the second question, it recalled that four permanent members and six non-permanent members composed the Council of the League of Nations and that this could invite a State to sit at the Council where the State had an interest on a particular item of the Council's agenda. The Council invited Turkey to sit with it, in connection with the legal dispute at stake.[95] The PCIJ found that the decision to be adopted by the Council pursuant to Article 3, paragraph 2 of the Treaty of Lausanne should be taken by unanimity, in accordance with Article 5, paragraph 1 of the Convenant of the League of Nations, given the silence of the Treaty of Lausanne on the matter.[96]

With reference to the third question, namely whether the representatives of the interested States could take part in the vote, the PCIJ observed that Article 5, paragraph 1 of the Covenant of the League of Nations does not regulate the particular situation where the Council decides a legal dispute. Then it turned to Article 15, paragraphs 6 and 7 of the Covenant, which regards the adoption of recommendations by the Council. Pursuant to these legal provisions, the votes of the interested States are not taken

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[92] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, PCIJ, Series B, No. 12.*
[93] Ibid., pp. 6-7.
[94] Ibid., pp. 27-28, 33.
[95] Ibid., p. 29.
[96] Ibid., p. 31.

into account in ascertaining whether there is unanimity. For these reasons, it concluded that it was this conception of the rule of unanimity that had to apply to the legal dispute before the Council.[97]

It thus follows that the PCIJ resorted to the principle *nemo iudex in re sua* (no one can be judge in his own suit) to intepret Article 5, paragraph 1 of the Covenant, as this legal instrument was silent on whether the representatives of the interested States could take part in the vote. It found that general principle of law in the provisions of Article 15, paragraphs 6 and 7 of the Covenant of the League of Nations. Further in this regard, it should be noted that international arbitral tribunals had often applied the principle *nemo iudex in re sua* in their awards.[98] Thus, the existence of the principle was plain and clear to the eyes of the members of the PCIJ.

The application of this principle to settle the legal issue at stake before the PCIJ attests the malleability of the contents and scope of application of the general principles of law. Although the rationale of the principle *nemos iudex in re sua* consists in ensuring the impartiality of the judiciary,[99] the PCIJ applied it in connection with proceedings before the Council of the League of Nations, i.e. a political organ of an international organization. Nevertheless, the decision of the PCIJ of applying this general principle of law does not seem to be capricious; in fact, Article 15 of the Covenant of the League of Nations, which regulates the adoption of recommendations by the Council, reflects the principle in question. Moreover, it is worth noting that the application of the principle of law *nemo iudex in re sua* in the context of political organs rather than of judicial organs has transcended the legal regime of the League of Nations. Article 27 of the UN Charter is proof of it, as it expresses the principle in respect of certain aspects concerning the voting process in the Security Council.[100]

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

[98] See examples in Cheng, Bin, *op. cit.* 25, p. 279 *et seq.*

[99] Ibid., p. 284.

[100] Article 27, paragraph 3 of the UN Charter reads as follows: 'Decisions of the Security Council on all matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; *provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a*

2.3.4.3 Factory at Chorzów

This case related to reparations alleged to be due by Poland to Germany.[101] Poland objected to the jurisdiction of the PCIJ to deal with the case,[102] because, *inter alia*, there were other tribunals where the injured companies represented by Germany could affirm their right to an indemnity.[103]

The PCIJ considered the issue in the light of Article 23, paragraph 2 of the Geneva Convention concerning Upper Silesia. Based on this legal provision, it concluded that it had jurisdiction over the case.[104] Additionally it invoked the principle *nullus commodum capere de sua iniuria propria*, in order to confirm the decision based on that legal provision.[105]

The judgment of this case examplifies that when a general principle of law is applied simultaneously with other legal rules, its application purports to validate a decision primarily adopted on the basis of the other legal rules. In other words, the general principle of law is applied to reinforce the legal reasoning leading to the decision. In this case the PCIJ decided the issue at stake on the basis of Article 23, paragraph 2 of the Geneva Convention concerning Upper Silesia, and then it confirmed the decision in the light of the principle *nullus commodum capere de sua iniuria propria*.

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

Finally, this judgment reveals that the application of general principles of law by international courts and tribunals is not necessarily subject to their previous transposition from national legal systems into international law. This is the case of

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dispute shall abstain from voting.' (Italics mine). For a thorough commentary on this legal provision, see Conforti, Benedetto, *The Law and Practice of the United Nations*, 3rd revised edition, Martinus Nijhoff Publishers, Leiden/Boston, 2005, pp. 74-80.

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

[102] Ibid., p. 20.

[103] Ibid., p. 25.

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

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

those general principles of law that are already part of international jurisprudence.

2.3.4.4 Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)

In this advisory opinion the PCIJ interpreted the conditions for appeals to the arbitrator referred to in Article VII of the Final Protocol of the Greco-Turkish Agreement of 1 December 1926.[106]

The PCIJ interpreted Article VII in accordance with the principle of textual interpretation. After that, it resorted to the principle *compétence de la compétence* in order to reinforce the accuracy of that interpretation.[107] In short, the PCIJ resorted to two general principles of law simultaneously to settle the legal issue at stake.

The PCIJ did not explain how it determined both general principles of law. Such a course of action is understandable, because early international tribunals and the PCIJ itself had already applied both principles.[108] Textual interpretation of treaties and *compétence de la competence* were well-known general principles of law.

2.3.4.5 Corfu Channel

In this case the ICJ examined whether Albania had knowledge of mine-laying in its territorial waters.[109] Given the difficulties for gathering direct evidence relevant to the case, it accepted indirect evidence because this 'is admitted in all systems of law' if it leaves 'no room for reasonable doubt'. For this reason it admitted proof by factual inferences or circumstantial evidence.[110]

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

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

[108] With respect to the principle of textual interpretation, see *Affaire au sujet des réclamations présentées par des sujets anglais à la République argentine pour les pertes provenant du décret du 13 février 1845*, and *Jaworzina*, above. With regard to the principle *compétence de la compétence*, see relevant jurisprudence in Lauterpacht, Hersch, *op. cit.* 26, p. 208; and Cheng, Bin, *op. cit.* 25, pp. 275-278.

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

[110] Ibid., p. 18.

The ICJ thus determined the existence of the principle that 'proof may be administered by means of circumstancial evidence' and applied it to the case.[111] In so doing it filled the gap left by the absence of relevant provisions in the Rules of Court.

The determination of the existence of that general principle of law is relevant to the thesis because the principle does not only applies in the context of civil procedure, but also in criminal procedure.[112] Therefore, it might be a precedent for drafters of rules of procedure and evidence of international criminal courts and tribunals, as well as for such courts and tribunals themselves in case their own rules of evidence are silent on the matter.

The holding evidences that the ICJ conceives of general principles of law as being legal principles not exclusively belonging to national legal systems, but as common to all legal orders. In fact, although in this example the ICJ did not clarify how it determined the principle that proof may be administered by means of circumstantial evidence, it referred to its admittance in 'all systems of law'. This might suggest that it looked at national legal systems and international arbitral procedure simultaneously.

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

In this advisory opinion the ICJ replied to the question of whether the General Assembly has the right to refuse to give effect to an award of compensation made by the UN Administrative Tribunal.[113] In the opinion of the ICJ, the General Assembly does not have such a right because the Statute of the UN Administrative Tribunal stipulates that a judgment is final and without appeal. Additionally, the ICJ stated that in accordance with a 'well-established and generally recognized principle of law', a judgment passed by a judicial body is *res iudicata* and binding upon the parties to the dispute'.[114]

By invoking the *res iudicata principle* in this ruling, the ICJ did not fill any legal gaps, as the Statute of the UN Administrative

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[111] See Cheng, Bin, *op. cit.* 25, p. 322.
[112] 'A condemnation, even to the death penalty, may be well founded on indirect evidence and may nevertheless have the same value as a judgment by a court which has founded its conviction on the evidence of witnesses.' *Corfu Channel, Merits, Judgment, ICJ Reports 1949*, p. 90.
[113] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1954*, p. 47.
[114] Ibid., p. 53.

Tribunal regulated the issue already.[115] Rather, it applied the principle as an additional legal ground to reinforce the legal reasoning underlying the advisory opinion.

Finally, it is worth noting that the determination of the existence of a general principle of law such as *res iudicata* did not create any problem for the ICJ, for the reason that international arbitral tribunals had often applied it and thus it was already part of international law.[116]

2.3.4.7 Right of Passage over Indian Territory

In this case the ICJ dealt with a right of passage in favour of Portugal through Indian territory and a correlative obligation binding upon India.[117] Portugal based its claim primarily on bilateral custom and on general custom, and subsidiarily on general principles of law (it presented a comparative law research covering sixty-four national legal systems).[118]

The ICJ decided not to examine whether there were general customary rules or general principles of law regulating the right of passage over the territory of States, given that a bilateral custom regulated the right of passage of Portugal over Indian territory.[119] This decision is important for the purposes of this thesis because of two reasons.

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

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[115] See also Degan, Vladimir, 'General Principles of Law (A Source of General International Law)', *FYIL*, Vol. 3, 1992, p. 48.
[116] See, for example, the cases cited by Lauterpacht, Hersch, *op. cit.* 26, pp. 206-207.
[117] *Right of Passage over Indian Territory, Merits, Judgment, ICJ Reports 1960*, p. 6.
[118] See Thirlway, Hugh, "The Law and Procedure of the International Court of Justice", *BYIL*, 1990, Vol. 61, p. 120.
[119] 'Portugal also invokes general international custom, as well as the general principles of law recognized by civilized nations, in support of its claim of a right of passage as formulated by it. Having arrived at the conclusion that the course of dealings between the British and Indian authorities on the one hand and the Portuguese on the other established a practice, well understood between the Parties, by virtue of which Portugal had acquired a right of passage in respect of private persons, civil officials and goods in general, the Court does not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result.' *Right of Passage over Indian Territory, Merits, Judgment, ICJ Reports 1960*, pp. 43-44.

According to Thirlway, the ICJ was aware that the application of general principles of law on the right of passage might lead to a different result.[120] The reason is that while the ICJ dismissed Portugal's claim to passage of troops, armed police, and ammunition because it had found that such passage was subject to prior authorization by India, the right of passage under general principles of law was not so limited.[121]

Second, the decision reveals that there might be some difficulties in transposing general principles of law into international law. With respect to the right of passage, India had submitted that the relationships between the subjects of national law were unlike the relationships between sovereign States, since sovereignty does not only consist in ownership of territory. Thus, even if national legal systems recognize a right of passage over adjacent land in certain circumstances, the exercise of that right would not have the same impact on the rights of the owner of the land as would have the passage of armed troops on the sovereignty over the territory of a State.[122] The judge *ad hoc* of India held a similar view.[123] However, the ICJ did not deal with that issue. But a member of the ICJ, in a separate opinion, did consider it and saw no difficulty in transposing the principle into international law.[124]

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[120] See Thirlway, Hugh, *op. cit.* 118, p. 120.

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

[122] See reference in Thirlway, Hugh, *op. cit.* 118, p. 121.

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

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

2.3.4.8 South West Africa

The *South West Africa* case gives another example significant to this thesis.[125] The judgment of this case shows that, in order to be considered a general principle of law, a given national legal principle must be generally accepted in national law. In this case the legal principle at stake was the Roman law principle of *actio popularis*.[126]

The ICJ examined the argument that it was essential as a safeguard for the performance of the mandates given by the League of Nations that each Member State could have a legal right in that matter and, ultimately, be able to take action with regard to the mandates.[127] The ICJ rejected the argument.[128]

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

In the opinion of Thirlway, the ICJ would not have applied the *actio popularis* as a general principle of law even if all national legal systems had recognized such action.[129] The reason is the 'radically different nature of judicial jurisdiction in the international and national procedures' and the doubtful 'transferable' nature of the *actio popularis* into international law.[130] Unfortunately Thirlway did not explain his argument in more detail, so that the reasons for rendering the transferable nature of the *actio popularis* 'doubtful' became apparent.

2.3.5 An analysis of the judgments and advisory opinions

The judgments and advisory opinions referred to above indicate

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[125] *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p. 6.
[126] In Roman law the *actio popularis* was 'An action that a male member of the general public could bring in the interest of the public welfare.' See Garner, Bryan (ed.), *op. cit.* 40, pp. 29-30.
[127] *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p. 46, § 85.
[128] 'Look at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an *'actio popularis'*, or right resident in any member of a community to take legal action in vindication of a legal interest. But although a right of this kind may be known to certain municipals systems of law, it is not known to international law at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1(c) of its Statute.' Ibid., p. 47, § 88.
[129] Thirlway, Hugh, *op. cit.* 118, p. 113.
[130] Ibid., p. 129, footnote 405.

that the PCIJ and the ICJ have resorted to general principles of law. Those judgments and advisory opinions are part of a larger PCIJ[131] and ICJ's[132] practice of having recourse to these principles.

However, in the ICJ's judgments and advisory opinions of the last decades it is difficult to come across examples of the application of general principles of law.[133] It is rather in the context of declarations, separate, and dissenting opinions of members of the ICJ and judges *ad hoc* where the issue of the applicability of general principles of law emerges more often.[134] Furthermore, the judgments and advisory opinions of the PCIJ and the ICJ furnish examples of the application of general principles of law for filling legal gaps only in very rare occasions.[135] This is a remarkable difference between the practice of the PCIJ and the ICJ, on the one side, and the practice of early international arbitral tribunals, on the other side. A reason to explain why the PCIJ and the ICJ do not resort to general principles of law for filling legal gaps might be that the ever-expanding body of conventional and customary rules reduces the chances of encountering legal gaps and thus of turning to general principles of law for that purpose. Another reason might be that the PCIJ and the ICJ have been rather reluctant in relying upon legal principles that are not manifested by State consent, as is the case of the conventional and customary rules of international

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[131] According to Blondel and Degan, this practice was relatively frequent, in particular, in the practice of the PCIJ. See Blondel, André, 'Les principes généraux de droit devant la Cour permanente de Justice internationale et la Cour Internationale de Justice', in Battelli, Maurice *et al.*, *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève, Tribune, 1968, pp. 201-236 ; Degan, Vladimir, *op. cit.* 124, pp. 41-54.

[132] For other examples in the practice of the ICJ, see Charney, Jonathan, *op. cit.* 27, pp. 190-191, footnote 291.

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

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

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

law. In any event, the fact is that the PCIJ and the ICJ have rather considered general principles of law in order to confirm the validity of a decision that was primarily taken on the basis of a different legal ground (as to reinforce the legal reasoning leading to a given decision),[136] or to interpret legal rules.[137]

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

As far as the determination of the existence of the general principles of law that they have invoked is concerned, normally the PCIJ and the ICJ have not made clear how they did effect it. As pointed out by Charney, these courts have been particularly reluctant to define how general principles of law are ascertained.[138] Often, the PCIJ and the ICJ have invoked general principles of law under different denominations: (i) 'traditional principle';[139] (ii) 'principles generally accepted';[140] (iii) 'well-known rule';[141] (iv) 'well-established and generally recognized principle of law';[142] (v) 'general principles of law recognized by civilized nations';[143] and (vi) 'general principles of law'.[144]

Analogously to early international arbitral tribunals, the PCIJ and the ICJ frequently dealt with Roman law principles, such as: (i) *eius est interpretare legem cuius condere*;[145] (ii) *nemo iudex in re sua*;[146] (iii) *nullus commodum capere de sua iniuria*

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[136] See subsections 2.3.4.3, 2.3.4.4, and 2.3.4.6, above.
[137] See subsections 2.3.4.1, 2.3.4.2, and 2.3.4.4, above.
[138] Charney, Jonathan, *op. cit.* 27, p. 190.
[139] *Jaworzina, Advisory Opinion, 1923, PCIJ, Series B, No. 8.*
[140] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No. 9.*
[141] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, PCIJ, Series B, No. 12.*
[142] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1954*, p. 47.
[143] *Right of Passage over Indian Territory, Merits, Judgment, ICJ Reports 1960*, p. 6.
[144] *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p. 6.
[145] *Jaworzina, Advisory Opinion, 1923, PCIJ, Series B, No. 8.*
[146] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, PCIJ, Series B, No. 12.*

propria;[147] and (iv) *res iudicata.*[148] It is worth noting that the consideration or the application of Roman law principles as general principles of law does not mean that the PCIJ and the ICJ deemed that Roman law was a source of international law. It does denote, however, that these international courts were willing to follow existing international jurisprudence in which general principles of Roman law had been applied. Such a way to proceed is consistent with Article 38, paragraph 4 of the PCIJ Statute and with Article 38, paragraph 1(d) of the ICJ Statute, which stipulate that judicial decisions are a subsidiary means for the determination of rules of law. In short, most of the general principles of law considered by the PCIJ and the ICJ were already part of international law.

As a matter of course, the PCIJ and the ICJ did not apply a given general principle of law when the conditions for its application were not met.[149] Moreover, they refused to apply legal principles that were not generally recognized in national law and were thus not general principles of law.[150]

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

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[147] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No. 9.*
[148] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1954*, p. 47.
[149] For example, *eius est interpretare legem cuius condere* in *Jaworzina, Advisory Opinion, 1923, PCIJ, Series B, No. 8.*
[150] For instance, *actio popularis* in *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p. 6.

2.4 The autonomy of general principles of law as a source of international law

In spite of the practice of international arbitral tribunals and of the PCIJ and the ICJ of applying general principles of law in their decisions, there are scholars who have denied the autonomy of general principles of law as a source of international law.[151] For long, however, most scholars have accepted that general principles of law are a source of international law different from treaties and custom.[152]

2.4.1 Scholarly views on general principles as a formal source of international law

Strictly speaking, international courts and tribunals do not apply sources of international law, but the rules and principles derived therefrom. These rules and principles come into existence in different ways. Such ways are the so-called 'formal sources' of international law, notwithstanding that the formation of international law is rather deformalized. In particular, this is the case for custom and general principles of law, unless one considers their application by an international court or tribunal the act of their creation. Despite their deformalized creation, general principles of law (and custom) are usually studied in the context of the formal sources of international law. This is so because the rules and principles derived therefrom fulfil normative functions in international law.[153]

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

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

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

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

level.[154]

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

In the opinion of Anzilotti, general principles of law derived from national legal systems are a material source of international law,[155] but not a formal one. In his conception, an international judge may find the necessary elements for formulating the legal rule to be applied in a particular case in national legal systems. However, that legal rule would not become part of international law; the international judge would create it only for solving a particular case.[156]

According to Strupp, the arbitral practice that preceded the adoption of the PCIJ Statute is irrelevant to the point in case, because the arbitral tribunals used to decide cases on the basis of Roman law but not of international law.[157] General principles of

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

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

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

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

law were not an autonomous source of international law, for the reason that their existence should be attested by State practice.[158] Clearly, Strupp's opinion reflects the then prevalent voluntaristic conception of international law, according to which there was no international legal rule or principle created without State consent. Such conception explains why Anzilotti, as well as Strupp later, affirmed that Article 38, paragraph 3 of the PCIJ Statute did not reflect general international law, but the particular international law applicable by the PCIJ.[159]

Similar opinions held Virally and Weil. For Virally, general principles of law are neither legal principles particular to international law, nor a particular law-making process, but a material source of international law.[160] In Weil's view, in spite of the rule laid down in Article 38, paragraph 1(c), of the ICJ Statute, general principles of law are not a formal source of international law. They are important for avoiding a *non liquet* and as a means for developing international law. Yet, this role is temporary and limited, given that the creation of international legal rules aims to regulate issues unregulated until then. The creation of new rules of international law decreases the chances of having recourse to general principles of law for avoiding *non liquets*, as far as the issues regulated by the new rules are concerned.[161]

The Soviet doctrine of international law rejected the idea that general principles of law could be a formal source of international law, as well.[162] Tunkin, one of the most well-known supporters of that doctrine, submitted that the preparatory work of the PCIJ Statute is an inappropriate means for interpreting the provisions of the ICJ Statute, given that these Statutes are different legal instruments. In his view, the preparatory work of

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

[159] Anzilotti, Dionisio, *op. cit.* 156, p. 335.

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

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

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

the former possesses a mere historical interest with regard to the latter.[163]

He argued that the general principles of law referred to in Article 38, paragraph 1(c), of the ICJ Statute are not different from the principles of international law, as the *chapeau* of Article 38 declares that the ICJ shall decide legal disputes in accordance with international law.[164] Moreover, the existence of similar principles in national legal systems does not mean that they are *ipso facto* general principles of law in the sense of Article 38, paragraph 1(c) of the ICJ Statute. For application in international law, general principles of law originating in national legal systems should be incorporated in conventional or customary rules. Given that Article 38, paragraph 1(c) of the ICJ Statute does not refer to 'general principles of international law' but to 'general principles of law', general principles of law would be legal principles in general, common to national legal systems and international law.[165] However, there are no legal principles common to all nations because there can neither exist principles common to two opposing legal systems, namely the socialist and the capitalist,[166] nor legal principles common to national legal systems and international law.[167]

The arguments advanced by Tunkin with regard to the status of general principles of law in international law were quite original. However, considering that the Socialist doctrine of international law collapsed together with the Soviet Union, those arguments are no longer tenable.

2.4.2 General principles as a formal and material source of international law

Curiously, one has the impression that, in general, scholars contend that general principles of law are *either* a formal source of international law, *or* a material source of international law. Yet, these principles might be both kind of sources at the same time. In fact, general principles of law are a formal source of international law, and they are often a material source too.

They are a material source of international law in the sense that States and international organizations may lay down international legal rules that are the expression of general

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[163] Tunkin, Grigory, ibid. pp. 523-532, and 98-99, respectively.
[164] Tunkin, Grigory, 'International Law in the International System', *RCADI*, Vol. 147 (1975-IV), p. 100.
[165] Ibid., p. 101.
[166] Ibid., p. 102.
[167] Ibid., p. 103.

principles of law. For instance, several general principles of law applied by early international arbitral tribunals have later transformed into customary rules and conventional rules later.[168] Consider, for example, the transformation of the following five general principles of law into conventional or customary rules: (i) the principle of good faith in the interpretation of treaties is part of the rule laid down in Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties;[169] (ii) the principle of textual interpretation of treaties is part of the rule laid down in Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties; (iii) the principle of contextual interpretation of treaties is part of the rule laid down in Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties; (iv) Article 36, paragraph 6, of the ICJ Statute expresses the principle *compétence de la competence*; and (v) Article 60 of the ICJ Statute reflects the *res iudicata* principle.

Notwithstanding that conventional and customary rules may reflect general principles of law, international courts and tribunals apply them as conventional or customary rules as appropriate, but not as general principles of law. This way to proceed is correct, in light of the principles of (i) *lex posterior derogat legi priori*, (ii) *lex specialis derogat legi generali*, and (iii) *lex posterior generalis non derogat legi priori speciali*. These principles are 'the three general principles which in all legal orders regulate the relations between rules or principles deriving from the *same* source'.[170] In international law they regulate the relations between rules deriving from all sources, namely conventions, custom, and general principles of law. True, as observed by Cassese, those three general principles do not apply if a rule of *ius cogens* is at stake, as this is 'hierarchically superior to all the other rules of international law'.[171]

2.4.3 A subtle difference between general principles of law and general principles of international law

Now the question arises as to whether the terms general principles of law and general principles of international law are

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[168] See Cheng, Bin, *op. cit.* 25, p. 390 ; Bartoš, Milan, 'Transformation des principes généraux en règles positives du droit international', *Mélanges offerts à Juraj Andrassy*, Ibler, Vladimir (ed.), La Haye, Martinus Nijhoff, 1968, pp.1-12.

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

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

[171] Ibid., p. 155.

synonyms or, in contrast, they refer to two different sets of legal principles. According to the majority of scholars, the meaning of those terms is different from each other. While the expression general principles of law refers to legal principles derived from national legal systems, the term general principles of international law encompasses legal principles entirely derived from international conventional and customary rules and they possess customary status.[172]

Accordingly, it follows that general principles of international law, in the context of the sources of international law as stated in the ICJ Statute, should be applied as customary international law in accordance with Article 38, paragaph 1(b) of the Statute.

However, there are scholars who have argued that the legal basis for the application of general principles of international law by the ICJ is Article 38, paragraph 1(c) of its Statute. Their argument is that the word 'law' in that paragraph is not qualified and, hence, the general principles of law referred therein may be general principles of national or international law.[173] Nonetheless, if general principles of international law are legal principles of customary nature, the relevant applicable legal provision of the ICJ Statute should be paragraph 1(b) of Article 38, which refers to custom.

Moreover there are international legal scholars that have a larger conception of the general principles of international law. One of these scholars is Brownlie. According to him, general principles of international law may be customary rules, general principles of law in the sense of Article 38, paragraph 1)(c) of the ICJ Statute, and logical propositions derived from legal reasoning

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[172] Among others, see Lachs, Manfred, 'The Development and General Trends of International Law in Our Time. General Course in Public International Law', *RCADI,* Vol. 169 (1980-IV), p. 196; Virally, Michel, *op. cit.* 160, p. 171; Podestá Costa, Luis and Ruda, José, *op. cit.* 73, p. 18; Thierry, Hubert, 'L'évolution du droit international. Cours général de droit international public', in *RCADI,* Vol. 222 (1990-III), pp. 39-40; Weil, Prosper, *op. cit.* 161, pp. 149-151; Barberis, Julio, *op. cit.* 10, p. 235; Rosenne, Shabtai, 'The Perplexities of Modern International Law. General Course on Public International Law', *RCADI*, Vol. 291 (2001), p. 63; Dupuy, Pierre-Marie, 'L'unité de l'ordre juridique international. Cours général de droit international public', *RCADI*, Vol. 297 (2002), p. 182; Cassese, Antonio, *op. cit.* 170, p. 188.

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

that are based on existing international law and national analogies.[174] Yet, Barberis has resisted the idea of including the logical propositions in the category of general principles of law, because they are not legal rules strictly speaking, but rules of logic.[175]

2.5 The subsidiary nature of general principles of law

Traditionally, general principles of law have been considered a subsidiary source of international law; subsidiary, in the sense that international courts and tribunals turn to it when a given legal issue is unregulated by conventional or customary legal rules.[176] Thus, recourse to general principles of law should not take place if the settlement of a given legal issue can be found without difficulty in individual cases by filling the gap with 'logical deductions from existing rules of international law or of analogy to them'.[177]

Stated differently, international courts and tribunals must first look for applicable conventional or customary rules of international law before turning to general principles of law. While the former encompass the rules derived from the so-called 'secondary sources' (such as binding resolutions of international organizations),[178] the latter include relevant general principles relating to the particular branch of international law at stake (such as the general principles of international humanitarian law), and the general principles of international law. It is only in their absence that international courts and tribunals should look at national legal systems as a source of general principles of law applicable in international legal relations.

At least that is the case when general principles of law are the only law upon which a given legal issue is decided. In fact it might also happen that international courts and tribunals apply general principles of law simultaneously with conventional or customary rules, as some of the awards, judgments, and advisory

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[174] Brownlie, Ian, *Principles of Public International Law*, Oxford, Clarendon Press, 5th edition, 1998, pp. 18-19.
[175] Barberis, Julio, *op. cit.* 10, p. 238.
[176] Article 5 of the *Projet de Déclaration* of the *Institut de Droit International* on general principles of law as a source of international law reads as follows: 'Les principes généraux de droit … n'ont qu'un caractère subsidiaire. S'il existe donc des règles de droit conventionnel ou coutumier applicable en la matière, ces sources doivent prévaloir.' See Verdross, Alfred (rapporteur), *op. cit.* 72, pp. 324-325, 328.
[177] Lauterpacht, Hersch, *op. cit.* 26, p. 85.
[178] The secondary sources 'are provided for by rules produced by primary sources (treaties).' See Cassese, Antonio, *op. cit.* 170, p. 183.

opinions analysed in sections 2.3 and 2.4 demonstrated.[179] In such situations it is evident that international courts and tribunals turn to general principles of law in addition to specific conventional or customary rules of international law.

The subsidiary role of general principles of law as a source of international law does not mean that there exists a formal hierarchy among the sources of international law. As mentioned above, the ACJ charged with the drafting of the PCIJ Statute rejected the idea of the existence of such hierarchy. This opinion is still prevalent in scholarly writing.[180]

Given the absence of a formal hierarchical relationship among the sources of international law, the conflict of laws derived from these sources remain under the *aegis* of the principles of *lex posterior derogat legi priori*, *lex specialis derogat legi generali*, and *lex posterior generalis non derogat legi priori speciali*.[181]

Although scholars seem to confine the applicability of those three legal principles to the relations between conventional and customary rules,[182] it appears that these principles in addition apply to the relations between conventional or customary rules, on the one hand, and general principles of law, on the other hand, as well. For example, the right of passage of a State through the territory of a third State may be regulated by a bilateral custom that differs from a general principle of law on the right of passage (*lex specialis derogat legi generali*). Another example, a newly emerged general principle of law does not abrogate a conventional rule (*lex posterior generalis non derogat legi priori speciali*).

It should be recalled that these three general principles of law on conflicts of laws do not apply if a rule of *ius cogens* is at

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

[180] See among others: Podestá Costa, Luis and Ruda, José, *op. cit.* 73, p. 13 ('A nuestro entender esta jerarquía surge en su aplicación lógica, no del texto o de la intención de las partes.'); Diez de Velasco, Manuel, *op. cit.* 19, T. I, pp. 117-118; Daillier, Patrick and Pellet, Alain, *op. cit.* 19, § 60, p. 114; Cassese, Antonio, *op. cit.* 170, pp. 153-155; Nollkaemper, André, *Kern van het internationaal publiekrecht*, tweede druk, Den Haag, Boom Juridische uitgevers, 2005, p. 84.

[181] Cassese, Antonio, *op. cit.* 170, p. 154. Daillier, Patrick and Pellet, Alain, hold a similar view; see *op. cit.* 19, p. 116, § 60.

[182] Podestá Costa, Luis and Ruda, José, *op. cit.* 73, pp. 16-17; Daillier, Patrick and Pellet, Alain, *op. cit.* 19, § 60, p. 116; Cassese, Antonio, *op. cit.* 170, p. 154.

stake, as this is superior in hierarchy to all the other rules of international law.[183]

Therefore, it might be said that the subsidiary nature of general principles of law as a source of international law manifests in three different functions: (i) to fill legal gaps, (ii) to interpret legal rules,[184] and (iii) to confirm a decision based on other legal rules, as to reinforce the legal reasoning.[185]

2.6 The determination of general principles of law

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

It appears that international courts and tribunals have two possibilities to ascertain general principles of law. First, they may have recourse to decisions of international courts and tribunals (including their own decisions), as these are a means for the determination of legal rules.[186] As demonstrated above, the PCIJ and the ICJ have heavily relied upon international arbitral awards for that purpose.

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

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[183] See Daillier, Patrick and Pellet, Alain, *op. cit.* 19, p. 116, § 60; Cassese, Antonio, *op. cit.* 170, p. 155. With regard to the law of treaties, see Articles 53 and 64 of the Vienna Convention on the Law of Treaties, on conflicts between treaties and *ius cogens*.

[184] Article 6 of the *Projet de Déclaration* of the *Institut de Droit International* on general principles of law as a source of international law reads as follows: 'Les principes généraux de droit … servent à interpreter les règles conventionnelles et coutumières, ainsi qu'à combler les lacunes de ces sources.' See See Verdross, Alfred (rapporteur), *op. cit.* 72, pp. 325, 328.

[185] With regard to the judgments and advisory opinions of the PCIJ and the ICJ that provide examples of the application of general principles of law, Degan stated: 'In all these instances … the Court did not leave any proof that it applied these principles as the main source of international law, i.e., as rules only applicable in the case. It left in fact the impression that the invocation of some of these principles was a part of its judicial reasoning, corroborating its final decision based on other sources, or on procedural provisions from its Statute and Rules.' Degan, Vladimir, *op. cit.* 115, p. 46.

[186] See references in footnote 19, above.

comparative law study to that effect, provided that the law of the court or tribunal in question allows such a course of action.

The determination of general principles of law by comparative law consists in a double operation. The first operation –the vertical move- consists in abstracting a legal principle of the legal rules from national legal systems. Subsection 2.6.1 explains that move in more detail. Subsection 2.6.1.1 sets out which national laws are relevant. Subsequently, subsection 2.6.1.2 studies the process of extracting a general principle of law more closely and observes that there will be a difference in contents between the general principle arrived at and the underlying legal rules.

The second operation in determining the existence of a general principle of law is the horizontal move, as described in subsection 2.6.2. The move consists in verifying that the legal principle thus obtained is generally recognized by nations. The question is which nations should recognize the principle. Should these be the so-called 'civilized nations' (subsection 2.6.2.1) or should another test prevail (subsection 2.6.2.2)? A second issue relates to the different conceptions of law that are relevant in determining whether a recognition is general (subsection 2.6.2.3), and a related question is which nations are most representative of these conceptions of law (subsection 2.6.2.4). Although the determination of the existence, contents, and scope of application of general principles of law may require the undertaking of a comparative law research, it is noteworthy that there is no trace of such a research in the judgments and advisory opinions of the PCIJ and the ICJ (section 2.6.3).

2.6.1 The 'vertical move'

As explained in subsection 2.3.1, the preparatory work of the PCIJ Statute reveals that the drafters of this legal instrument conceived of general principles of law as legal principles recognized by States *in foro domestico*, that is, in their national legal systems. Scholars, in general, share that conception of general principles of law.[187]

Yet, in the judgments and advisory opinions of the PCIJ and the ICJ is not self-evident that general principles of law are are derived from national laws. In fact, there is no trace in their

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[187] Sorensen, Max, *op. cit.* 28, p. 18 *et seq.* Lachs, Manfred, *op. cit.* 172, p. 196; Virally, Michel, *op. cit.* 160 p. 171; Podestá Costa, Luis and Ruda, José, *op. cit.* 73, p. 18; Thierry, Hubert, *op. cit.* 172, pp. 39-40; Weil, Prosper, *op. cit.* 161, pp. 149-151; Barberis, Julio, *op. cit.* 10, p. 235; Rosenne, Shabtai, *op. cit.* 172, p. 63; Dupuy, Pierre-Marie, *op. cit.* 172, p. 182.

judgments and advisory opinions of any comparative law research.

For this reason, some scholars suggest that those international courts may have applied general principles of law as general tenets induced from international legal rules or deduced from legal logic, rather than as legal principles derived from national legal systems.[188] Even if that were correct, its underlying proposition does not invalidate that those very same general principles of law are legal principles generally recognized in national law. For instance, members of the PCIJ and the ICJ have made clear that general tenets such as 'jurisdiction' and 'good faith' originated in national law and were subsequently transposed into international law.[189]

The arbitral awards and the judgments and advisory opinions of the PCIJ and the ICJ examined above illustrate how much arbitrators and judges drew upon their intuition in order to determine general principles of law, probably inspired by their own national legal system. With regard to this particular point Sorensen observed that international courts and tribunals do not normally indicate the method they employ to determine general principles of law.[190] It even appears that international courts and tribunals hardly ever refer to comparative law research.[191]

This analysis leads us to a five-step reasoning. First, the general principles of law as applied by early international arbitral tribunals and the PCIJ and the ICJ are fundamental legal principles in all legal systems, national and international. Second, the majority of those legal principles derive

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[188] Cassese, Antonio, *op. cit.* 170, p. 192.

[189] For example, with regard to the principle of jurisdiction, a member of the PCIJ stated: 'There are certain elementary conceptions common to all sytstems of jurisprudence, and one of these is the principle that a court of justice is never justified in hearing and adjudging the merits of a cause of which it has not jurisdiction. … The requirement of jurisdiction, which is universally recognized in the national sphere, is no less fundamental and peremptory in the international.' *Mavrommatis Palestine Concessions, Judgment No. 2, Opinion by M. Moore, 1924, PCIJ, Series A, No. 2,* pp. 57-59. A second example in this regard relates to the principle of good faith: 'Contracting parties are always assumed to be acting honestly and in good faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law.' *Lighthouses case between France and Greece, Judgment, Opinion by M. Séfériadès, 1934, PCIJ, Series A/B/, No. 62*, p. 47.

[190] See Sorensen, Max, *op. cit.* 28, p. 18.

[191] Mosler, Hermann, 'To What Extent does the Variety of Legal Systems of the World Influence the Application of the General Principles of Law Within the Meaning of Article 38(1)(c) of the Statute of the International Court of Justice?', in T.M.C. Asser Instituut (ed.), *International Law and the Grotian Heritage*, The Hague, T.M.C. Asser Instituut, 1985, pp. 179-180.

from Roman law, as evidenced above.[192] Thirdly, Roman law was the basis of the codification process undertaken by States of the Romano-Germanic legal family and, in a minor proportion, of the Common Law.[193] Fourthly, from these three considerations, the existence of the general principles of law applied by early international arbitral tribunals and the PCIJ and the ICJ was plain and clear in the eyes of the members of these international courts and tribunals. Finally, undertaking a comparative law research to prove the existence of general principles of law such as *res iudicata* or *nemo iudex in re sua* was therefore unnecessary.

The above-examined awards, judgments, and advisory opinions show that early international arbitral tribunals, the PCIJ, and the ICJ applied general principles pertaining to different fields of national law. Thus, they have not confined themselves to applying general principles of law pertaining to private law.[194] As evidenced by subsections 2.2.2 and 2.3.4, they have applied general principles of law pertaining to law in general, procedural law, etc.[195]

2.6.1.1 The relevant national law

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

For Barberis, such national law is law *lato sensu*, namely legislation, customary law, decrees, or resolutions of administrative organs; however, he does not mention judicial decisions.[196] In my opinion, one may include judicial decisions among the examinable law. There are no reasons to exclude judicial decisions; in particular, if the national legal system examined in order to derive a general principle of law belongs to

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[192] See also Sorensen, Max, *op. cit.* 28, p. 23.

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

[194] As Judge Tanaka stated with regard to the meaning of Article 38, paragraph1(c) of the ICJ Statute, 'To restrict the meaning to private law principles or principles of procedural law seems from the viewpoint of literal interpretation untenable. So far as the "general principles of law" are not qualified, the "law" must be understood to embrace all branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc.' In *South West Africa, Second Phase, Judgment, ICJ Reports 1966,* pp. 294-295.

[195] Daillier and Pellet have made an illustrative classification of the general principles of law applied by the PCIJ and the ICJ. See Daillier, Patrick and Pellet, Alain, *op. cit.* 19, pp. 352-353, § 227.

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

the Common Law legal family. In the Common Law tradition a legal rule is a jurisprudential one; scholars and judges consider codes mere acts of consolidation.[197] All this is different from the Romano-Germanic legal tradition.

Of course international courts and tribunals must derive general principles of law from national law that is in force. It is thus probable that general principles of law are not necessarily rigid and permanent. In the opinion of Akehurst, general principles of law 'are always capable of undergoing a process of orderly change, as the national laws on which they are based are amended. … They do not have the immutable character which has sometimes been attributed to natural law.'[198]

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

2.6.1.2 A difference in contents

The contents of a general principle of law are different from the contents of the legal rules from which they are derived, because these principles consist in abstractions of legal rules deprived of their particular elements.[199]

Small differences on the contents of legal rules pertaining to different national legal systems do not hamper the ascertainment of a general principle of law. What matters is the existence of a common legal principle underlying those legal rules.[200] The task of deriving general principles of law from national laws should not consist in looking mechanically for coincidences among legal rules, but in determining their common denominator. Hence, in ascertaining general principles of law it is crucial to identify the *ratio legis* and the fundamental principles that are common to a particular institution within different national legal systems.[201]

Since general principles of law consist in abstractions of legal rules from national legal systems, the question arises as to whether they are apt for playing a normative role in international law. Below I first provide the ideas by Akehurst, Weil, and Kolb

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[197] See David, René et Jauffret-Spinosi, Camille, *op. cit.* 11, p. 343.
[198] Akehurst, Michael, *op. cit.* 36, p. 815.
[199] See Sorensen, Max, *op. cit.* 28, p. 25.
[200] See Akehurst, Michael, *op. cit.* 36, p. 814.
[201] See Reuter, Paul, *Droit international public*, Paris, Presses Universitaires de France, 1958, p. 118.

on this matter, and then give my own opinion.

Akehurst observed that general principles of law exist frequently at a very high degree of abstraction and that if the degree is excessively high, general principles of law may become vague and thus useless to be applied by international courts and tribunals.[202]

Weil holds a similar opinion. He argued that as the process of abstraction and generalization preceding the derivation of a general principle of law aims at the essence of national legal systems, every similitude will depend on the level of abstraction of the legal rules that are object of the comparison: the greater the abstraction, the greater the similitude. If the level of abstraction is too high, the legal principle thus arrived at will be of no use at the international level. For these reasons, Weil concluded that the process of abstraction and generalization that pave the way to the ascertainment of a general principle of law is self-destructive.[203]

For Kolb, the contents of the general principles of law are broader than the contents legal rules because they are not precisely defined as the contents of the latter; at the same time, they are not as vague as general political concepts. General principles of law possess 'that just degree of abstraction and concreteness, to be able to be dynamic and filled with some specific legal meaning at once'.[204] They are thus enough flexible as to serve as legal arguments in a dynamic interpretation of legal rules, as well as a means for the development of the law. Notwithstanding the flexibility of their contents, general principles of law are anchored in the realm of legal phenomena, which guarantees that minimum level of legal certainty without which the law becomes arbitrary.[205]

Kolb's opinion is most convincing. In fact, general principles of law have played a significant normative function in international law, by giving rise to the creation of customary and conventional rules (that is, as a material source).[206] Besides, they have fulfilled a meaningful function as a means for dynamic interpretations of conventional and customary rules. For instance, it is worth recalling the principle *nemo iudex in re sua*, which, in the opinion of the PCIJ, applies not only with regard to

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[202] See Akehurst, Michael, *op. cit.* 36, p. 815.
[203] Weil, Prosper, *op. cit.* 161, pp. 146-147.
[204] Kolb, Robert, *op. cit.* 5, p. 9.
[205] Ibid.
[206] See subsection 2.4.2.

the judiciary but also to political organs.[207]

True, and in this particular respect I agree with Akehurst and Weil, general principles of law may be unable to precisely regulate particular legal issues because of their natural abstraction. Nevertheless, general principles of law have the notable feature of being able to adapt the contents of legal rules to new developments and new ideas, in a way that precise legal rules cannot perform because of the rigidity of their contents and scope of application.

2.6.2 The 'horizontal move'

The verification that a given legal principle is in fact generally recognized by nations can be done by means of comparative law.[208] Thus the question arises as to which national legal systems should be included in such research. This is analysed in the next four subsections.

2.6.2.1 The 'civilized nations'

Here it is worth remembering that under Article 38, paragraph 1(c), of the ICJ Statute, this international court shall apply 'the general principles of law recognized by civilized nations'. The requirement thus laid down by this legal provision is recognition by 'civilized nations'. So, at first glance it may appear that any comparative law research aimed to determine general principles of law should encompass the domestic legal systems of such nations. However, the reference to 'civilized nations' in Article 38 of the PCIJ and the ICJ statutes has been much criticized, particularly in the past, and may by now have become obsolete. Below it follows an overview of the discussion on the meaning of that term.

The first criticism arose from the ACJ itself, that is, the organ charged with the drafting of the PCIJ Statute. De la Pradelle (one of its members) affirmed that the expression 'civilized nations' was superfluous, because the concept of 'law' already implied civilization.[209]

Other scholars deemed that expression inappropriate because it reflectes *l'air du temps* of a past period in which a distinction used to be made between the degrees of civilization of

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[207] See subsection 2.3.4.2.
[208] See Sorensen, Max, *op. cit.* 28, p. 23.
[209] Permanent Court of International Justice/Advisory Committee of Jurists, o*p. cit.* 58, p. 335.

Christian European nations and the others,[210] and because it is misleading.[211] Ammoun, a former member of the ICJ, pointed out the inconsistency of the expression 'civilized nations' with the provisions of the UN Charter on sovereign equality of all Member-States.[212]

The expression has fallen into desuetude in the practice of the ICJ, since this has very rarely referred to it in its judgments and advisory opinions.[213] Yet, there are scholars who have attempted to give a new meaning to the requirement of recognition by 'civilized nations'. Bassiouni, for instance, affirmed that despite the fact that in the era of the UN a presumption existed and continues to exist that all the States members of this organization are civilized, 'This requirement has utility where a given nation, because of peculiar historical circumstances, no longer follows its previously "civilized" system of law, or that of the other "civilized nations."'[214]

In the same line of reasoning stands the opinion of Tomuschat, for whom the requirement of recognition by 'civilized nations' might be useful for preventing that common standards of civilization are lowered by legal principles found in the legal systems of nations that 'fell back into barbarism and crime.'[215]

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[210] For instance, see Barberis, Julio, *op. cit.* 10, p. 244; Capotorti, Francesco, 'Cours général de droit international public', in *RCADI*, Vol. 248 (1994), p. 118; Tomuschat, Christian, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law', in *RCADI*, Vol. 281 (1999), p. 337; Dupuy, Pierre-Marie, *op. cit.* 172, pp. 179-180.

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

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

[213] See, for example, *Right of Passage over Indian Territory, Merits, Judgment, ICJ Reports 1960*, pp. 43-44. Insofar as the declarations and opinions of members of the ICJ are concerned, the use of that expression is generally absent. There are just a few examples on the contrary. See *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, Dissenting Opinion of Judge Levi Carneiro, ICJ Reports 1952*, p. 161; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, Separate Opinion of Judge Lauterpacht, ICJ Reports 1955,* pp. 104-105.

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

[215] 'Originally, "civilized nations" may indeed have had overtones of European arrogance, given the fact, in particular, that the text originated in 1920. But the phrase has acquired an entirely new meaning over the last decades. Already, the traumatic experience of Nazi Germany had shown the world that, unfortunately, even a nation which may have had an enviable record in the past may fall back into barbarism and crime. It must be ensured that the principles of such nations

One of the merits of giving a new meaning to the requirement of recognition by 'civilized nations' is to give *effet utile* to these words,[216] which seem to have fallen into desuetude not merely in the practice of the ICJ, but also in international practice in general.

The requirement of recognition by 'civilized nations' may nevertheless provide international courts and tribunals with an appropriate test to determine whether certain national laws should be examined to derive general principles of law pertaining to fields of law such as criminal law, family law, or procedural law, where internationally recognized human rights might be in jeopardy. In these situations, international courts and tribunals could set aside from the comparative research all national legal rules that are inconsistent with those rights, on the ground that laws contrary to internationally recognized human rights are not laws of 'civilized nations'.

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

2.6.2.2 Other tests to establish general recognition

Scholars have submitted that a general principle of law applicable at the international level is a legal principle recognized by the following entities: 'the community of nations',[217] 'States',[218] 'States most representative of different conceptions of law',[219] 'the Member-States of the United Nations'.[220] Other descriptions are of course also possible.

While those expressions are better than the anachronic 'civilized nations' as they do not have any negative connotation,

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have no impact on the common standard of civilization.' Tomuschat, Christian, *op. cit.* 210, pp. 337-338.

[216] On the *règle de l'effet utile* as a principle of treaty interpretation, see Gutiérrez Posse, Hortensia, 'La maxime *ut res magis valeat quam pereat* (interpretation en fonction de l'effet utile): les interprétations "extensives" et "restrictives"', *OZOR*, Vol. 23, 1972, pp. 229.254.

[217] Cassese, Antonio, *op. cit.* 170, p. 188.

[218] Weil, Prosper, *op. cit.* 161, p. 144; Mosler, Hermann, *op. cit.* 3, p. 517.

[219] 'Mais il est facile de considérer la formule en question comme un renvoi aux ordres juridiques de ces Etats qui sont plus représentatifs des conceptions différentes du droit.' Capotorti, Francesco, *op. cit.* 210, p. 118.

[220] Bassiouni, Cherif, *op. cit.* 214, p. 768.

most of them are as vague as the latter. In fact, those alternative expressions do not provide the international judge with a precise test for determining which national legal systems should be included in the comparative law research, or, where they do so, the test seems to be overly demanding.

Hence the question remains: what is the appropriate test to prove that 'the community of nations' recognizes a given general principle of law? The reference to recognition 'by States' is not better than the previous one, since it does not make clear whether there is a specific number or any other parameter to establish whether a legal principle is a general principle of law applicable at the international sphere. If at present the number of existing States is around 200, does it make a difference if the number of national legal systems researched is fifty rather than five?

The reference to recognition by 'the Member-States of the United Nations', in contrast, offers a concrete test, which is examining the legal systems of the UN members. However, it is evident that the test is unworkable, as it would require the examination of 192 national legal systems.[221]

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

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

2.6.2.3 The different conceptions of law

With regard to the first question, it is worth noting that while some comparative law scholars deal with 'legal families' and 'conceptions of law', others prefer to use the notion of 'legal traditions'. For instance, David and Spinozi have considered the Romano-Germanic and the Common Law to be the major legal families of the world. They have furthermore mentioned the

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

Russian, the Islamic, the Hindu, the Chinese, the Japanese, and the African as being important 'conceptions of law' (but not 'legal families' in themselves).[222] Another comparatist, Glenn, deems that the main legal traditions of the world are the Chthonic, the Talmudic, the Civil Law, the Islamic, the Common Law, the Hindu, and the Asian tradition.[223]

Whereas the term 'legal family' denotes a group of legal systems that shares common legal techniques, reasoning, classifications, etc.,[224] the term 'legal tradition' underlines the temporal dimension of Law in a particular social context.[225] In any event, be it called 'legal families' or 'legal traditions', the Common Law and the Romano-Germanic legal families (the latter also known as 'Civil Law')[226] are generally considered the largest.[227] For this reason, if one were to adopt the test proposed by Capotorti, all comparative research aimed at determining the existence of a general principle of law applicable in international legal relations should at least encompass the legal systems most representative of the Romano-Germanic and the Common Law legal families.

2.6.2.4 The representative national systems

How can it be determined that a given national legal system is most representative of its legal family? The first impulse one feels is to look at the national legal systems that gave birth to a particular legal family or tradition. For this reason one may say that English law is most representative of the Common Law and that German or French or Italian laws are most representative of the Romano-Germanic legal family. However, while it is hard to disagree with this proposition, it is problematic as ultimately it would limit the comparative legal research to the same national

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[222] David, René et Jauffret-Spinosi, Camille, *op. cit.* 11, pp. 15-23.
[223] Glenn, Patrick, *Legal Traditions of the World*, Oxford, Oxford University Press, 2nd edition 2004 (first published 2000), 401 pp.
[224] See David, René et Jauffret-Spinosi, Camille, *op. cit.* 11, p. 15. See also Glenn, Patrick, *op. cit.* 223, p. 154, footnote 113.
[225] See Glenn, Patrick, ibid., pp. 1-13.
[226] Even if it is not more explicit than the term 'Civil Law', the denomination 'Romano-Germanic' seems to be more appropriate because it pays tribute to the efforts made by the universities of Latin and German countries to develop legal studies after the 12th century. See David, René et Jauffret-Spinosi, Camille, *op. cit.* 11, p. 17.
[227] The Romano-Germanic legal family spread over continental Europe, Latin America, a large part of Africa, the Near East, Japan, Indonesia and China (the last two just with regard to particular branches of law), among other regions of the world. The Common Law family includes England, Ireland, the USA, Canada, Australia, some Caribbean States, and an important number of African States. Ibid.

legal systems took into account by international courts and tribunals in times of classic international law, that is, a majority of national legal systems from Western Europe. What is more, the ascertainment of general principles of law would be confined to an inquiry of the same few national legal systems, the 'most representative' ones.

As a corrective, I suggest the utilization of a test based on equitative geographic distribution, so as to make clear that national legal systems from all over the world are worthy of consideration by international courts and tribunals searching for general principles of law. A comparative law research made on the basis of equitative geographic distribution will make clear that not only the solutions offered by the main legal families of the world are to be examined, but also that the general principles of law thus derived are the expression of the community of nations rather than of an oligarchic international society. In my view, the utilization of this test will definitely enhance the legitimacy of the general principles of law thus derived.

Further in that regard, in the research it is crucial to include those national legal systems that appear to be most developed or more complete in connection with the legal issue at hand.[228] It is pointless to examine national legal systems that do not regulate the kind of legal issue at stake. Therefore, if for example an international court or tribunal is looking for general principles of law on an issue pertaining to the participation of victims of crime in criminal proceedings, it might be fruitless to look for relevant legal principles in the national legal systems that do not allow for victims participation in criminal proceedings.

It goes without saying that international courts and tribunals are not expected to examine national legal systems with a difficult accessibility or being inaccessible at all; especially if their laws are not translated into the working languages of the international court or tribunal concerned. As matters stand now, there are not large obstacles for obtaining texts of national legislation and case-law of the various nations, thanks to the Internet and the enhancement of international transport. This is why, at present, international courts and tribunals are in a better position to undertake extensive comparative legal research than ever before.

Finally, it should be noted that the classification of national legal systems in legal families is not always useful for

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

deriving general principles of law. The reason is that the notion of 'legal families' has been created for didactical purposes, in order to display the similarities and dissimilarities existing between the various national legal systems. All classifications of national legal systems depend on the context in which we are placed and on the concerns of the authors of the classifications. Hence, the classification of national legal systems made by a sociologist might be probably different from that made by a jurist. Most importantly, different classifications may be made depending on whether we deal with public law, private law, or criminal law.[229] In short, the decision –if any- to adopt a given classification of national legal systems for ascertaining general principles of law should ultimately be based on the field of law the court or tribunal is dealing with in the case at hand.

2.6.3 The absence of comparative legal research in the PCIJ and ICJ practice

International law, by its very nature, must be generally applicable to all members of the international community. One of the problems related to the evolution and the identification of international law is the significance of the common denominator of the national legal systems suitable for application, directly or after some adaptation, in international relations.[230]

Article 9 of the ICJ Statute prescribes a representative composition of the principal judicial organ of the UN. For this reason, it has been suggested that the composition of the ICJ facilitates any comparative law research aimed to determine a general principle of law.[231] Thus, as it is likely that international judges retain some trace of their legal education and practice in their homeland,[232] the determination of a general principle of law

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[229] See David, René et Jauffret-Spinosi, Camille, *op. cit.* 11, p. 16 : 'La notion de "famille de droits" ne correspond pas à une réalité biologique ; on y recourt seulement à une fin didactique, pour mettre en valeur les ressemblances et les différences qui existent entre les différents droits. Cela étant, toutes les classifications ont leur mérite et aucune n'est sans critique. Tout dépend du cadre dans lequel on se place et de la préoccupation qui, pour les uns et pour les autres, est dominante. On ne proposera pas les mêmes classifications si l'on envisage les choses sur un plan mondial ou sun un plan simplement européen. On envisagera les choses autrement si l'on voit les choses en sociologue ou en juriste. D'autres groupements pourront être pareillement de mise, selon que l'on centrera son étude sur le droit public, le droit privé ou le droit criminel.'

[230] See Mosler, Hermann, *op. cit.* 191, p. 173.

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

[232] 'It is inevitable that everyone of us in this Court should retain some trace of his legal education and his former legal activities in his country of origin. This is inevitable, and even justified, because in its composition the Courrt is to be representative of "the main forms of civilization and of the principal legal systems

would take place if judges coming from countries representing the main world legal families agree that the legal principle at stake is recognized by their own national legal system.

Nevertheless, the reasons for explaining why the judgments and advisory opinions of the PCIJ and the ICJ do not show any example of comparative legal research aimed at determining the existence of a general principle of law seems to be found elsewhere. Below two potential reasons are provided, which in the opinion of this author are essential.

First, as stated above, the PCIJ and the ICJ have often relied on general principles of law that had been usually applied by international arbitral tribunals. It has been thus unnecessary to carry out a comparative legal research to ascertain general principles of law such as *res iudicata*, *nemos iudex in re sua*, or good faith.

Second, the absence of explicit reference to comparative law research in the judgments and advisory opinions of the PCIJ and the ICJ do not necessarily imply that they never took account of the comparative legal researches offered by parties to the proceedings.[233] The absence does not mean that the ICJ disregards the significance of examining the common denominator of national legal systems.[234] It may denote, however, that this international court was afraid that the presence of a comparative legal research would not be in conformity with the style of a judgment, 'the reasoning of which must proceed in a continuous chain of thought and argument to the operative part.'[235]

However, 'it would be welcomed not only by the parties but also by the international legal world if the reasoning of judgments and advisory opinions were to explain that the Court had examined, by comparative methods, the assertion –sometimes badly stated- that a general principle of law, having a specified meaning and significance, forms part of binding general international law.'[236]

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of the world" (Statute, Article 9), and the Court is to apply "the general principles of law recognized by civilized nations".' *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, Dissenting Opinion of Judge Levy Carneiro, ICJ Reports 1952*, p. 161.

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

[234] See Mosler, Hermann, *op. cit.* 191, p. 180.

[235] Ibid.

[236] Ibid.

2.7 The transposition of general principles of law

As mentioned at the outset of the thesis, general principles of law are legal principles generally recognized in national law which are transposable into international law. These principles are applied by international courts and tribunals by means of analogy.[237] That is, insofar as there is a relevant similarity between the national law institution where the legal principle is derived from (the source of the analogy) and the corresponding institution of international law where the legal principle would apply (the target of the analogy).[238]

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

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

2.7.1 Application by analogy

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

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[237] See Lauterpacht, Hersch, *op. cit.* 26, pp. 81-87; Anzilotti, Dionisio, *op. cit.* 156, pp. 106-109.

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

similar problem and its solution'.[239]

There are no criteria specifying how much or what kind of similarity is sufficient to uphold analogies in general or to uphold a particular analogy.[240] Ultimately, the validity of a legal analogy is 'rooted in the experience of the lawyers and the judges who employ it'.[241] Accordingly, the relevance of a particular analogy will depend on the circumstances of the case and on the judges dealing with that case.

At the international level, international courts and tribunals applied general principles of law meanwhile taking for granted a basic similarity or analogy between natural persons and States and between interpersonal relations and international relations. The application has taken place so long as similar circumstances to those justifying their application at the national level exist at the international level too.[242]

The awards, judgments, and advisory opinions reviewed in sections 2.2 and 2.3 indicate that private law was the main source of national law analogies upon which international courts and tribunals used to draw.[243] According to Lauterpacht, the frequent recourse to general principles of law by international courts and tribunals demonstrates the existence of analogies between international law and private law, involving two fields of law regulating the interests of coordinated natural or artificial persons.[244] Consider, for instance, the following examples of mutual influence. There are analogies between contract law and the law of international treaties; succession law and the law of succession of States; civil responsibility and State responsibility; rules of property and possession, and acquisition of territorial sovereignty; acquisitive and extinctive prescription; servitudes; interest and the measures of damages, etc.[245]

However, private law was not the exclusive source of analogies. General principles of law pertaining to public law have

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[239] Ibid., p. 4.
[240] Ibid., p. 5.
[241] Ibid., p. 12. Although Weinreb's work deals with the use of analogies in the courts of the USA, there is no apparent reason for considering that the validity of an analogy in international courts and tribunals is different.
[242] See Cheng, Bin, *op. cit.* 25, p. 391.
[243] Private law is 'The body of law dealing with private persons and their property and relationships.' See Garner, Bryan (ed.), *op. cit.* 40, p. 1234.
[244] Lauterpacht, Hersch, *op. cit.* 26, p. 83.
[245] Lauterpacht gives a plethora of examples. See ibid., *passim*.

been applied as well,[246] as the application of general principles of law pertaining to procedural law by arbitral tribunals, the PCIJ, and the ICJ demonstrate.[247] At present recourse to public law analogies might be more frequent than it was in the past. This may be due to the fact that the development of branches of international law possessing 'public law' elements, such as international constitutional law,[248] international institutional law,[249] and international criminal law, facilitates the use of public law analogies by international courts and tribunals dealing, generally or occasionally, with such branches of law.

In fact, there are relevant analogies between national legal systems and international law, for instance, with respect to administrative law and criminal law. With regard to administrative law, there are analogies between the employment relations involving national public administration and civil servants, on the one hand, and international organizations and international civil servants, on the other hand.[250] As to criminal law, as explained in chapter 4, below, a case in point is the analogies between national and international criminal proceedings.

Certainly, not all analogies are relevant. Some analogies may be misleading or inaccurate for a number of reasons. First, it is mistaken to look for analogies in a field of international law that has no counterpart in national law. For this reason Lauterpacht considered pointless looking for analogies pertaining to the law of armed conflicts or to extradition, for instance.[251]

The second error consists in not paying sufficient attention to the lack of a 'universally compulsory judicial tribunal' to state what international law is, or to the absence of a central authority to enforce it. Accordingly, Lauterpacht explained, certain

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[246] Public law is 'The body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself; constitutional law, criminal law, and administrative law taken together.' See Garner, Bryan (ed.), *op. cit.* 40, p. 1267.

[247] For instance, the principles of *lex fori*, *onus probandi actori incumbit*, and proof may be administered by means of circumstantial evidence. See subsections 2.2.2 and 2.3.4, above.

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

[249] See, e.g., Amerasinghe, Chattharanjan, *op. cit.* 30, *passim*.

[250] Ibid., pp. 18, 288-290.

[251] Lauterpacht, Hersch, *op. cit.* 26, p. 85.

analogies are inappropriate for supporting the application of general principles of law. However, Lauterpacht continued, 'caution on this account need not be pushed too far.' For Lauterpacht, certain analogies are inappropriate not because of the absence of a corresponding legal relation between international law and private law, but rather because the international community had not yet reached the development of legal organization, 'at which law is in all cases stronger than the individual will, or at which the rule of law is powerful enough to extend to all the essential aspects of the international relations.'[252] In short, Lauterpacht referred to the existence of structural differences between international law and national legal systems, structural differences that to some extent still exist, as we shall see in subsection 2.7.4 after having examined the traditional arguments against the transposition and application of general principles of law at the international level.

2.7.2 Traditional arguments against transposition

In Lauterpacht's opinion, the then negative attitude of international lawyers *vis-à-vis* the application of general principles of private law in international law was due to the then prevalent positivism, which, in international law, was based on the doctrine of sovereignty. Positivists only accepted legal rules directly derived from the will of States as binding rules of international law. The doctrine of sovereignty rejected any recourse to private law as this regulates, according to such doctrine, economic interests of a lower order than the eternal and inalienable State interests.[253]

The doctrine of sovereignty appeared in international law under two aspects, namely, (i) as the doctrine of positivism and (ii) as the idea of the State as an entity of an absolute legal and moral value.[254] According to the doctrine of positivism, international conventions and custom are the only sources of international law because they are the only ones that create rules expressly recognized by States.[255] And in accordance with the idea of the State as an entity of an absolute legal and moral value, the only legitimate purpose of international law is to serve to the preservation and development of States.[256]

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[252] Ibid., p. 86.
[253] Ibid., 30, p. ix.
[254] Ibid., p. 43.
[255] For a criticial examination of the teaching of positivst scholars, such as Hall, Oppenheim, and Liszt, see ibid., pp. 51-54.
[256] For a critical examination of this conception, see ibid., pp. 44-50.

The doctrine of positivism asserted that the will of States is the ultimate and exclusive source of national and international law, since nothing can be imposed to the State without its consent; in their relations, States do no accept any limitation to their sovereignty other than their own will.[257] According to early positivists scholars such as Vattel, Moser, and De Martens, the distinguishing traits of positive international law were the following: the sovereign equality among States; the composition of the international society by States; the structure of the international society, which consisted in a juxtaposition of sovereign and equal States; the fact that international law regulated the relations between States exclusively; and the fact that international law was the outcome of State consent and thus only treaties and custom were its sources, as the former were the expression of the express consent and the latter of the tacit consent of States.[258] Besides, the conception of the State as an entity of absolute legal and moral value considered States as legally and morally superior to whatever other form of human organization. The recognition of general principles of (private) law as a source of international law appeared as dangerous and perplexing to the tenants of the doctrine of sovereignty, for the reason that sovereign States can never be subject to rules to which they have not consented and that would disregard the everlasting and inalienable interests protected by States at the international level.[259]

Other scholars, while recognizing the special status of States as subjects of international law, were less restraint in their attitude towards the application of general principles of (private) law in international law. In Ripert's opinion, general principles of law derived from national legal systems could require some adjustment in order to apply in international law, because the rules of national law aimed to regulate relations among private law persons and not among States as subjects of international law.[260] Ripert did not make an argument against the application

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[257] See Dailler, Didier and Pellet, Alain, *op. cit.* 19, p. 52, § 21.
[258] Ibid., pp. 57-59, §§ 26-27.
[259] See Lauterpacht, Hersch, *op. cit.* 26, pp. 43-44.
[260] 'Il est pourtant certain que l'on ne peut appliquer en matière internationale des règles de droit interne sans que ces règles ne subissent une certaine transformation. Le droit international ne connaît que les rapports entre Etats [...] Or, les règles du droit interne sont faites pour régir les rapports entre personnes de droit privé ; les principes généraux du droit ont été dégagés de l'analyse de ces rapportrs. Dans la mesure où la qualité de sujet de droit est essentielle, il faut prendre garde que les sujets ne sont pas les mêmes dans le droit international et dans le droit interne.' Ripert, Georges, 'Les règles du droit civil applicables aux rapports internationaux (Contribution à l'étude des principes généraux du droit

of general principles of (private) law in international law, but he observed that these principles might require a certain transformation so that can be applied therein.

The practice of the PCIJ and the ICJ illustrates that, from time to time, some of their members have raised arguments against the application of general principles of (private) law in the settlement of inter-States legal disputes, based on the doctrine of State sovereignty.[261]

However, the applicable law of early international arbitral tribunals as formulated by States in international treaties, as well as the awards of those tribunals,[262] weakens the argumental force of the main points made by the positivist doctrine. In fact, States empowered early international arbitral tribunals not only to apply conventional and customary law, but also other legal principles, such as the 'principles of justice'. As evidenced by the arbitral awards examined in subsection 2.2.2, such principles encompassed general principles of law. In addition, the PCIJ Statute empowered the Court to apply 'general principles of law recognized by civilized nations'; this also debilitates the argumental force of the points made by the publicists upholding the doctrine of sovereignty, as far as the general principles of law are concerned. In short, international law consisted of conventional law, customary law, and general principles of law already in times of the early international arbitral tribunals.

2.7.3 The 'special character' of international law

The doctrine of positivism and the idea of the State as an entity of an absolute legal and moral value were not the only arguments used to rejecte the applicability of general principles of (private) law in international legal relations. Another argument consisted in affirming that international law protects interests that are radically different from the interests that private law protects. This argument was based on the above-mentioned idea of the State as an entity of an absolute legal and moral value.[263]

Furthermore, another positivst doctrine promoted the argument of the 'different protected interests' as an obstacle to the

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visés au Statut de la Court permanente de Justice internationale', *RCADI*, Vol. 44, 1933-II, pp. 581-582.

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

[262] See subsections 2.2.1 and 2.2.2, above.

[263] See Lauterpacht, Hersch, *op. cit.* 26, pp. 71-73.

application of general principles of (private) law in international law, namely, the doctrine on the essential difference of subjects of international law and national law. According to this doctrine, States were the only subjects of international law. Natural and juridical persons had rights and duties under national laws but not under international law. A necessary outcome of the doctrine on the essential difference of subjects of international law and national law is the view that national law concepts (including general principles of law) are unsuitable for application in international law because of the difference on legal subjects.[264]

However, as pointed out by Lauterpacht, the interests protected by States are not essentially different from the interests safeguarded by national legal systems in general and by private law in particular. According to Lauterpacht, the argument of the special character of international law was not persuasive because of the then increasing repudiation to the view that States were not subject to duties and because not only the interests of individuals are primarily economic, but also those of States.[265] In addition, States were not the only subjects of international law then, as this conferred rights and imposed international obligations upon belligerents, war criminals, and the League of Nations among others legal subjects.[266] Plainly, Lauterpacht's observation holds good at present better than ever, for the reason that even if international legal scholars generally agree that States are the main subject of international law, they also agree that States are not its exclusive subjects.[267] Consequently, the doctrine on the essential difference of subjects of international law and national law was not a persuasive argument to uphold the inapplicability of general principles of law at the international level in the past, let alone at present.

2.7.4 Structural differences between international law and national legal systems

Most of international legal scholars –if not all- agree that one of the main formal characteristics of international law is its still essentially decentralized structure. The structure of international law is decentralized due to the lack of an international sovereign

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[264] Ibid., pp. 73-74.
[265] Ibid., pp. 71-73.
[266] Ibid., pp. 74-55.
[267] See, e.g., Diez de Velasco, Manuel, *op. cit.* 19, pp. 247-249, 327 *et seq.*; Cassese, Antonio, *op. cit.* 170, pp. 71-72; Warbrick, Colin, 'States and Recognition in International Law', in Evans, Malcolm (ed.), *International Law*, 2nd edition, New York, Oxford Univeristy Press, 2006, p. 218.

power.[268] The lack of an international sovereign power in the international system means that there is no superior authority having the power to issue binding orders upon every member of the international society.[269] The decentralized structure of the international society is largely determined by the principle of sovereignty, which is one of the fundamental principles of the UN according to Article 2, paragraph 1 of its Charter.[270]

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

There are international legal scholars who point to the largely decentralized structure of international law as being an important obstacle to the application of general principles of law in international law. Among these scholars we find Dailler, Pellet, Nollkaemper, Weil, and Rosenne, among others. For example, Daillier and Pellet affirm that only the general principles of law that are compatible with the fundamental features of the international order can be transposed into international law, and that the application of general principles of law in international law should not be based on automatic analogies (*il ne s'agit pas d'une analogie aveugle*').[271]

In the same train of thought stands Nollkaemper. In his opinion, legal principles originated in national legal systems cannot apply as such in international law because while the structure of the former is essentially vertical, the structure of international law is essentially horizontal. For Nollkaemper, general principles of law may require an adaptation to the special features of international law before being applied therein.[272]

According to Weil, the transposition of general principles of law into international law is practicable only to the extent that the structure and purposes of international law are compatible with those of national legal systems; and even though the transposition of a given national legal principle is viable, this principle will require an adaptation to the specifics of international law. For

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[268] See, e.g., Zemanek, Karl, *op. cit.* 173, pp. 38-39; Capotorti, Francesco, *op. cit.* 210, pp. 27-30; Tomuschat, Christian, *op. cit.* 210, pp. 43-44.
[269] Ibid., pp. 43.
[270] Ibid. On Article 2, paragraph 1 of the UN Charter, see Mbaye, Kéba, 'Article 2, paragraphe 1', in Cot, Jean-Pierre and Pellet, Alain (eds.), *La Charte des Nations Unies, Commentaire article par article*, 2nd edition, Economica, Paris, 1991, pp. 79-96.
[271] Daillier, Patrick and Pellet, Alain, *op. cit.* 19, pp. 351-352, § 226.
[272] Nollkaemper, André, *op. cit.* 180, p. 77.

Weil, such adaptation may completely transform the content and scope of application of a general principle of law. Therefore, he said, principles such as *force majeure*, *pacta sunt servanda, rebus sic stantibus, res iudicata* and others, apply in international law in a different way from the manner in which they do in national legal systems. However, Weil asserts, it may well happen that the transposition of a national legal principle into international law is unworkable due to the inadequacy of the principle for international law.[273]

In Rosenne's opinion, the application of general principles of law in international law is limited to a fall-back function, given the different structures of national legal systems and international law. For Rosenne, a significant structural difference is that whereas national law is a law of subordination, international law is a law of coordination.[274] Yet, this may be an oversimplification, as neither all branches of national law are laws of subordination (such as private law), nor are all branches of international law laws of coordination. International law does not exclusively regulate the relations between States anymore. At present, the international society does not solely consist of States and consequently there are new branches of international law regulating the relations between States and other subjects of international law. Because of the transformation of the international society, new fields of international law have emerged, such as international criminal law, international institutional law, and international constitutional law. Therefore, it is clear that international law has its own 'public law' and, consequently, its own law of subordination.

Furthermore, there is another important formal difference between international law and national legal systems: international law is a law created by its main legal subjects, namely the States.[275] That is, in international law States are the principal law-makers and the usual addressees of the international legal rules and principles.[276] On the other hand, in national legal systems the legislative organ enacts legislation that is binding upon all the inhabitants of the State. Therefore, in national legal systems the law-maker is generally not the

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[273] Weil, Prosper, *op. cit.* 161, p. 147.
[274] Rosenne, Shabtai, *op. cit.* 172, p. 63.
[275] Tomuschat, Christian, *op. cit.* 210, pp. 44.
[276] I said 'usual' because it may happen that the addressee of the international legal norms is a different subject of international law, such as the individual. Think for example of the large majority of the norms of international criminal law.

addressee of the legal rules and principles,[277] as is the case in international law.

As far as the legal sources are concerned, there is no formal hierarchy between the sources of international law but between international legal rules and principles (rules of *ius cogens* and rules of *ius dispositivum*).[278] While a rule of *ius dispositivum* 'is created by the consent of participating nations, as by an international agreement, and is binding only on the nations that agree to be bound by it',[279] a rule of *ius cogens* is a 'Mandatory or peremptory norm of general international law accepted and recognized by the international community as a rule from which no derogation is permitted.'[280] In contrast, the sources of national legal systems are hierarchically structured, usually in the form of constitution, primary legislation, and secondary legislation.[281]

With regard to the enforcement mechanisms, it is worth noting that a basic similarity between international law and national legal systems is that compliance with legal rules and principles habitually occurs with no necessity of having recourse to enforcement mechanisms. However, in the context of international law compliance with the rules and principles has a great significance, for the reason that the international society lacks an international judiciary power exercising full compulsory jurisdiction over States.[282]

Notwithstanding that basic similarity, there is a crucial difference between international law and national legal systems as regards the issue of adjudication of legal disputes: While national legal systems lay down rules giving the power to courts and tribunals of adjudicating legal disputes arising in their jurisdictions and pursuant to such rules the legal subjects can be brought to court even against their will, international law provides

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

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

[279] See Garner, Bryan, *op. cit.* 40, p. 876.

[280] Ibid., p. 877.

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

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

for rules empowering courts and tribunals to decide legal disputes arising among States, but, pursuant to those rules, States cannot be brought to court against their will. This is so in international law because the basis of international jurisdiction is based on State consent.[283]

2.7.5 Transposition into new branches of international law

Despite the still significant influence of the principle of sovereignty in the structure of the international society, international law is moving ahead to change its essentially decentralized structure for one more hierarchical intended to protect the public interests aims of the international community.[284]

In fact, the structure of international law has evolved: the individual has acquired (albeit in a limited way) legal subjectivity under international law;[285] the number of international organizations has drastically increased, as their functional competences did too;[286] a hierarchy has emerged among the rules of international law;[287] the number of international courts and tribunals has dramatically raised;[288] etc. In brief, although the structure of international law is still largely decentralized, the structural differences between national legal systems and international law have diminished to some extent and it is thus likely that this state of affaires facilitates the application of general principles of law in international law.

However, the risk of futility in looking for analogies in national law, if the legal relation at stake is peculiar to international law and has no corresponding legal relation in national legal systems, is always present. With respect to relatively new branches of international law, such as international criminal law, it is not extremely difficult finding out corresponding legal relations at the national level, given that international criminal law has been largely inspired in the image and the

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[283] See Dailler, Patrick and Pellet, Alain, *op. cit.* 19, p. 863, § 524; Diez de Velasco, *op. cit.* 19, p. 803.
[284] See Tomuschat, Christian, *op. cit.* 210, pp. 44-45.
[285] See McCorquodale, Robert, 'The Individual and the International Legal System', in Evans, Malcolm (ed.), *International Law*, 2nd edition, New York, Oxford University Press, 2006, pp. 307-332.
[286] See generally Diez de Velasco, Manuel, *Las Organizaciones Internacionales*, 9ª edición, Madrid, Tecnos, 1995, 706 pp.; Akande, Dapo, 'International Organizations', in Evans, Malcolm (ed.), *International Law*, 2nd edition, New York, Oxford University Press, 2006, pp. 277-305.
[287] See Cassese, Antonio, *op. cit.* 170, p. 198 *et seq.*
[288] See Romano, Cesare, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', *NYJIL*, Vol. 31, No. 4, 1999, pp. 709-751.

likeness of national criminal laws.[289]

The existence of relevant analogies in new fields of international law such as international criminal law and international constitutional law seems to result from the hybrid nature of these new disciplines. In effect, as their names make apparent, these new branches of international law borrow from national legal systems the rationale and some institutions of criminal and constitutional laws, respectively.[290]

Apparently that was also the view of Schachter. For him, general principles of law will frequently be appropriate for international application, as new fields of law have become the concern of international law. However, he went on to say, it does not signify that general principles of law are to be transposed into international law "lock, stock and barrel", paraphrasing the celebrated expression of Judge McNair in *International Status of South West Africa*, but that the national legal rules pertaining to new branches of law have become pertinent for transposition.[291] Thus, even though he did not state it explicitly, legal principles generally recognized in national law may require an adaptation to their new settlement, i.e., international law.

Thus, analogy does not require identical institutions. Slight differences on a particular legal issue do not necessarily prevent the application of a general principle of law, if this can be adapted to the particularities of the international legal system. Such differences may require adaptation, but need not lead to rejection.[292] International courts and tribunals shall adapt the contents and scope of application of general principles of law to the specifics of international law during the process of transposition from national legal systems into international law. Even Judge McNair, who was concerned about automatic transpositions of private law notions into international law, eventually affirmed that general principles of private law might shed light on the then new concept of mandate in international

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[289] See subsection 4.4.1.

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

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

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

law.[293]

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

2.8 Concluding remarks

In summary, there exists a practice of applying general principles of law in inter-States legal disputes since a long time ago. This practice was initiated by early international arbitral tribunals and continued –though less frequently- by the PCIJ and the ICJ.

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

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

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

demonstrated in chapter 3 and for the reasons set forth there, the emergence of new fields of international law, such as international criminal law, has put general principles of law at the scene again.

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

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

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

legal subjects of national legal systems.

Chapter 3 General principles of law in the decisions of international criminal courts and tribunals

3.1 Preliminary remarks

International criminal law is a branch of international law. Therefore it draws upon the same sources, namely conventions, custom, and general principles of law.[294]

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

First of all, international criminal law is a relatively new branch of international law. It is relatively new because the list of international crimes has gradually emerged and the rules of an international criminal procedure are scarce and only pertain to the criminal court or tribunal for which they were adopted.[295]

Second, international criminal law is somewhat rudimentary. This is due to the fact that the elements of the international crimes (the objective element or *actus reus*, and the subjective element or *mens rea*) have not been immediatly obvious, and because no scale of penalties has been laid down in international legal rules.[296] These two reasons lead international criminal courts and tribunals to turn to general principles of law in order to fill the legal gaps and to interpret imprecise legal rules.

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

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[294] 'En général, les sources du droit international pénal sont identiques à celles du droit international général.' See Simma, Bruno et Paulus, Andreas, *op. cit.* 12, p. 55. See Cassese, Antonio, *op. cit.* 12, p. 27; Ascensio, Hervé, *op. cit.* 153, pp. 403-409, *passim*; Degan, Vladimir, *op. cit.* 13, p. 26, p. 50; Werle, Gerhard, *Principles of International Criminal Law*, The Hague, TMC Asser Press, 2005, p. 44, § 123.

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

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

Finally, international criminal law has primarily developed by importing domestic criminal law concepts and institutions into the international realm.[297] Thus, given the analogies between many concepts and institutions of domestic criminal law and international criminal law, international criminal courts and tribunals have transposed into the international arena some of such concepts and institutions by means of general principles of law.

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

3.2 Early international criminal tribunals

This section investigates the role of general principles of law in the judgments of the early international criminal tribunals, namely the IMT and the IMTFE. Subsection 3.2.1 deals with the judgment of the IMT,[298] and subsection 3.2.2 with the judgment of the IMTFE.[299]

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[297] Ibid., p. 18.

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

[299] On the IMTFE, see Minear, Richard, *Victors' Justice: The Tokyo War Crimes Trial*, Princeton, Princeton University Press, 1971, 229 pp.; Röling, Bert, *op. cit.* 298; Röling, Bert and Rüter, Christiaan (eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948*, Amsterdam, University Press Amsterdam, 1977, Vol. I, 515 pp.; Piccigallo, Philip, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951*, Austin and London, University of Texas Press, 1979, 292 pp.; Hosoya, Chihiro *et al.* (eds.), *The Tokyo War Crimes Trial: An International*

3.2.1 The IMT

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

3.2.1.1 The applicable law

The Agreement for the Establishment of an International Military Tribunal, concluded in London on 8 August 1945, established the IMT for trying the major war criminals of the European Axis. The major war criminals were to be tried in accordance with the Statute and the RP of the IMT.[300]

The IMT was the first international criminal tribunal in modern history.[301] For this reason, the drafters of the Statute and the RP did not have the chance to draw upon the experience of a previous international criminal court or tribunal in order to draft those legal instruments. As a result they looked in their own legal system or culture for answers to questions such as who were going to be prosecuted, which charges were to be brought, and what procedures were to be followed.[302]

The drafting of the Charter and the RP was thus a complex process. While the legal system of the USA and the legal system of the United Kingdom were and still are part of the Common Law legal family, France's legal system was and still is part of the Romano-Germanic legal family, and the Soviet Union's legal system was part of the then existing Socialist legal family. Hence,

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Symposium, Tokyo, Kodansha Ltd., 1986, 226 pp.; Brackman, Arnold, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, New York, William Morrow and Company Inc., 1987, 432 pp; Röling, Bert and Cassese, Antonio, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, Cambridge, Polity Press, 1993, 143 pp.

[300] Text of the Agreement and the Charter in International Law Commission, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (memorandum, submitted by the Secretary-General)*, New York, United Nations, 1949, pp. 89-99. The text of the RP is available at http://www.yale.edu/lawweb/avalon/imt/proc/imtrules.htm (last visited on 3 July 2006)

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

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

whereas the USA and the United Kingdom had a criminal procedure based on the adversarial model, France and the Soviet Union had a criminal procedure based on the inquisitorial model.[303]

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

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

The IMT had the power to try persons *in absentia* (Article 12). In effect, it tried and convicted one of the accused this way.[304] It should be noted that whereas the adversarial criminal procedure is based on the effective presence of both parties in the proceedings, the inquisitorial procedure allows trials *in absentia* under certain circumstances.[305] Therefore, in this

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[303] Ibid., p. 67.

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

[305] Article 14, paragraph 3(d) of the ICCPR stipulates that in the adjudication of any criminal charge against him or her, everyone is entitled to be tried in his or her presence. In this respect, the Human Rights Committee held in *Mbenge v. Zaire (16/77)*, 'proceedings *in absentia* are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice. Nevertheless, the effective exercise of the rights under article 14 presuppose that the necessary steps should be taken to inform the accused beforehand about the proceedings against him ... Judgments *in absentia* require that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance'. Quoted by Joseph, Sarah *et al.*, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd edition, Oxford, Oxford University Press, 2005, p. 437.

respect, the drafters of the IMT Charter adopted an inquisitorial stance.

Pursuant to the IMT Charter's provisions on fair trial, the indictment included full particulars of the charges (Article 16), as is the case in the model of inquisitorial criminal procedure. The question of the content of the indictment was controversial becauset the supporters of the adversarial model, on the one hand, proposed to provide the accused with only a concise statement of the charges and to conceal evidence from the accussed until they were in court, and the supporters of the inquisitorial model, on the other hand, deemed the proposal unfair. Ultimately, the content of the indictments was more detailed than in the adversarial model but less than in the inquisitorial model.[306]

Given that the Allies did not propose the institution of jury trials, the Statute and the RP did not lay down detailed exclusionary rules of evidence, as is the case in jury trials.[307] The inquisitorial approach prevailed and, as a result, the IMT Charter stipulated that any evidence submitted to the IMT was admissible insofar as the IMT deemed it to have probative value (Article 19). Furthermore, the IMT was not required to prove facts of common knowledge (Article 21); the power of a tribunal to take judicial notice of such facts is a general principle of law.[308]

3.2.1.2 Three examples

I identified three examples of recourse to general principles of law in the IMT's judgment. The examples are given in the same order as they appear in the judgment.

3.2.1.2.1 Nullum crimen nulla poena sine lege

As stated above, the IMT Charter criminalized the planning or waging of a war of aggression or a war in violation of an international treaty. At trial, counsel for the accused contended, 'a fundamental principle of all law –international and domestic- is that there can be no punishment of crime without a pre-existing law'.[309] Counsel submitted that as national legal systems had not

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[306] See Murphy, John, *op. cit.* 313, p. 71; Larin, Aleksandr, 'The Verdict of the International Military Tribunal', in Ginsburgs, George and Kudriavtsev, Vladimir (eds.), *The Nuremberg Trial and International Law*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1990, pp. 80-81.

[307] The IMT 'did not apply common law rules of evidence'. Wright, Quincy, *op. cit.* 298, p. 256.

[308] See Cheng, Bin, *op. cit.* 25, pp. 302-304.

[309] *Judgment of the International Military Tribunal for the Trial of German Major War Criminals (With the dissenting opinion of the Soviet Member), Nuremberg,*

criminalized aggressive war or fixed penalties in this regard, the criminalization of aggressive war by the Charter constituted an *ex post facto* retribution contrary to the 'law of all civilized nations',[310] i.e., to the general principles of law.

According to some scholars,[311] the Defence's argument was correct. But this was not the IMT's view. For this tribunal, given the 'decisive' and 'binding' character of the Charter, it was unnecessary to consider whether aggressive war was a crime under international law before the execution of the Agreement.[312] Additionally, the IMT held that the principle *nullum crimen nulla poena sine lege* 'is not a limitation of sovereignty, but is in general a principle of justice.'[313] It also stated that it would be unjust to leave unpunished 'those who in defiance of treaties and assurances have attacked neighbouring states without warning'.[314] For these reasons, it rejected the application of the principle *nullum crimen nulla poena sine lege* to the case.[315] *Ad abundantiam* the IMT affirmed that aggressive war was already a crime under international law.[316]

The question arises as to what exactly the IMT meant by saying that the principle *nullum crimen nulla poena sine lege* was a principle of justice rather than 'a limitation to sovereignty'. In my opinion it meant that the principle was not part of general international law; otherwise, the principle should have limited the sovereignty of the States parties to the Agreement and Charter, just as any other legal rule or principle laying down an international obligation does limit the sovereignty of any State. In contrast, by holding that the principle in question was a principle of justice, i.e., a non-binding principle, the IMT created itself the possibility of choosing between applying the principle and retributing the accused. Eventually it chose the latter option because it deemed it 'more just' than the other option.

30th September and 1st October, 1946, London, His Majesty's Stationery Office, 1946, p. 38.

[310] Ibid.

[311] See the literature cited by Werle, Gerhard, *op. cit.* 294, p. 10, footnote 47.

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

[313] Ibid., p. 39.

[314] Ibid.

[315] Ibid.

[316] Ibid., pp. 39-41.

3.2.1.2.2 There is no criminal responsibility without moral choice

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

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

> The provisions of this Article are in conformity with the law of nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.[317]

Contrary to the IMT's holding, the conformity of Article 8 of the IMT Charter with the then existing general international law is doubtful. Actually, until the Second World War superior orders always excluded criminal responsibility on the part of the subordinate who acted under the orders; only the superior was subject to criminal responsibility.[318] Thus, the rule laid down in Article 8 of the Statute and the confirmation of the validity of that conventional rule by the IMT constituted an innovation with regard to the existing international criminal law.

What matters for the purpose of this thesis is the fact that the IMT resorted to a general principle of law in order to reach that conclusion. In the view of the IMT, Article 8 of the Charter was in conformity with international law because according to 'the criminal law of most nations' (i.e., the general principles of law), there is no criminal responsibility without moral choice. Stated differently, the orders alone do not amount to a ground for excluding criminal responsibility. To obey superior orders does not automatically exclude the responsibility of the perpetrator but might be of importance during the evaluation of the subjective element of the crime, such as the issue of whether the perpetrator acted as a free agent.[319] Therefore, obeying orders can only play a role within the context of the general grounds for excluding responsibility, in particular, duress and mistake of law.[320]

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[317] Ibid., p. 42.
[318] See Werle, Gerhard, *op. cit.* 294, p. 153, §§ 450-451.
[319] International Law Commission, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (Memorandum, Submitted by the Secretary-General),* New York, United Nations, 1949, p. 42.
[320] See Ambos, Kai, *op. cit.* 14, p. 461 and the authors cited in footnote 46; Werle, Gerhard, *op. cit.* 294, p. 154, § 454.

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

3.2.1.2.3 Personal culpability

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

> Article 9, it should be noted, uses the words 'The Tribunal may declare' so that the Tribunal is vested with discretion as to whether it will declare any organization criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. ... [T]he Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.[321]

The IMT thus applied the principle of culpability as a means for the interpretation of Article 9 of the Charter. Clearly, by applying the principle of culpability the IMT restricted the scope of application of that legal provision. In effect, the IMT held that 'Membership alone is not enough to come within the scope of these declarations'.[322]

The IMT was right in so contending, as the principle of personal culpability is indeed a 'well-settled' principle of criminal law. This principle prescribes that no one may be held responsible for an act he has not performed, or in the commission of which he has not participated, or for an ommission that cannot be attributed to him.[323]

The principle of culpability entails two legal consequences. First, no one may be held responsible for crimes

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[321] *Judgment of the International Military Tribunal for the Trial of German Major War Criminals (With the dissenting opinion of the Soviet Member), Nuremberg, 30th September and 1st October*, 1946, London, His Majesty's Stationery Office, 1946, pp. 66-67.
[322] Ibid., p. 67.
[323] Cassese, Antonio, *op. cit.* 12, p. 136.

committed by other persons. Second, an individual may only be held criminally responsible if he or she is in one way or another culpable for any violation of criminal rules.[324]

Apparently the IMT did not face major problems determining the existence and contents of the principle of personal culpability. As the IMT stated, the principle was a 'well-settled' criminal law principle. In fact, the origins of the principle can be traced back at the end of the 18th and beginning of the 19th centuries, times of the Liberal reaction against the Inquisition.[325]

Finally, it is worth noting that the affirmation of the principle of personal culpability at the international level by the IMT possesses a great significance at present, as modern international criminal law is grounded in this principle.[326] Nowadays, international criminal law conceives of personal culpability or guilty as meaning that the author of an alleged crime must be individually responsible for the acts constituting the offence, provided that there is no ground for excluding his or her responsibility.[327]

3.2.2 The IMTFE

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

3.2.2.1 The applicable law

On 19 January 1946, General MacArthur, the Supreme Commander for the Allied Powers, established by Special Proclamation the IMTFE. He acted on the authority conferred upon him by the Moscow Conference, as agreed between the governments of the USA, the United Kingdom, and the Soviet

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[324] Ibid., pp. 136-137.
[325] See, e.g., Binder, Alberto, *Introducción al Derecho Penal*, Buenos Aires, Ad Hoc, 2004, pp. 241-243. For a thorough examination of the principle of personal culpability, see Roxin, Claus, *Derecho Penal: Parte General*, Vol. I (Fundamentos. La estructura de la Teoría del Delito), traducción de la 2° edición alemana y notas por D. Luzón Peña *et al.*, Madrid, Civitas, reimpresión 2003 (1ª edición en Civitas, 1997), p. 788 *et seq.*
[326] See Article 7, paragraph 1 of the ICTY Statute, Article 6, paragraph 1 of the ICTR Statute, Article 6, paragraph 1 of the SCSL Statute, and Article 25, paragraphs 2 and 3 of the ICC Statute.
[327] See Ambos, Kai, *op. cit.* 14, p. 74.

Union with the concurrence of China.[328] A Charter regulated the constitution, jurisdiction, and functions of the IMTFE.[329]

The IMTFE Charter was inspired in that of the IMT. As a result, there are little material differences between both Charters. The jurisdiction of the IMTFE included crimes against peace, war crimes, and crimes against humanity (Article 5, paragraphs a-c), as the jurisdiction of the IMT did. Yet, the definition of the crimes against humanity is somewhat different, as it covers the acts perpetrated in the context of a *declared or undeclared* war of aggression. This difference in the definition of the crimes against humanity allowed the IMTFE to consider in the judgment the hostilities committed without any prior declaration of war.[330]

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

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

Although the Japanese Army could have been considered a 'criminal organization' based on an analogy with the Nuremberg precedent, the Charter did not authorize the designation of criminal organizations.[331] Therefore, this is one of the differences existing between the two Charters.

The trial was structured on the basis of the adversarial model of a criminal procedure.[332] For example, the form of the indictment had to consist in 'a plain, concise, and adequate statement of each offense charged' (Article 9, paragraph a). This

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[328] See Judgment of the International Military Tribunal for the Far East, in Röling, Bert and Rüter, Christiaan (eds.), *op. cit.* 299, pp. 19-20.

[329] Text of the IMTFE Charter in www.yale.edu/lawweb/avalon/imtfech.htm (last time visited on 23 November 2004).

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

[331] According to a former judge of the IMTFE, 'The Japanese military, specially the Army, ha[d] indeed an enormous responsibility. They set the conditions for the fateful development [of the Pacific War]'. Röling, Bert, *op. cit.* 298, p. 597.

[332] Moreover, the proceedings assumed an adversarial character because the President of the IMTFE and other six judges were used to it. See Röling, Bert and Rüter, Christiaan (eds.), *op. cit.* 299, p. XI.

is a second difference existing between the two Charters, because, as mentioned above, in the context of the IMT the indictment had to specify the charges in detail.

The accused had the right to counsel of their own choice and the right to self-representation (Article 9, paragraph b). As regards the powers of the IMTFE (Article 11), these were identical to the powers of the IMT. The same is the case as far as the role of the IMTFE in conducting the trial is concerned (Article 12).

The rules of evidence applied by the IMTFE were similar in scope to those applied by the IMT. Yet, they were more detailed (Article 13),[333] as they were the rules dealing with the course of the trial proceedings (Article 15). In contrast, there is one difference with regard to the IMT proceedings: The accused were guaranteed certain rights only if represented, such as to make an opening statement, to examine witnesses, and to address the IMTFE (Article 15, paragraphs c, e, and f respectively).

3.2.2.2 The principle nullum crimen nulla poena sine lege

Given the small number of substantial differences between the applicable law of the IMTFE and that of the IMT, it is almost natural that the judgment of the former is consistent with, and confirmative of, the judgment of the latter.[334] This applies *mutatis mutandi* to the findings where the applicability of certain national legal principles as general principles of law is at stake.

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

Therefore, the IMTFE only discussed the applicability of the principle *nullum crimen nulla poena sine lege*. In this respect the IMTFE relied on the finding of the IMT, that is, the principle in question was not a limitation of sovereignty.[335]

In brief, the IMTFE did not contribute to the determination and application of general principles of law in international criminal law, unlike the IMT and, especially, the contemporary

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[333] For an insight into evidentiary issues arisen at trial, see Minear, Richard, *op. cit.* 299, pp. 118-124.

[334] See International Law Commission, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (Memorandum, Submitted by the Secretary-General),* New York, United Nations, 1949, p. 83-86; Werle, Gerhard, *op. cit.* 305, p. 11.

[335] See IMTFE's judgment, in Röling, Bert and Rüter, Christiaan (eds.), *op. cit.* 299, p. 28.

international criminal courts and tribunals. The contributions of the latter are shown below.

3.3 Contemporary international criminal courts and tribunals

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

3.3.1 The ICTY

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

3.3.1.1 The applicable law

On 22 February 1993, the UN Security Council decided to establish an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law perpetrated in the territory of the former Yugoslavia since 1991. It also requested the UN Secretary-General to submit a report including proposals for the effective implementation of the decision.[336] The UN Secretary-General submitted such report on 3 May 1993.[337] On 25 May 1993 the UN Security Council, acting under Chapter VII of the UN Charter, *inter alia* approved the Report, decided to establish the ICTY, and to this end to adopt the Statute annexed to the Report. It also decided that all States must cooperate fully with the ICTY.[338] The Statute has been amended seven times so far.[339]

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

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

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

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

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

humanity (Article 5).[340]

Furthermore, the Statute lays down four principles of individual criminal responsibility. First, a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime within the jurisdiction of the ICTY shall be individually responsible for the crime. Second, the official position of a person shall not relieve him of criminal responsibility nor mitigate the sentence. Thirdly, superior responsibility. Finally, superior orders shall not relieve an accused of criminal responsibility but may mitigate punishment (Article 7).[341]

With regard to the defences available for the accused, the UN Secretary-General affirmed in the Report that the ICTY 'will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations.'[342] In fact the ICTY resorted to general principles of law on this matter, as illustrated in subsection 3.3.1.2.

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

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

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

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[340] With regard to the crimes within the jurisdiction of the ICTY, the Report says, 'the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.' See Report, § 34.

[341] The literature on individual criminal responsibility under international law is immense. For an overview of the topic, see Cassese, Antonio, *op. cit.* 12, pp. 135-158; Werle, Gerhard, *op. cit.* 294, pp. 116-128. But for a thorough analysis, see Ambos, Kai, *op. cit.* 14, *passim*.

[342] Report, § 58.

principles of law' (Article 28).

The RPE too are part of the applicable law of the ICTY. They were adopted by the judges of the ICTY pursuant to Article 15 of the Statute. They have been amended 39 times so far.[343] Among the RPE there is one rule referring explicitly to the general principles of law. This is Rule 89(C), which is a residual evidentiary rule and stipulates that, 'In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.'

3.3.1.2 Eighteen decisions

The large majority of the decisions examined below are judgments. The reason for this choice is no other reason than the fact that most of the examples of resort to general principles of law by the ICTY come into view in judgments. Nevertheless, all other decisions giving examples relevant for this thesis are also scrutinized here. I identified eighteen decisions germane to the thesis. The sequence of their presentation is chronological, so as to display the evolution of the ICTY's jurisprudence on general principles of law.

3.3.1.2.1 Prosecutor v. Tadić, Decision on Jurisdiction

This decision concerns an appeal lodged by the Defence against the judgment rendered by Trial Chamber II on 10 August 1995,[344] which had denied the Defence's motion challenging the jurisdiction of the ICTY.[345]

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[343] The last version of the RPE dates from 13 September 2006. See www.un.org/icty/legaldoc-e/index.htm (last time visited on 27 June 2007).

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

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

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

Courts must be established by law

According to the Defence, the establishment of the ICTY was illegal because it was not established by law; to be duly established by law, the ICTY should have been created by treaty or by amendment of the UN Charter.[346] For this reason, the Appeals Chamber examined the issue of whether the establishment of the ICTY 'was contrary to the general principle whereby courts must be "established by law"'.[347]

From the outset it is worth recalling that the ICCPR, the ECHR, and the ACHR grant the right to a fair trial by a competent, independent, and impartial tribunal established by law.[348] In the Defence's view, this right is a general principle of law because of its fundamental nature and since it is a minimum requirement for the administration of criminal justice at the international level.[349]

However, according to the Appeals Chamber,

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

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[346] Ibid., §§ 26-27. Patently, the Defence assumed the existence of relevant analogies between legislation and treaties.
[347] Ibid., § 41 *et seq.*
[348] Article 14, paragraph 1 of the ICCPR reads as follows: 'In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' This right is also provided for the ECHR (Article 6, paragraph 1) and the ACHR (Article 8, paragraph 1). For a commentary on that legal provision of the ICCPR, see Joseph, Sarah *et al.*, *op. cit.* 305, pp. 391-426.
[349] *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, App. Ch., 2 October 1995, § 41.

> be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be 'established by law'.[350]

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

> It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear-cut. Regarding the judicial function, the International Court of Justice is clearly the 'principal judicial organ' (*see* United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.
>
> It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be 'established by law' finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.[351]

Despite those considerations, the Appeals Chamber did not reject the application of the principle that courts must be established by law to the case, but it interpreted the principle differently from the interpretation usually given at the level of national legal systems. The Appeals Chamber interpreted the principle as meaning that an international court or tribunal is deemed to be established by law if it provides for all guarantees of fairness in full conformity with internationally recognized human

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[350] Ibid., § 42.
[351] Ibid., § 43.

rights standards.[352] According to the Appeals Chamber this interpreation is the 'most sensible' and 'most likely meaning' in international law.[353] It concluded that the ICTY is 'established by law' since its regulatory instruments grant a fair trial, as well as the impartiality and the independence of the judges.[354] And for these reasons eventually it dismissed the first ground of the Defence's appeal.[355]

From the preceding passages of the decision follows that the Appeals Chamber conceived of the principle that courts must be established by law as a general principle of law. Resort to this principle was done to fill the gap left by the absence of relevant rules in the Statute and the RPE, as well in customary law. In effect, the Appeals Chamber relied upon that principle in order to dismiss that ground of appeal.

The method of determination employed by the Appeals Chamber is rather peculiar. Instead of abstracting the principle from national legal rules, it derived it from the above-mentioned human rights treaties, in particular, the ECHR.[356] Hence, it seems that the Appeals Chamber did not really determine a general principle of law, but a general principle of international criminal law. As we shall see later, general principles of international criminal law are abstracted from conventional and customary international criminal law and do not require a comparative law research.[357]

Assuming that courts must be established by law is a general principle of law, the Appeals Chamber was right in asserting that its meaning cannot be at the international level the same as the meaning at the level of national legal systems. The reason is that in national legal systems the word 'law' of the term 'established by law' means the law of the parliament or congress;[358] as the Appeals Chamber stated, there is not such a thing in the international society. Clearly, the decentralized structure of the international society is an obstacle to the direct application of this principle at the international level, because the structure of the international society is not analogous to the structure of States.

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[352] Ibid., § 45.
[353] Ibid.
[354] Ibid., §§ 45-46.
[355] Ibid., § 47.
[356] See ibid., § 43.
[357] See subsection 4.1.3.
[358] See *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, App. Ch., 2 October 1995, § 43.

However, as mentioned earlier, the Appeals Chamber did not reject the application of the principle in question at the international level; it adjusted the meaning of the principle to the features of the international setting. After the adjustment, the principle means that an international criminal court or tribunal is 'to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments'.

One has the impression that the adjustment was pointless. This is because, in any event, the ICTY (as well as any other international criminal court or tribunal) must comply with the rule of law, i.e., with the fair trial standards. Additionally, such standards are part not only of the ICTY Statute, but also of customary law.[359] What is more, it seems that the ICTY Appeals Chamber itself deems the fair trial standards as part of the *ius cogens*, since in its view Article 14 of the ICCPR 'reflects an imperative norm of international law to which the Tribunal must adhere'.[360]

Therefore, if one assumes that an international criminal court or tribunal is to be rooted in the rule of law pursuant to its regulatory instruments and to customary law, then the best interpretation of the meaning of the principle under examination, in the context of international criminal law, is the second possible interpretation mentioned by the Appeals Chamber. That is, the words 'established by law' mean establishment of international courts and tribunals by a body possessing the power to take binding decisions, as the UN Security Council when acting under Chapter VII of the UN Charter.[361] Yet, the Appeals Chamber did not uphold this interpretation because, in its view, the 'most sensible and most likely meaning of the term in the context of international law' is that 'established by law' means that the establishment of the ICTY must be in accordance with the rule of law.[362]

The passages of the Appeals Chamber's decision referred to above did not provoke much scholarly writing. Nonetheless, we

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[359] *Prosecutor v. Kayishema and Ruzindana, Judgment (Reasons),* Case No. ICTR-95-1-A, App. Ch., 1 June 2001, § 51.
[360] *Prosecutor v. Tadić, Appeals Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-AR77, App. Ch., 27 February 2001, p. 3. See also Lambert-Abdelgawad, Elisabet, 'Les Tribunaux pénaux pour l'ex-Yougoslavie et le Rwanda et l'appel aux sources du droit international des droits de l'homme', in Delmas-Marty, Mireille *et al.* (eds.), *Les sources du droit international pénal*, Paris, Société de législation comparée, 2004, p. 105.
[361] *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, App. Ch., 2 October 1995, § 44.
[362] Ibid., § 45.

find Crawford's opinion.[363] According to this scholar, the Appeals Chamber's interpretation of the principle in question is problematic. It would be wrong to assert that international criminal courts and tribunals are subject to lesser human rights standards than national criminal courts; otherwise, States might violate international human rights by setting up international criminal tribunals.[364] Crawford also argues that Article 14 of the ICCPR does not stipulate that a court is deemed to be established by law if the court respects the fair trial standards; it does stipulate that a court should respect the human rights standards *and* it must be established by law. Thus, a judicial body whose establishment is illegal or whose judges are arbitrarily chosen cannot be considered to be established by law even if its proceedings guarantee the fair trial standards.[365]

Crawford is right in contending that it is dangerous to propose that an international criminal court or tribunal is subject to lesser human rights standards than a national court. However, there is some doubt as to whether the Appeals Chamber made such a proposition; after all, the Appeals Chamber interpreted the principle at stake as meaning that an international criminal court ought to be rooted in the rule of law.

No appeal lies unless conferred by statute

The Prosecutor had challenged the competency of the Defence's appeal with regard to the ground that the ICTY had been illegally established, as the ground did not relate to the jurisdiction of the ICTY pursuant to Rule 72(B) of the RPE.[366] However, the Appeals Chamber asserted its jurisdiction over the Defence's appeal based on its inherent or incidental jurisdiction.[367] Judge Sidwa dissented from the majority of the Appeals Chamber in that regard. In his opinion,

> The law relating to appeals in most national jurisdictions is that no appeal lies unless conferred by statute. The right to appeal a decision is part of substantive law and can only be granted by the law-making body by specific enactment. Where the provision for an appeal or some form of review by a higher forum is not regulated by the statute under which an order is passed, there is usually

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[363] Crawford, James, 'The Drafting of the Rome Statute', in Sands, Philippe (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge, Cambridge University Press, 2003, pp. 129-133.
[364] Ibid., p. 131.
[365] Ibid., p. 132.
[366] Ibid., § 4.
[367] Ibid., §§ 14-22.

> some omnibus statute providing for appeals in such cases. The courts have no inherent powers to create appellate provisions or acquire jurisdiction where none is granted. Where the law provides for an appeal, the court may, by the adoption of reasonable and proper rules, supply deficiencies in the statutory provisions as to practice. Appellate courts have no jurisdiction over incompetent appeals other than dismiss them. It is thus clear that a tribunal or court cannot assume appellate powers under any concept of inherent jurisdiction or by expanding its jurisdiction through any amendment to its rules.[368]

Apparently Judge Sidwa determined a general principle of law whereby 'no appeal lies unless conferred by statute'.[369] He resorted to this principle to confirm his decision, which he had based on a literal interpretation of Rule 72(B) of the RPE.

How did Judge Sidwa determine that no appeal lies unless conferred by statute? Clearly he derived the principle from national laws, as he referred to the law of appeals in 'national jurisdictions'. This brings us to the horizontal move. Although Judge Sidwa pointed to the fact that 'most' national jurisdictions recognize the principle, he did not put forward any evidence to that effect. Nevertheless, according to scholarly writing, the generality of national legal systems recognizes that principle. For example, Pradel affirms that legislation is the regular means for conferring appeals in national legal systems.[370]

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

> International law is not totally grounded in national concepts, though at times it borrows ideas from national jurisdictions to meet the international range of its objectives. For the most part, it seeks to keep itself free of rigid, strict and inflexible national rules and principles where they tend to be dogmatic or obstruct a fair, liberal or equitable approach to a problem. The strict rules

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

[369] By 'statute', Judge Sidwa meant "statutory law". That is, 'The body of law derived from statutes rather than from constitutions or judicial decisions. Also termed *statute law, legislative law; ordinary law.* See Common Law; Constitutional Law.' See Garner, Bryan (ed.), *op. cit.* 40, p. 1452.

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

> governing appeals and the whole range of rules and procedures surrounding the system, whether substantive or procedural, as found in national systems, may be a source of material to draw from, but international bodies would accept them free from strict rigidities binding them, from which they cannot extricate themselves. International law conceives of procedures which are flexible and subject to modification and change in extreme cases, should questions of fairness and equity come into play.[371]

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

We know that an international court or tribunal may adjust a general principle of law to the peculiarities of the international environment, if necessary. In the case of the principle that no appeal lies unless conferred by statute, an international court or tribunal might interpret the term 'statute' as meaning that no appeal lies unless conferred by international law (including conventional law, customary law, and general principles of law), should questions of fairness be at stake. However, such reasoning would be incorrect. Not only no appeal lies unless conferred by statute, but also the legal provision conferring the appeal must be laid down by the competent law-making body for doing so. In the case of the ICTY such body is the UN Security Council, because the 'constitutional' rules on appellate proceedings are laid down in the Statute and this has been adopted by that UN organ. Therefore, one cannot but conclude that the ICTY should have not assumed appellate powers that had not been granted by the UN Security Council. In short, Judge Sidwa's opinion was correct.

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

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

This decision regards two Defence's motions on the principle of *non bis in idem*, which the Prosecutor had opposed.[372] One of the Defence's arguments in support of the motions was that the proceedings instituted by the ICTY violated the principle *non bis in idem*, as the trial of the accused had already begun in Germany (the State from where the accused had been transferred to the ICTY). The Prosecutor responded that this principle did not apply to the case, since the German courts had not tried the accused.[373]

According to the Trial Chamber, the trial of the accused before the ICTY did not violate the principle *non bis in idem* and in this vein it dismissed the motion.[374] In order to reach that conclusion, the Trial Chamber argued that there was no violation of this principle as provided for the Statute:

> The principle of *non bis in idem* appears in some form as part of the internal legal code of many nations. Whether characterized as *non bis in idem*, double jeopardy or *autrefois acquis, autrefoit convict*, this principle normally protects a person from being tried twice or punished twice for the same acts. This principle has gained certain international status since it is articulated in Article 14(7) of the International Covenant on Civil and Political Rights as a standard of a fair trial, but it is generally applied so as to cover only a double prosecution within the same State. The principle is binding upon this International Tribunal to the extent that it appears in Statute, and in the form that it appears there.[375]

By pointing out the recognition of the principle *non bis in idem* by many national legal systems, purposely or accidentally the Trial Chamber made apparent that *non bis in idem* is a general principle of law. According to the Trial Chamber, this principle prescribes that a person should not be tried or punished twice for the same acts. It also made clear that the principle refers to double prosecution *within the same State*. Hence, the principle

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

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

[374] Ibid., § 5.

[375] Ibid., § 9.

does not prevent that a person be tried in more than one State for the same acts.

However, notwithstanding the Trial Chamber's apparent determination of *non bis in idem* as a general principle of law, it did not apply it to the case at hand but the rule on *non bis in idem* that is laid down in Article 10 of the ICTY's Statute.[376] Such a course of action was correct, because this provision of the Statute is the relevant *lex specialis* and the general principle of law *non bis in idem*, the *lex generalis*.

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

Obviously, the applicability of a general principle of law such as *non bis in idem*, which is also a general principle of international criminal law because it can be derived from a series of international human rights treaties, cannot be subject to such a rigid interpretation. This would render the applicability of the principle by an international court or tribunal unworkable. If one adapts the principle to the international environment, the principle *non bis in idem* would entail the prohibition of double prosecution or punishment within the same international court or tribunal. It should be noted that the ICTY Statute does not lay down any legal provision barring the international tribunal of prosecuting or punishing an individual twice for the same acts.[377]

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

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

Another possible interpretation, more consistent with the rights of defendants since it would be a barrier against abuse of power, would be to construe the principle as to forbidding double prosecution or punishment in more than one international criminal court or tribunal. Being the present time one of multiplication of this kind of criminal jurisdiction, such interpretation of the principle *non bis in idem* would be welcome.

3.3.1.2.3 Prosecutor v. Erdemović, Sentencing Judgment

This sentencing judgment concerns the guilty plea of the defendant with regard to a charge of crimes against humanity.[378] Given the terms in which the accused had formulated his plea, the Trial Chamber deemed that he could have committed the crimes pursuant to superior orders and under duress.[379] The decision is relevant to the thesis because the Trial Chamber determined two general principles of law, namely: (i) the conditions of application of the defences of duress, state of necessity, and superior orders are particularly strict; and (ii) the severest penalties may be imposed for crimes against humanity.

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

Because 'the Statute provides no guidance' on the issue at stake,[380], the Trial Chamber resorted to the source general principles of law to fill the gap left by the absence of relevant legal rules. In the Trial Chamber's view, according to the 'general principles of law as expressed in numerous national laws and case-law', the conditions of application of the defences of duress, state of necessity, and superior orders are particularly strict.[381] After that it dismissed duress as a ground for excluding criminal responsibility in this particular case.

The Trial Chamber's holding shows that an international court or tribunal may abstract a legal principle not only from national legislation but also from judicial decisions. In fact, the Trial Chamber derived the principle from 'numerous national laws and case-law'. This decision thus confirms the doctrinal view that

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[378] *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T, T. Ch. I, 29 November 1996. See Van der Wilt, Harmen, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1993-1998*, Antwerpen/Groningen/Oxford/Vienna, Intersentia/Hart Publishing/Verlag Österreich, Vol. 1, 1999, pp. 534-536.
[379] *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T, T. Ch. I, 29 November 1996, § 14.
[380] Ibid., § 16.
[381] Ibid., § 19.

general principles of law are to be derived from national law in general rather than national legislation in particular.[382]

The decision also shows that although the Trial Chamber stated that 'numerous national laws and case-law' recognize the general principle of law whose existence had apparently determined, the Trial Chamber gave the only example of French criminal legislation, judicial decisions, and scholarly writing.[383] The exclusive reference to French law makes the Trial Chamber's determination a hasty generalization rather than a comparative law study, as the size of the sample is too small to support the Trial Chamber's conclusion.[384] Had the Trial Chamber provided more relevant examples, its holding would have been more persuasive.

The severest penalties apply for crimes against humanity

The Trial Chamber noted that neither the Statute nor the RPE give any indication as to the length of imprisonment to which a person responsible for a crime may be sentenced, with the exception of the references to the general practice regarding prison sentences in the courts of the former Yugoslavia and to the penalty of life imprisonment.[385] For this reason it decided to ascertain the scale of penalties applicable for crimes against humanity by drawing upon the 'general principles of law recognized by all nations'.[386]

In that respect the Trial Chamber stated,

> [T]here is a general principle of law common to all nations whereby the severest penalties apply for crimes against humanity in national legal systems. It thus concludes that there exists in international law a standard according to which a crime against humanity is one of extreme gravity demanding the most severe penalties when no mitigating circumstances are present.[387]

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

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

[384] Cassese and Nollkaemper too criticized that very same aspect of the Trial Chamber's ruling. See Cassese, Antonio, *op. cit.* 23, p. 47; Nollkaemper, André, *op. cit.* 382, p. 394.

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

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

[387] Ibid. § 31.

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

> In conclusion, the Trial Chamber finds that reference to the general practice regarding prison sentences applied by the courts of the former Yugoslavia is, in fact, a reflection of the general principle of law internationally recognized by the community of nations whereby the most severe penalties may be imposed for crimes against humanity. In practice, the reference means that all the accused who committed their crimes on the territory of the former Yugoslavia could expect to be held criminally responsible. No accused can claim that at the time the crimes were perpetrated he was unaware of the criminal nature of his acts and the severity of the penalties sanctioning them. Whenever possible, the International Tribunal will review the relevant legal practices of the former Yugoslavia but will not be bound in any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction.[388]

It thus follows that the Trial Chamber determined the existence of a general principle of law whereby the severest penalties apply for crimes against humanity. It had recourse to this principle to fill the gap left by the absence of rules of the Statute and the RPE applicable to the issue at stake.

One has the impression that the Trial Chamber may have determined an extremely vague legal principle, which could be useless for normative purposes. In fact, the principle leaves open the question of what 'the severest penalties' are. Is it the death penalty exclusively? Is it the penalty of life imprisonment too? What about a penalty of forty years imprisonment, is that not severe? And a penalty of twenty years imprisonment, is that not severe as well?

Further in that regard, the general principle of law that the severest penalties apply for crimes against humanity does not offer what the Trial Chamber was looking for, that is, a scale of penalties. Moreover, the notion of severe punishment varies from one society to another, and within a single society, it may vary from time to time. Thus, what is the utility of a legal principle stipulating that the severest penalties may be imposed for crimes against humanity?

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[388] Ibid. § 40.

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

As far as the general recognition of the principle by nations is concerned, the Trial Chamber's determination is another example of hasty generalization. As stated by Van der Wilt, 'the Trial Chamber failed to identify national judicial precedents, it merely assumed that the relevant provisions of law in the former Yugoslavia did no deviate from the general sentencing practice concerning crimes against humanity, exhibited by the Nuremberg Tribunal and beyond'.[389]

Cassese too criticized the Trial Chamber's determination, for two reasons. First, the Trial Chamber failed to indicate the national law upon which it relied; this reason is similar to the one put forward by Van der Wilt. Second, it did not mention whether it took account of national laws on war crimes and genocide, so as to establish whether these laws provide for penalties as serious as the penalties related to the crimes against humanity.[390] The points made by Van der Wilt and Cassese are correct.

Finally, it is worth noting that the principle in question cannot be interpreted as permitting the imposition of the death penalty by the ICTY. The capital punishment is, needless to say, the severest punishment. That is due to the fact that the ICTY Statute limits the penalty to be imposed by the tribunal to imprisonment.[391] Therefore, it should be kept in mind that the general principle of law that the severest penalties apply for crimes against humanity is to be interpreted in the light of the legal regime of the international criminal court or tribunal where it would apply. Put it differently, the severity of the punishment to be imposed on convicted persons cannot exceed the limits laid down by the regulatory instruments of the international criminal court or tribunal concerned.

3.3.1.2.4 Prosecutor v. Tadić, Opinion and Judgment

The decision under examination relates to the *Tadić* case.[392] It is

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[389] Van der Wilt, Harmen, *op. cit.* 378, pp. 534-535.
[390] Cassese, Antonio, *op. cit.* 23, p. 48.
[391] See Article 24, paragraph 1, ICTY Statute.
[392] *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997. See Scharf, Michael, 'Prosecutor v. Tadić. Case No. IT-94-1-T. ICTY,

germane to the thesis because it dealt with the issue of whether the legal principle *unus testis, nullus testis* is a general principle of law. This decision illustrates that a given legal principle must be generally recognized in national law in order to become a general principle of law.

The issue arose from the circumstance that the RPE of the ICTY do not require corroboration of the victim's testimony in cases of sexual assault.[393] *A contrario sensu*, does it mean that the testimony of a victim of a crime other than sexual assault is necessarily subject to corroboration? Put it differently, does the legal principle *unus testis, nullus testis* apply in such a situation? In the Trial Chamber's view, it does not.[394]

The Trial Chamber arrived at that conclusion after having examined national legal systems of the Romano-Germanic and the 'Marxist' legal families. As a result, it determined that most of the national legal systems of the Romano-Germanic legal family (it reviewed legislation of Belgium, Denmark, Germany, Greece, Italy, the Netherlands,[395] Portugal, and Spain, as well as judicial decisions from France, Belgium, and the Netherlands) do not require corroboration of a single testimony anymore.[396] It found the same answer in the legislation of two national legal systems of what the Trial Chamber called the 'Marxist' legal family, namely, the legal systems of the former Yugoslavia and China, which follow the Romano-Germanic principle of the freedom of evaluation of evidence.[397]

The Trial Chamber's finding is correct and consistent with scholarly writing.[398] However, the Trial Chamber's conclusion is

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May 7, 1997', *AJIL,* Vol. 91, No. 4, 1997, p. 718-721; Boot, Machteld, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1993-1998*, Antwerpen/Groningen/Oxford/Vienna, Intersentia/Hart Publishing/Verlag Österreich, Vol. 1, 1999, pp. 452-456.

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

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

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

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

[397] Ibid., § 538.

[398] See Pradel, Jean, *op. cit.* 15, pp. 534-535.

somewhat bizarre: In place of concluding that *unus testis, nullus testis* is not a general principle of law, it asserted that it is not a rule of customary law and, hence, the ICTY is not bound to apply it.[399] The conclusion is rather surprising because, apparently, the Trial Chamber was looking for a general principle of law (it examined national legal systems that were classified in legal families) and not a customary rule. In effect, one has the impression that the Trial Chamber failed to distinguish between these two sources of international (criminal) law.

3.3.1.2.5 Prosecutor v. Erdemović, Judgment

In this judgment the Appeals Chamber dealt with highly controversial legal issues,[400] as demonstrated by the fact that the five members of the Appeals Chambers appended separate opinions.

As far as the general principles of law are concerned, the Appeals Chamber denied the existence of a principle whereby duress is a complete defence to a charge of crimes against humanity or war crimes involving the killing of innocent human beings,[401] but found the principle that an accused deserves less punishment because he is less responsible when he performs a criminal act under duress.

The Prosecutor had charged the accused with one count of a crime against humanity alternatively with one count of a violation of the laws or customs of war. The accused pleaded guilty to the count of a crime against humanity. The Trial Chamber accepted the plea and sentenced him to ten years' imprisonment.[402]

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

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

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

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

After that, the Defence lodged an appeal requesting the Appeals Chamber to revise the sentence given that the crime had been committed under duress. The majority of the Appeals Chamber, by three votes to two, found that duress is not a complete defence in international law to a charge of crimes against humanity or war crimes involving the killing of innocent human beings.[403]

In the opinion of Judges McDonald and Vohrah, from the majority, the applicable law to the issue at stake was the law 'exhaustively listed' in Article 38 of the ICJ Statute. After having determined that no customary rule existed on the matter, they undertook a comparative analysis of the 'world's legal systems' to derive a relevant general principle of law. As a result they found the general principle of law that an accused deserves less punishment because he is less responsible when he performs a criminal act under duress.[404] Judge Li (the remaining judge from the majority) endorsed Judges McDonald and Vohrah's opinion on this particular point.[405]

The opinion of Judge Stephen, from the minority with respect to this particular legal issue, is worth of consideration. He proposed to recognize the defence of duress as a general principle of law not only 'because of the approach of the civil law but also as a matter of simple justice'.[406] Interestingly, his conception of the general principles of law seems to be based on natural law, as he proposed recognizing duress as a general principle of law 'as a matter of simple justice' notwithstanding that the principle was not generally recognized in national law, in particular, in the national laws of the Common Law legal family.

According to Simma and Paulus, the divergent opinion between Judges McDonald and Vohrah, on the one side, and Judge Stephen, on the other side, on whether or not duress is a complete defence under general principles of law, reveals that not always the judges from the Common Law arrive at the same conclusion.[407] Apparently, Simma and Paulus meant that judges from a same legal family do not always agree on whether the family recognizes a given legal principle. However that is not what

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[403] Ibid., § 19.
[404] *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 40, 55-72.
[405] *Prosecutor v. Erdemović, Separate and Dissenting Opinion of Judge Li*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 3.
[406] *Prosecutor v. Erdemović, Separate and Dissenting Opinion of Judge Stephen*, Case No. IT-96-22-A, App. Ch., 7 October 1997, §§ 25-26.
[407] Simma, Bruno et Paulus, Andreas, *op. cit.* 12, p. 63, § 14.

happened in the judgment under examination. Judge Stephen, similarly to Judges McDonald and Vohrah, did acknowledge that the Common Law does not recognize duress as a complete defence in certain circumstances.[408] What distinguishes Judge Stephen's opinion from the joint opinion of Judges McDonald and Vohrah in that regard is that Judge Stephen put forward for consideration the acceptance of duress as a general principle of law 'as a matter of simple justice', i.e., regardless of the prescriptions of the law.

The judgment is material to the thesis also because it shows that in spite of the subsidiary nature of general principles of law as a source of international law, the filling-gap function of these principles may have a crucial role in the context of international criminal law. In the case under examination, had the Appeals Chamber determined that duress is a complete defence under general principles of law, the accused would have been acquitted and released immediately, for the reason that he had been charged with only one count. But given that for the majority of the members of the Appeals Chamber such a general principle of law did not exist, eventually the accused was sentenced to five years imprisonment.[409] Put it differently, individual freedom may depend on the existence of a relevant general principle of law. At least this is the case as far as personal defences are concerned, since the purpose of the defences is to advance grounds for excluding criminal responsibility.

Another aspect of the judgment that deserves special attention is the moves necessary to determine a general principle undertaken by Judges McDonald, Vohrah, and Stephen.

With regard to the vertical move, Judges McDonald and Vohrah, on the one side, and Judge Stephen, on the other side, did not agree on what the outcome of a legal research aimed to determine a general principle of law should be. Whereas for the former it should be a 'consistent concrete rule', for the latter it should not be a concrete legal rule but a general principle that embodies the reasons for the creation of a norm.[410] Judge Stephen was right in so contending. As explained in

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

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

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

subsection 2.6.3, above, (i) general principles of law consist in abstractions of legal rules deprived of their particular elements; and (ii) in determining a general principle of law, it is crucial to identify the *ratio legis* and the fundamental principles that are common to a particular institution within different national legal systems. Hence, there is no doubt that the outcome should be a general legal principle rather than a concrete and detailed legal rule, without prejudice that the legal principle thus derived will play the role of a legal rule. That is, it will fulfil a normative function in the decision.

With reference to the horizontal move, the joint opinion of Judges McDonald and Vohrah is the first wide-ranging comparative law research carried out in the practice of the ICTY. It included thirty national legal systems that are classified in 'civil law systems',[411] 'common law systems',[412] and 'criminal law of other States'.[413] The research included national legal systems whose jurisprudence 'was, as a practical matter, accessible' to the judges.[414] The examination takes account of legislation, judicial decisions, and scholarly writing.

In brief, the issue of duress as a complete defence in international law to a charge of murder as a crime against humanity or war crime has been the first controversial ICTY's ruling with regard to general principles of law. The decision under examination has contributed to the development of international criminal law. In (opposite) effect, as rightly pointed out by Schabas, the ICC Statute provides for the defence of duress, which means that the precedent of the Appeals Chamber was set aside.[415]

3.3.1.2.6 Prosecutor v. Delalić et al., Judgment

This Trial Chamber's judgment dealt with events alleged to have taken place at a prison-camp in Bosnia and Herzegovina in 1992.[416]

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

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

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

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

[415] William Schabas, *op. cit.* 301, pp. 90-91. See also Article 31, paragraph 1(d), ICC Statute.

[416] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998. See Swaak-Goldman, Olivia, 'Prosecutor v. Delalić. No. IT-96-21-T', *AJIL*, Vol. 93, No. 2, 1999, pp. 514-519; Van der Wilt, Harmen, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of*

The Prosecutor had charged the four accused with grave breaches of the Geneva Conventions of 1949 and violations of the laws or customs of war, under Articles 2 and 3 of the ICTY Statute respectively.[417] In this judgement the Trial Chamber dealt with the following general principles of law: (i) *res iudicata*; (ii) *nullum crimen nulla poena sine lege*; (iii) adjudication of criminal culpability requires an analysis of the objective and subjective elements of the crime; (iv) the burden of proof rests upon the prosecutor; and (v) *in dubio pro reo*.

Res iudicata

With the purpose of establishing whether Article 2 of the ICTY Statute applied to the case, the Trial Chamber had to determine whether the armed conflict that had taken place in Bosnia and Herzegovina since its independence in March 1992 was international in character.[418]

In the opinion of the Prosecutor the conflict was international.[419] At its turn, the Defence submitted that the Prosecutor should not be allowed to postulate the existence of an international armed conflict because Trial Chamber II had already adjudicated this question in the judgment of the *Tadić* case, where the Prosecutor had been a party. In this judgment the Trial Chamber had decided that the conditions for the application of Article 2 of the Statute were not met. For this reason, the Defence submitted that the issue of the nature of the armed conflict was *res iudicata* for the Prosecutor.[420]

However, in the view of the Trial Chamber,

> There can be no question that the issue of the nature of the armed conflict relevant to the present case is not *res iudicata*. The principle of *res iudicata* only applies *inter partes* in a case where a matter has already been judicially determined within that case itself. As in national criminal systems which employ a public prosecutor in some form, the Prosecution is clearly always a party to cases before the International Tribunal. The doctrine of *res iudicata* is limited, in criminal cases, to the question of whether, when the

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International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997-1999, Antwerpen/Oxford/New York, Intersentia, Vol. 3, 2001, pp. 669-683.

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

[418] Ibid., § 204-235.

[419] Ibid., § 204.

[420] Ibid., § 205.

> previous trial of a particular individual is followed by another of the same individual, a specific matter has already been fully litigated. In national systems where a public prosecutor appears in all criminal cases, the doctrine is clearly not applied so as to prevent the prosecutor from disputing a matter which the prosecutor has argued in a previous, different case.[421]

The Trial Chamber did not reject the submission of the Defence merely because the conditions for the application of the principle of *res iudicata* were not met in the case. It also rejected the submission because it did not feel bound by the decisions taken by other Trial Chambers in earlier cases.[422]

The legal reasoning of the Trial Chamber was correct. The principle of *res iudicata* was inapplicable because the parties to the *Tadić* case were not the same as the parties to the *Delalić et al.* case. Since a long time it has been recognized that one of the two effects of this principle is that 'Once a case has been adjudicated by a valid and final judgment, the same issue may not be disputed again *between the same parties*, so long as that judgment stands.'[423] In criminal law, this negative effect of the principle *res iudicata* is embodied in the maxim *non bis in idem.*[424]

The Trial Chamber did not need to ascertain the existence and contents of the principle of *res iudicata*, as this had been done already by international courts and tribunals.[425] It only needed to determine whether the conditions for the application of the principle in question had been met in the case at hand. As mentioned above, this did not happen.

Nullum crimen nulla poena sine lege

Also the principle *nullum crimen nulla poena sine lege* was considered in the Trial Chamber's judgment, as a principle of interpretation of the criminal law applicable by the ICTY. According to the Trial Chamber, *nullum crimen sine lege* and *nulla poena sine lege* 'are well recognized in the world's major criminal justice systems as being fundamental principles of criminality".[426] *Nullum crimen nulla poena sine lege* is related to another 'fundamental principle' of criminal law, namely 'the

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[421] Ibid., § 228.
[422] Ibid.
[423] Cheng, Bin, *op. cit.* 25, p. 337, and the arbitral and judicial decisions cited therein. Italics mine.
[424] Ibid. See also Novak, Manfred, *op. cit.* 9, p. 272.
[425] See Cheng, Bin, *op. cit.* 25, p. 337.
[426] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998, § 402.

prohibition against *ex post facto* criminal laws with its derivative rule of non-retroactive application of criminal laws and criminal sanctions' and 'the requirement of specificity and the prohibition of ambiguity in criminal legislation'.[427] However, even if *nullum crimen sine lege* and *nulla poena sine lege* 'exist and are recognized in all the world's major criminal justice systems',[428] '[i]t is not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems. This is essentially because of the different methods of criminalization of conduct in national and international criminal justice systems'.[429]

According to the Trial Chamber,

> Whereas the criminalization process in a national criminal justice system depends upon legislation which dictates the time when the conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties and conventions, or after a customary practice of the unilateral enforcement of a prohibition by States.[430]

In this vein the Trial Chamber concluded that the requirements for the application of the principle *nullun crimen nulla poena sine lege* in international criminal law are different from the conditions for their application in national law.[431]

Clearly, the Trial Chamber conceived of the principle *nullum crimen nulla poena sine lege* as a general principle of law. This is revealed by the reference to the recognition of the principle by national legal systems.[432] Even if for many scholars the principle *nullum crimen sine lege* is a customary rule of international law,[433] the Trial Chamber's conception of these

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[427] Ibid.
[428] Ibid, § 403.
[429] Ibid.
[430] Ibid, § 404.
[431] 'It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order. To this end, the affected State or States must take into account the following factors, *inter alia*: the nature of international law; the absence of international legislative policies and standards; the *ad hoc* processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States.' Ibid., § 405.
[432] Werle is of the same opinion. See Werle, Gerhard, *op. cit.* 294, pp. 32-33, footnote 172.
[433] See ibid.

principles is not necessarily wrong. As explained earlier,[434] a given legal principle may be part of conventional law, customary law, and general principles of law simultaneously. And this could be the case of the principle *nullum crimen nulla poena sine lege*.

The Trial Chamber correctly stated the two requirements covered by the principle in question as a general principle of law, namely the prohibition of retroactive criminal laws (*lex praevia*) and the specificity of criminal laws (*lex certa*). These requirements are also laid down in Article 15 of the ICCPR.[435] While the prohibition of retroactive criminal laws is explicitly laid down in this legal provision, the requirement of specificity has been discerned by scholars and the Human Rights Committee.[436]

Article 15, however, does not lay down the other two requirements that are typically attributed to the principle *nullum crimen nulla poena sine lege*, namely (i) crimes may only be laid down in written law (*lex scripta*) and (ii) the prohibition of analogy *in mala partem* (*lex stricta*).[437]

Historically, the requirement of written law or *lex scripta*, understood as legislation enacted by parliament, has been typical of the national legal systems of the Romano-Germanic legal family. In the national legal systems of the Common Law legal family, in contrast, the main source of criminal law has been the common law, as developed by judicial decisions. However, such a significant difference on the method of criminalization employed by the Romano-Germanic legal family, on the one hand, and the Common Law legal family, on the other hand, has decreased over the time. The reason is that, at present, in Common Law jurisdictions such as England and Wales, an important volume of criminal law is to be found in statutes (statutory offences).[438] Even so, it should be noted that in the Common Law legal family *lex scripta* is not a formal requirement of the principle *nullum crimen nulla poena sine lege*. This is also evidenced by the fact that in these jurisdictions the courts apply a sort of scale of

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[434] See section 2.4.2.
[435] See text of Article 15 of the ICCPR in footnote 8, above.
[436] See references in footnote 9, above.
[437] See Ambos, Kai, *op. cit.* 10, p. 21. See also Cassese, Antonio, *op. cit.* 15, pp. 141-142 and Lamb, Susan, *Nullum Crimen, Nulla Poena sine Lege in International Criminal Law*, in Cassese, Antonio *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, New York, Oxford Univeristy Press, 2002, p. 734.
[438] See Ashworth, Andrew, *Principles of Criminal Law*, 4th edition, Oxford, Oxford University Press, 2003, p. 6.

sentences that has developed at common law.[439]

The requirement of *lex stricta*, at its turn, seems to be less obvious.[440] Sometimes it is considered as consisting in the principle of strict interpretation, according to which criminal laws are to be interpreted strictly, favouring the accused in case of doubt.[441] And some other times it is understood as prohibiting recourse to analogy *in mala partem*, that is, to the detriment of the accused. While the prohibition of recourse to analogy *in mala partem* is characteristic of the national legal systems of the Romano-Germanic legal family,[442] it is not of the national legal systems in which judges have the power to create law.[443]

It thus appears that *nullum crimen nulla poena sine lege* as a general principle of law encompasses only two requirements, namely the prohibition of retroactive criminal laws (*lex scripta*) and the specificity of criminal laws, that is, the elements of the crimes must be as clearly expressed as possible (*lex certa*). These are the only two requirements laid down by the generality of national legal systems of the world.

In international criminal law the requirement of specificity is more flexible than in the national legal systems of the Romano-Germanic legal family;[444] especially as far as the *nullum poena* element of the principle is concerned.[445] The requirement of specificity at the international level seems to be more limited than at the level of national legal systems because while these usually require a quite thin scale of penalties,[446] neither general nor particular international criminal law lays down a scale of penalties.[447] However, even if the inexistence of a scale of penalties in international criminal law results in a great judicial discretion in punishing convicted persons,[448] the discretion is

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[439] With regard to England and Wales, see ibid., pp. 19-23.
[440] See Ambos, Kai, *op. cit.* 9, p. 23.
[441] Ibid.
[442] For example with regard to German criminal law, see Roxin, Claus, *op. cit.* 336, p. 40.
[443] See Ambos, Kai, *op. cit.* 9, p. 23.
[444] See Werle, Gerhard, *op. cit.* 294, pp. 32-33, § 91.
[445] Cassese's view on the matter is radical: 'The principle is not applicable at the international level'. See Cassese, Antonio, *op. cit.* 12, p. 157.
[446] See Werle, Gerhard, *op. cit.* 294, pp. 32-33, § 91. See also Ambos, Kai, *op. cit.* 9, pp. 23-28.
[447] The ICTY Appeals Chamber has denied the existence of a hierarchy between genocide, crimes against humanity, and war crimes. See *Prosecutor v. Tadić, Judgment in Sentencing Appeals,* Case No. IT-94-1-A and IT-94-1-A*bis*, App. Ch., 26 January 2000, § 69.
[448] The ICTY Appeals Chamber has stressed that sentencing is 'a discretionary decision'. See *Prosecutor v. Krstić, Judgment,* Case No. IT-98-33-A, App. Ch.,

limited by certain provisions of the statutes and RPE of the various international criminal courts and tribunals:[449] penalties are limited to imprisonment,[450] fines,[451] and forfeiture of proceeds acquired by the crime.[452]

In conclusion, the Trial Chamber's assertion that 'the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards' is right, if understood as meaning that the requirements of *lex scripta* and *lex stricta* are not covered by *nullum crimen nulla poena sine lege* as a general principle of law, and as meaning that the principle of specificity of the *nulla poena* element of the principle has not been applied at the international level in its full dimension.

Adjudication of criminal culpability requires an analysis of the objective and subjective elements of the crime

One of the four accused had been charged, *inter alia*, with 'wilful killing', which is punishable under Article 2 of the Statute, and 'murder', which is punishable under Article 3. The question arose as to whether there is a difference between wilful killing and murder, as to make the elements of these crimes materially different from each other.[453]

In the view of the Trial Chamber the elements of those crimes are identical. In other words, wilful killing and murder are the same crime. It arrived at that conclusion by interpreting Articles 2 and 3 in accordance with the ordinary meaning of the terms employed in these legal provisions and in the context of the Geneva Conventions of 1949 (from where those terms had been 'borrowed' by the ICTY's Statute drafters).[454]

Then the Trial Chamber proceeded to ascertain and formulate the elements of the crime wilful killing/murder,[455] because 'It is apparent that it is a general principle of law that the

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19 April 2004, § 242. See also Schabas, William, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*, New York, Cambridge University Press, 2006, p. 563 *et seq.*

[449] See Cassese, Antonio, *op. cit.* 12, p. 157.

[450] Article 24, paragraph 1, ICTY Statute; Article 23, paragraph 1, ICTR Statute; Article 19, paragraph 1, SCSL Statute ; Article 77, paragraph 1, ICC Statute.

[451] Article 77, paragraph 2, ICC Statute.

[452] Ibid.

[453] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998, §§ 420-421.

[454] Ibid., § 422.

[455] See Swaak-Goldman, Olivia, *op. cit.* 416, p. 517; Van der Wilt, Harmen, *op. cit.* 416, p. 677.

establishment of criminal culpability requires an analysis of two aspects':[456] the *actus reus*, that is, the physical act necessary for the crime, which is also known as the 'objective element' of crimes; and the *mens rea*, i.e., the necessary mental element, which is also known as 'the subjective element'.[457]

In that passage of the judgment he Trial Chamber determined the general principle of law that the establishment of criminal culpability requires an analysis of the objective and subjective elements of the crime. The material scope of application of this principle is unambiguous: international criminal courts and tribunals must examine whether the requirements of the elements of a crime are met in order to adjudicate criminal responsibility.

The principle played an interpretative function in the judgment. The Trial Chamber resorted to this principle as a means for interpreting Articles 2 and 3 of the Statute.

As for the determination of the principle, the Trial Chamber was right in contending that the existence of the principle is 'apparent'. Given the obvious existence of the principle, one may wonder why the Trial Chamber cited a judicial decision from the USA to support its contention.[458] Citing only one national judicial decision for the purpose of determining a general principle of law is rather insufficient, as the existence of these principles would be better established by revealing their general recognition in national law. Another acceptable course of action could have been not to cite any national law at all, given the apparent nature of the principle that adjudication of criminal culpability requires an analysis of the objective and subjective elements of the crime.

The burden of proof rests upon the prosecutor

The Trial Chamber also examined the issue of the burden of proof on any party in the proceedings.[459]

After recalling that Article 21, paragraph 3 of the Statute lays down the presumption of innocence of the accused until he is proven guilty, the Trial Chamber remarked the lack of provisions

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[456] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998, § 424.
[457] Ibid., § 425. On the functions and structure of the elements of crimes, see Binder, Alberto, *op. cit.* 325, pp. 134-138.
[458] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998, § 424, footnote 433.
[459] Ibid., §§ 599-604.

in the RPE regulating the burdens of proof and stated:

> It is a fundamental requirement of any judicial system that the person who has invoked its jurisdiction and desires the tribunal or court to take action on his behalf must prove his case to its satisfaction. As a matter of common sense, therefore, the legal burden of proving all facts essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings.[460]

The Trial Chamber resorted to the principle that the burden of proof rests upon the prosecutor, in order to fill the gap left by the absence of a relevant legal rule in the RPE. This principle is the criminal law version of the principle *onus probandi actori incumbit*; as shown above,[461] early international arbitral tribunals conceived of the latter as a 'principle of universal jurisprudence'.

The principle that the burden of proof rests upon the prosecutor is one of the corollaries of the presumption of innocence, a basic human right guaranteed not only by the ICTY Statute, but also by human rights treaties[462] and national laws.[463] The principle has been codified in Article 66, paragraph 2 of the Statute of the ICC, and reinforced by Article 67, paragraph 1(i). The latter provision recognizes the right of the accused 'Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.'

In dubio pro reo

After having resorted to the principle that the burden of proof rests on the Prosecutor, the Trial Chamber invoked another corollary of the presumption of innocence, namely *in dubio pro reo*:

> The general principle to be applied by the Trial Chamber is clearly, on the basis of this brief analysis, that the Prosecution is bound in law to prove the case alleged against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been

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[460] Ibid., § 599.
[461] See subsection 2.2.2.4, *Affaire du Queen*.
[462] The presumption of innocence is guaranteed, *inter alia*, by Article 14, paragraph 2 of the ICCPR.
[463] See Cryer, Robert *et al.*, *International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, p. 356.

proved. [464]

While the standard on the burden of proof of the Prosecutor is prescribed by Rule 87(A) of the ICTY RPE, the principle *in dubio pro reo* is not. It is thus highly probable that the Trial Chamber deemed *in dubio pro reo* to be a general principle of law.

It should be noted that *in dubio pro reo* concerns the appraisal of facts 'as to whether the offence has been proved', as stated by the Trial Chamber.

3.3.1.2.7 Prosecutor v. Furundžija, Judgment

In this judgment,[465] the Trial Chamber resorted to general principles of law in order to define the crime of rape.

Furundžija had been charged with violations of the laws and customs of war, more precisely with outrages upon personal dignity including rape under Article 3 of the Statute. The alleged act of rape consisted in forced oral penetration. The Trial Chamber could not find any definition of the crime of rape under conventional and customary international law; nor could it discern any element of the crime of rape from the general principles of international criminal law and the general principles of international law. Hence, in order to fill the legal gap, it deemed it necessary 'to look for principles of criminal law common to the major legal systems of the world', i.e., general principles of law. According to the Trial Chamber, 'These principles may be derived, with all due caution, from national laws.'[466]

The Trial Chamber observed, 'that a trend can be discerned in the national legislation of a number of States of broadening the defintion of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault.'[467] This preliminary finding reveals the Trial Chamber's readiness to define the crime of rape in accordance with such trend, as eventually it did.

After examining various national legal systems, the Trial

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[464] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998, § 601.

[465] *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998. See Schabas, William, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Antwerpen/Oxford/New York, Intersentia, Vol. 3, 2001, pp. 753-760.

[466] Ibid., § 177.

[467] Ibid., § 179.

Chamber held,

> It is apparent from our survey of national legislation that, in spite of inevitable discrepancies, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.[468]

That was the definition of the crime of rape under general principles of law. Therefore that was the law to be applied to the facts of the case. Had this law be applied, forced oral penetration would not have been assimilated to rape but to sexual assault. In fact, as stated by the Trial Chamber, whereas some national legal systems assimilate forced oral penetration to sexual assault, others do assimilate it to rape.[469]

The Trial Chamber however took a different course of action. It decided to revisit general principles of international criminal law and general principles of international law with the aim to seek what it called 'an appropriate solution' to the legal issue at stake.[470] The subsequent legal reasoning was the following: (i) forced oral penetration is a humiliating and degrading attack on human dignity; (ii) the essence of international humanitarian law and human rights law lies in the protection of the human dignity; (iii) given (i) and (ii), forced oral penetration should be classified as rape.[471] Finally, the Trial Chamber defined the *actus reus* of the crime of rape as follows: (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.[472] It is patent that this formulation of the *actus reus* of the crime of rape is broader than under general principles of law, because it includes forced oral penetration.

In searching the definition of the crime of rape under general principles of law, the Trial Chamber examined not only national legislation but also decisions of national courts. It did not look for a common legal rule, but a common principle

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[468] *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998, § 181.
[469] Ibid., § 182.
[470] Ibid. See Schabas, William, *op. cit.* 465, pp. 756-757.
[471] *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998, § 183.
[472] Ibid., § 185.

underlying the different national legal systems. Such a way to proceed was technically correct, and led the Trial Chamber to finding the definition of the crime of rape under general principles of law. Having found the definition quoted above, it was not only unnecessary to turning back to general principles of international law to settle the issue at stake, but also contradictory. In fact, the Trial Chamber had already stated that resort to the general principles of international law was of any avail on this matter.[473]

In effect, one has the impression that assimilating forced oral penetration to rape in this case was unfair towards the accused, because the Trial Chamber's efforts to convict him of rape were manifest. One has also the impression that by choosing the broad definition of the crime of rape (under general principles of international law instead of general principles of law), the Trial Chamber violated the principle of strict construction of criminal statutes.[474] Last but not least, if doubts about the definition of the crime still persisted, the definition should have been interpreted in favour of the accused (*favor rei*). The principle of strict construction of criminal status and the principle of *favor rei* are part of general international criminal law.[475]

As far as the horizontal move of the determination process is concerned, the Trial Chamber investigated eighteen national legal systems. The choice of legal systems made by the Trial Chamber was appropriate for demonstrating the universality of the general principle of law thus found,[476] as they were representative of the different regions of the world.

This judgment also provides material for discussion with reference to the transposition issue. From the outset of its search for a relevant general principle of law, the Trial Chamber stated:

> Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation

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[473] *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998, § 177.

[474] The principle of strict interpretation of criminal status prescribes that 'one is not allowed to broaden surreptiously, by way of interpretation, the contents of criminal rules, so as to make them applicable to instances nos specifically envisaged by the rules.' See Cassese, Antonio, *op. cit.* 12, p. 154.

[475] Therefore Article 22, paragraph 2 of the ICC Statute expresses general international law. This provision reads as follows: 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the persons being investigated, prosecuted or convicted'. See Lamb, Susan, *op. cit.* 437, pp. 752-753.

[476] Chile, China, Germany, Japan, SFRY, Zambia, Austria, France, Italy, Argentina, Pakistan, India, South Africa, Uganda, Australia (New South Wales), the Netherlands, England and Wales, and Bosnia and Herzegovina, in that order.

> is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since 'international trials exhibit a number of features that differentiate them from national criminal proceedings', account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.[477]

The Trial Chamber relied upon Judge Cassese's separate and dissenting opinion in the *Erdemović* case. He was one of the three members of the Trial Chamber dealing with the Furundžija case.

The Trial Chamber was right in asserting that reference should not be made to a single legal family in order to ascertain general principles of law. However, there are some doubts as to the accuracy of the second condition laid down by the Trial Chamber. In fact, what are the special features of international trials? Despite that the Trial Chamber mentioned their existence, it did not state them. Another related query is the following: To what extent the transposition of a general principle of law on the definition of the crime of rape may be affected by such special features of international trials? The Trial Chamber did not shed any light on this issue either. Consequently, the Trial Chamber's *obiter dictum* is rather puzzling.

3.3.1.2.8 Prosecutor v. Tadić, Judgment

In this judgment,[478] the Appeals Chamber recognized the principle of personal culpability. In contrast, it did not conceived of the

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[477] Ibid., § 178 (footnote ommited).

[478] *Prosecutor v. Tadić, Judgment,* Case No. IT-94-1-A, App. Ch., 15 July 1999. For a commentary on the judgment, see Sassoli, Marco and Olson, Laura, 'Prosecutor v. Tadić. Case No. IT-94-1-A', *AJIL,* Vol. 94, No. 3, 2000, pp. 571-578; Gill, Terry, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Antwerpen/Oxford/New York, Intersentia, Vol. 3, 2001, pp. 868-875.

Doctrine of Common Purpose as a general principle of law. In addition, the declaration appended to the judgment by Judge Nieto-Navia examined the scope of application of the principle *non bis in idem*.

Nullum crimen sine culpa and the Doctrine of Common Purpose

The question arose as to whether under international criminal law the accused could be held criminally responsible for the killing of five men, even if there was no proof that he personally had killed any of them. A fundamental issue consisted in determining whether the acts of one individual may lead to the criminal culpability of another individual where both participate in the execution of a common criminal plan.[479] From the outset, the Appeals Chamber stated

> The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*). In national legal systems this principle is laid down in Constitutions, in laws, or in judicial decisions. In international criminal law the principle is laid down, *inter alia,* in Article 7(1).[480]

It is thus clear that the principle of culpability, a basic principle of criminal law, was recognized by the Appeals Chamber as a general principle of law.[481] It is also plain that the Appeals Chamber did not need to invoke the principle as a general principle of law to fill a gap, as it is encompassed by Article 7, paragraph 1 of the ICTY Statute. In fact, that passage of the Appeals Chamber's judgment reveals the huge argumentative force that the invocation of certain 'fundamental' general principles of law may bring into legal reasoning; especially in situations such as the one of that passage of the judgment, in which the Appeals Chamber did not reinforce a holding by resorting to a given general principle of law as a subsidiary argument, but started the legal reasoning by turning to it. In this particular case, the Appeals Chamber resorted to the principle of culpability as the yardstick against which the consistency of the

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[479] *Prosecutor v. Tadić, Judgment,* Case No. IT-94-1-A, App. Ch., 15 July 1999, § 185.
[480] Ibid, § 186 (footnotes omitted).
[481] The Appeals Chamber referred to the recognition of the principle by the constitution of Italy, French and Austrian legislation, and decisions of British and German courts.

Doctrine of Common Purpose with international criminal law had to be measured.[482]

With regard to that doctrine, the Appeals Chamber first ascertained its customary status as a form of accomplice liability and its implicit recognition by the Statute.[483] And then it stated:

> It should be emphasised that reference to national legislation and case-law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case-law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognized by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case.[484]

It follows that while the Appeals Chamber determined the customary status of the doctrine at stake, it found that this is not a form of accomplice liability under general principles of law. Obvioulsy the finding did not bear a practical significance in the context of the case at hand, for the reason that the doctrine is part of customary law and the ICTY can apply it on this legal basis. One may wonder why the Appeals Chamber was interested in determining whether some general principle of law reflected the Doctrine of Common Purpose, considering that it had already ascertained its customary status. It is probable that it merely intended to reinforce its legal reasoning by pointing to the fact that the doctrine is rooted in several national legal systems, even if its recognition is not as general as to render it a general principle of law.

This brings us to the horizontal move of the determination process. Interestingly, while the Appeals Chamber started by requiring a rather high standard for ascertaining the general recognition by nations of the Doctrine of Common Purpose ('most, if not all, countries'), it concluded by declaring that it would be necessary that the main legal families of the world adopt the same

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[482] *Prosecutor v. Tadić, Judgment,* Case No. IT-94-1-A, App. Ch., 15 July 1999, § 187.
[483] Ibid., § 220.
[484] Ibid., § 225.

approach. After a close examination it seems that the expression 'most, if not all, countries' was not intended as a standard for determining general recognition but as a rethorical tool for making clear that the doctrine was not generally recognized in national law.

The Appeals Chamber relied upon the traditional classification of national legal systems in legal families, namely the Romano-Germanic and the Common Law, to establish the requirement of general recognition. With regard to the former, it examined the law of Germany, the Netherlands, France, and Italy; and with respect to the latter, the law of England and Wales, Canada, the USA, Australia, and Zambia.[485] It is noticeable that while the choice of the examples concernig the Common Law was representative of different regions of the world (Europe, America, Oceania, and Africa), the choice of those regarding the Romano-Germanic legal family was entirely Eurocentric.

Non bis in idem

In this case the Prosecutor had lodged an appeal against the acquittal of the defendant on certain counts, on the basis of Article 25 of the Statute. This provision does not bar the Prosecutor from appealing an acquittal. Pursuant to the principle *non bis in idem*, an individual shall not be tried or punished twice for the same crime.[486] For this reason Judge Nieto-Navia deemed it necessary to deal with a twofold issue: (i) whether *non bis in idem* is a general principle of law and, in the affirmative, (ii) whether Article 25 is consistent with *non bis in idem.*[487]

After having examined the laws of the USA, England and Wales, France, and Germany, Judge Nieto-Navia found no common legal principle on that matter: whereas in the Romano-Germanic legal family appeals against acquittal do not infringe upon the principle *non bis in idem,* in the Common Law they do violate it. Hence he concluded that there is no general principle of law prohibiting the Prosecutor to lodge appeals against acquittals and, thus, no need to determine whether Article 25 of the Statute conflicts with the principle *non bis in idem.*[488]

Judge Nieto-Navia's finding, i.e., there is no general principle of law prohibiting the Prosecutor to lodge an appeal against acquittal, is correct. But he did not provide a clear

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[485] Ibid., § 224.
[486] See 3.3.1.2.2, above.
[487] *Prosecutor v. Tadić, Judgment, Declaration of Judge Nieto-Navia*, Case No. IT-94-1-A, App. Ch., 15 July 1999, § 1.
[488] Ibid., § 3-9.

answer (in the affirmative or in the negative) to his own first 'yes/no question', namely whether *non bis in idem* is a general principle of law. Instead, he responded that there is no general principle of law preventing the Prosecutor to appeal an acquittal.

In my view, Judge Nieto-Navia's answer may have two opposite meanings. The first is that *non bis in idem* is not a general principle of law and thus he considered it unnecessary to answer question (ii). The second is that *non bis in idem* is a general principle of law, which prohibits the trial or punishment for a crime for which an individual had already been *finally* acquitted or convicted in accordance with the relevant procedural law. There are two strong reasons to believe that Judge Nieto-Navia referred to the second meaning: such interpretation of the principle does not prohibit appealing acquittals of lower courts and is consistent with the provisions of the ICCPR.[489]

3.3.1.2.9 Prosecutor v. Kupreskić et al., Judgment

The decision under analysis now is the Trial Chamber's judgment of the *Kupreskić et al.* case.[490] It considered the existence of general principles of law on the issue of cumulation of offences (*concursum delictorum*).[491]

From the outset, the Trial Chamber stated:

> In delving into this new area of international criminal law, the Trial Chamber will rely on general principles of international criminal law and, if no such principle is found, on the principles common to the various legal systems of the world, in particular those shared by most civil law and common law criminal systems. In this search for and examination of the relevant legal standards, and the consequent enunciation of the principles applicable at the international level, the Trial Chamber might be deemed to set out a sort of *ius praetorium*. However, its powers in finding the law are of course far more limited than those belonging to the

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[489] Article 14(7) of the ICCPR reads as follows: 'No one shall be liable to be tried or punished again for an offence for which he has already been *finally* convicted or acquitted in accordance with the law and penal procedure of each country.' (Italics mine). See Joseph, Sarah *et al.*, *op. cit.* 305, pp. 460-461.

[490] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000. For a commentary on the judgment in general, see Schabas, William, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1999-2000,* Antwerpen/Oxford/New York, Intersentia, Vol. 4, 2002, pp. 888-892.

[491] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000, §§ 673-695.

> Roman *praetor*: under the International Tribunal's Statute, the Trial Chamber must apply *lex lata* i.e. existing law, although it has broad powers in determining such law.[492]

That passage of the judgement reveals the importance that general principles of law may play in filling legal gaps once it has been determined the inexistence of applicable conventional and customary international law (including general principles of international criminal law).

As for the methodology to be employed to derive both sets of legal principles, the Trial Chamber declared:

> General principles of international criminal law, whenever they may be distilled by dint of construction, generalisation or logical inference, may also be relied upon. In addition, it is now clear that to fill possible gaps in international customary and treaty law, international and national criminal courts may draw upon general principles of criminal law as they derive from the convergence of the principal penal systems of the world. Where necessary, the Trial Chamber shall use such principles to fill any *lacunae* in the Statute of the International Tribunal and in customary law. However, it will always be necessary to bear in mind the dangers of wholesale incorporation of principles of national law into the unique system of international criminal law as applied by the International Tribunal.[493]

The issue of cummulation of offences is relevant to both substantive and procedural international criminal law.[494] With respect to the former, it concerns the question of whether and on what conditions the same act or transaction may violate more than one rule of international criminal law and in case of a double conviction for a single action how this should impact on sentencing.[495] With regard to the latter, it touches upon the issue of on what conditions the Prosecutor may choose cumulative charges for the same act or transaction, when should the Prosecutor submit alternative charges, and what the powers of a Trial Chamber are for deciding on a charge that has been

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[492] Ibid., § 669.
[493] Ibid., § 677.
[494] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 670.
[495] Ibid.

incorrectly formulated by the Prosecutor.[496]

The Trial Chamber set out four legal principles regarding the substantive law of cumulation of offences, namely: (i) reciprocal speciality; (ii) speciality; (iii) consumption; and (iv) protected values. These principles regulate the issue of cummulation of offences where a single criminal transaction breaches two or more legal provisions simultaneously.[497]

The first principle ascertained by the Trial Chamber is the Romano-Germanic principle of reciprocal speciality, which corresponds to the so-called 'Blockburger test' of the courts of the USA. Pursuant to this principle, 'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of an additional fact which the other does not.'[498] The principle was derived from decisions of courts of the USA and 'civil law courts'.[499] The validity and importance of this principle was reaffirmed by the ICTY Appeals Chamber in other cases.[500]

The second is the principle of speciality, which applies if the requirements of the principle of reciprocal speciality are not met. According to this principle, 'one of the offences falls entirely within the ambit of the other offence'. According to the Trial Chamber, the principle reflects a principle of general international law (*lex specialis derogat legi generali*) and is recognized by national criminal law such as the Dutch and Italian criminal codes.[501] The ICTY Appeals Chamber confirmed the validity of this principle in another case.[502]

The third is the Romano-Germanic principle of consumption, also known as principle of the lesser included

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[496] Ibid. See generally Cassese, Antonio, *op. cit.* 12, p. 212; Walther, Susanne, 'Cumulation of Offences', in Cassese, Antonio *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, New York, Oxford University Press, 2002, pp. 475-478; *Werle*, Gerhard, *op. cit.* 294, pp. 178-179.
[497] Ibid., § 678-679.
[498] Ibid., § 681.
[499] Ibid., §§ 681, 685.
[500] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-A, App. Ch. 20 February 2001, § 339; *Prosecutor v. Jelisic, Judgment*, Case No. IT-95-10-A, App. Ch. 5 July 2001, § 82; etc.
[501] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 683.
[502] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-A, App. Ch. 20 February 2001, § 340.

offence in the Common Law legal family.[503] According to this principle, conviction of a lesser offence than the offence charged is permitted as long as the definition of the greater offence necessarily includes the definition of the lesser offence.[504] The Trial Chamber found this principle after having examined English scholarship, judicial decisions from Austria, Germany, France, and the case-law of the European Commission of Human Rights and the European Court of Human Rights.[505] The principle was approved by the ICTY Appeals Chamber: 'It is … an established principle of both the civil and common law that punishment should not be imposed for both a greater offence and a lesser included offence. Instead, the more serious crime subsumes the less serious (*lex consumens derogat legi consumptae*)'.[506] The Appeals Chamber also recognized the difficulties for applying this principle at the international level, given the lack of a scale of penalties under international criminal law.[507]

Finally, the fourth principle set out by the Trial Chamber is the principle of different values, according to which, 'if an act or transaction is simultaneously in breach of two criminal provisions protecting different values, it may be held that that act or transaction infringes *both* criminal provisions.'[508] The Trial Chamber determined the principle after investigating decisions of the courts of Canada, France, Austria, and Italy.[509] Differently from the principles referred to above, the principle of different values was not endorsed by the ICTY Appeals Chamber.[510]

The query comes up as to whether the four above-referred principles are really general principles of law. According to Cassese, the norms for regulating the issue of cumulation of offences can be deduced from the 'principles of criminal law common to the major legal systems of the world as well as international case law'. And then he proceeded to explain those four principles as ascertained and interpreted in the practice of the ICTY.[511] Apparently also Werle is the same opinion, since in

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[503] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000, §§ 687-688.
[504] Ibid., § 687, footnote 953.
[505] Ibid., §§ 687-692.
[506] *Prosecutor v. Kunarac et al., Judgment*, Case No. IT-96-23 & IT-96-23/1-A, App. Ch., 12 June 2002, § 170.
[507] Ibid., § 171.
[508] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 694.
[509] Ibid., §§ 693, 695, footnotes 956 and 957, respectively.
[510] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-A, App. Ch. 20 February 2001, §§ 412-413.
[511] Cassese, Antonio, *op. cit.* 12, pp. 214-215.

his view the methodology for deriving principles on cumulation of offences consist in 'a distillation of general legal principles taken from the corresponding rules of national legal systems'.[512]

It is doubtful whether the four principles set out by the Trial Chamber are genuine general principles of law. Some of them (reciprocal speciality) are too detailed and precise to be considered abstractions of legal rules; some others are not generally recognized in national law (or at least their general recognition by nations has not been demonstrated by the Trial Chamber), but have been crafted by referring to some national laws and general international law (principle of speciality), or to a few national laws and case-law of the European Court of Human Rights and the European Commission of Human Rights (principle of protected values). Only the principle of consumption/lesser included offence was wholly derived from the main legal families of the world and is enough abstract as to be considered a general principle of law. In this respect it should be recalled the Trial Chamber's preliminary notice, whereby in its search for the relevant legal standards and the ensuing articulation of the relevant principles the Trial Chamber could set out a kind of *ius praetorium*. Considered as a whole, the four principles in question seem to fit better into the category of *ius praetorium* than of general principles of law.

Finally the Trial Chamber dealt with the procedural law aspect of the issue of cumulation of offences. Because neither the Statute nor the RPE of the ICTY or the general principles of international criminal law regulate the manner in which Trial Chambers should proceed in the case of a wrong legal classification of facts by the Prosecutor (especially when certain elements of the crime charged against the accused have not been proved but the evidence reveals that, if the facts were characterized in a different way, a crime under the jurisdiction of the ICTY would even so have been committed), the Trial Chamber embarked upon an examination of national criminal laws for deriving 'principles of criminal law common to the major legal systems of the world'.[513]

The Trial Chamber did not find a legal principle on the matter common to the Common Law and the Romano-Germanic legal families. The basic difference resides in the larger powers enjoyed by the courts of the latter family to establish the

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[512] Werle, Gerhard, *op. cit.* 292, p. 179.
[513] *Prosecutor v. Kupreskić et al., Judgment,* Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 728.

applicable law. These powers are based on the principle *iura novit curia*. Furthermore, in some Romano-Germanic legal systems the powers of courts in this regard are narrower than in others; in some States (Germany and Spain) the court may only reclassify, in the course of the trial, the facts of the case after notifying the accused and permitting him to prepare his defence; in some others (such as France and Italy), courts may as an alternative give a diverse legal classification of the facts from that put forward by the Prosecution, without automatically notifying the accused.[514]

As a result of the lack of a pertinent 'general principle of criminal law common to all major legal systems of the world', the Trial Chamber decided to search for 'a general principle of law consonant with the fundamental features and the basic requirements of international criminal justice'.[515] Two requirements were set out in light of the undeveloped nature of international criminal law, namely that the rights of the accused be fully protected and that 'the Prosecutor and, more generally, the International Tribunal be in a position to exercise all the powers expressly or implicitly deriving from the Statute, or inherent in their functions, that are necessary for them to fulfil their mission efficiently and in the interests of justice'.[516]

In that vein the Trial Chamber pinpointed a series of long, detailed, and precise guidelines which,[517] for that very reason, are not real general principles of law but judge-made law.

3.3.1.2.10 Prosecutor v. Tadić, Judgment on Allegations of Contempt

In this judgment the Appeals Chamber asserted the existence of a general principle of law whereby courts have the inherent power to deal with contempt.[518]

The judgment is about contempt proceedings against prior counsel of Tadić. In these proceedings the accused submitted that the changes operated in Rule 77 of the ICTY RPE during the relevant period (September 1997/April 1998) expanded the extent

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[514] Ibid., §§ 729-737.
[515] Ibid., § 738.
[516] Ibid., § 739.
[517] Ibid., § 742.
[518] *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin,* Case No. IT-94-1-A-R77, App. Ch., 31 January 2000. For a general comment on this judgment, see Cockayne, James, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1999-2000*, Antwerpen/Oxford/New York, Intersentia, Vol. 4, 2002, pp. 191-200.

of conduct that amount to contempt of the ICTY, infringing upon his rights.[519]

Rule 77 describes the conducts that amount to contempt.[520] Until the last amendment, the then existing paragraph (E) prescribed that nothing in Rule 77 affected the inherent power of the ICTY to hold in contempt persons who knowingly and wilfully interfere with its administration of justice. Rule 77 does not refer to such inherent power since then.

As a preliminary matter the Appeals Chamber deemed it necessary to examine the general question of the ICTY's power to deal with contempt. It held that the ICTY has this power because it is essential for an international criminal tribunal to take action against interferences to the administration of justice. As for the content of the power, it might be determined in the light of the 'usual sources of international law'.[521]

Customary law did not regulate the matter.[522] For this reason the Appeals Chamber embarked upon an examination of the 'general principles of law common to the major legal systems of the world, as developed and refined (where applicable) in international jurisprudence';[523] in short, the general principles of law.

Although the law of contempt originated in the context of the Common Law, many national legal systems of the Romano-Germanic legal family have enacted legislation bringing to a parallel consequence.[524] While the power to deal with contempt in Common Law legal systems is part of the inherent jurisdiction of courts, in the Romano-Germanic legal family the power to deal with contempt is enacted by legislation.[525]

The Appeals Chamber went on to state:

> A power in the Tribunal to punish conduct which tends to obstruct, prejudice or abuse its administration of justice is a necessity in order to ensure that its exercise

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[519] *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-AR77, App. Ch., 31 January 2000, § 12.
[520] Rule 77 was adopted on 11 February 1994, revised on 30 January 1995, amended on 25 July 1997, revised on 12 November 1997 and amended on 13 December 2001. See www.un.org/icty/legaldoc-e/index.htm (last visited on 14 June 2006).
[521] *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-AR77, App. Ch., 31 January 2000, § 13.
[522] Ibid., § 14.
[523] Ibid., § 15.
[524] Ibid.
[525] Ibid., § 17.

> of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded. Thus the power to deal with contempt is clearly within its inherent jurisdiction. That is not to say that the Tribunal's powers to deal with contempt or conduct interfering with the administration of justice are in every situation the same as those possessed by domestic courts, because its jurisdiction as an international court must take into account its different setting within the basic structure of the international community.[526]

For these reasons the Appeals Chamber concluded that the ICTY's inherent power to deal with contempt has existed since the establishment of the ICTY and it does not depend on the existence of a specific provision of the RPE.[527]

It is doubtful the existence of a general principle of law whereby courts have the inherent power to deal with contempt, contrary to the Appeals Chamber contention. In fact, the legal principle underlying both the Common Law and the Romano-Germanic legal families is that courts have the power to deal with contempt, but not that courts have the *inherent* power to deal with such conduct. This is due to the fact that, as the Appeals Chamber had shown, in the national legal systems of the Romano-Germanic legal family the power to deal with contempt is given by legislation.

Scholars that commentend upon this decision have disapproved the Appeals Chamber's determination. According to Cockayne, the determination is 'troubling' because the evidence furnished by the Appeals Chamber can also be interpreted in the sense that the Romano-Germanic legal systems do not consider it essential for criminal courts to have the power to deal with contempt, and that where the power is deemed necessary, it must be given by legislation. Had ICTY followed that approach, it would have exercised such power only if the UN Security Council had endowed it.[528]

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[526] Ibid., § 18 (footnote omitted).

[527] 'The inherent power of the Tribunal to deal with contempt has necessarily existed ever since its creation, and the existence of that power does not depend upon a reference being made to it in the Rules of Procedure and Evidence. As the Appeals Chamber is satisfied that the current formulation of Rules 77(A) to (D) falls within that inherent power, the amendments made in December 1998 did not increase the nature of the conduct which amounts to contempt to the prejudice of the Respondent's rights.' Ibid., § 28. The holding was reaffirmed in a subsequent decision: *Prosecutor v. Aleksovski, Judgment on Appeal by Anto Nobilo against Finding of Contempt,* Case No. IT-95-14/1-AR77, App. Ch., 30 May 2001, § 38.

[528] Cockayne, James, *op. cit.* 518, p. 193.

The Appeals Chamber 'found' the principle in question by inspecting national legal systems of the Common Law and the Romano-Germanic legal families. Within the first group it scrutinized decisions of English, Canadian, Australian, and American courts. Within the second group, it examined legislation from Germany, China, France, and Russia.[529] Interestingly, while in this case the Appeals Chamber included the Chinese legal system as an example of the Romano-Germanic legal tradition, a Trial Chamber had referred to it as a 'Marxist legal system'.[530]

With respect to the transposition of that principle into international law, it should be noted that in spite of the Appeals Chamber's concerns about the potential impact that the different structure of international law and national legal systems may bear upon the applicability of domestic legal principles at the international level, eventually it transposed the principle at stake into the international arena and applied it to the case without more.

3.3.1.2.11 Prosecutor v. Blaškić, Judgment

The Trial Chamber's judgment of the *Blaškić* case is relevant to this study for two reasons.[531] First, the Trial Chamber expressed that the rules on individual criminal responsibility laid down in Article 7, paragraph 1 of the Statute reflect general principles of law. Second, the Trial Chamber applied the principle of proportionality in sentencing both as a rule of the ICTY Statute and a general principle of law.

Personal culpability

With regard to the first principle The Trial Chamber held:

> The Trial Chamber concurs with the views deriving from the Tribunal's case-law, that is, that individuals may be held responsible for their participation in the commission of offences under any of the heads of individual criminal responsibility in Article 7(1) of the Statute. This approach is consonant with the general principles of criminal law and customary international

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[529] *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-AR77, App. Ch., 31 January 2000, § 16-17.
[530] See subsection 3.3.1.2.4, above.
[531] *Prosecutor v. Blaškić, Judgment,* Case No. IT-95-14-T, T. Ch. I, 3 March 2000. See Keijzer, Nico and Van Sliedregt, Elies, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1999-2000*, Antwerpen/Oxford/New York, Intersentia, Vol. 4, 2002, pp. 656-667.

law.[532]

Stated differently, Article 7, paragraph 1 of the Statute reflects the principle of personal culpability or individual criminal responsibility, as the ICTY Appeals Chamber had already determined.[533] It is probable that the principle was invoked not so much to confirm the validity of Article 7, paragraph 1 of the Statute with general international law –which was uncontroverted by the parties- as to reinforce the legal reasoning on the basis of a basic principle of criminal law.

Proportionality in sentencing

The Trial Chamber resorted to the principle of proportionality in sentencing in these terms:

> [T]he principle of proportionality, a general principle of criminal law, and Article 24(2) of the Statute call on the Trial Chamber to bear in mind the seriousness of the offence and could consequently constitute the legal basis for a scale of sentences.[534]

It is thus clear the dual legal nature of the principle of proportionality in sentencing in the ICTY's legal framework, both as a general principle of law and a specific rule of the Statute (Article 24, paragraph 2).[535] It is also obvious that the principle was not called upon to fill any legal; nor it was to interpret the second paragraph of Article 24 of the Statute. By pointing to the principle of proportionality as a general principle of law first, it is highly probable that the Trial Chamber intended to enhance the impact of its statement, as if general principles of law were a hierarchically superior source of international law, above the Statute.

The ICTY has resorted to the principle of proportionality in sentencing very frequently. It has for example declared that the principle is based on classical retributive theory and that calls for the imposition of punishment that is proportional to the harm done.[536] Punishment must be proportional to the wrongdoing,

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[532] *Prosecutor v. Blaškić, Judgment,* Case No. IT-95-14-T, T. Ch. I, 3 March 2000, § 264.
[533] See subsecion 3.3.1.2.8, above.
[534] *Prosecutor v. Blaškić, Judgment,* Case No. IT-95-14-T, T. Ch. I, 3 March 2000, § 796.
[535] The relevant part of Article 24, paragraph 2 of the ICTY Statute reads as follows: 'In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence'.
[536] *Prosecutor v. Nikolić, Sentencing Judgment,* Case No. IT-02-60/1-S, T. Ch., 2 December 2003, § 86.

i.e., it must fit the offence.[537] The principle of proportionality in sentencing is so important for the ICTY[538] that prompted the Appeals Chamber to declare that the pursuit of other sentencing purposes, such as rehabilitation, would violate the principle of proportionality if such purposes are given excessive importance in sentencing.[539]

3.3.1.2.12 Prosecutor v. Furundžija, Judgment

This judgment dealt *inter alia* with the principle of impartiality of the judiciary. It is pertinent to this thesis because it reveals some controversy as to whether the principle is customary in nature or a general principle of law.[540]

Rule 15(A) of the ICTY RPE regulates the issue of disqualification of judges. It prescribes that a judge shall not sit on a trial or appeal in any case in which his impartiality might be affected. In the Appeals Chamber's view, this legal provision is to be interpreted in accordance with the general rule that 'a Judge should not only be subjectively free from bias, but also … there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias'.[541] The Appeals Chamber did not state the legal nature of that general rule, but Judges Shahabuddeen and Robinson clarify the issue by declaring that the Appeals Chamber had implicitly referred to customary law.[542]

In Judge Shahabuddeen's view, searching for the foundation of the principle of impartiality in general international law was needless, for the reason that Article 13 of the Statute lays down the principle and regulates the issue at stake.[543] Additionally, he asserted that the principle of

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[537] *Prosecutor v. Brdanin, Judgment,* Case No. IT-99-36-T, T. Ch., 1 September 2004, § 1090.
[538] It's a 'primary consideration', according to the Appeals Chamber. See *Prosecutor v. Aleksovski, Judgment*, Case No. IT-95-14/1-A, App. Ch., 24 March 2000, § 182.
[539] *Prosecutor v. Kordić et al., Judgment,* Case No. IT-95-14/2-A, App. Ch., 17 December 2004, § 1073.
[540] *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-A, App. Ch., 21 July 2000. For a commentary, see Lombardi, Greg and Scharf, Michael, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 2000-2001*, Antwerpen/Oxford/New York, Intersentia, Vol. 5, 2003, pp. 357-368.
[541] *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-A, App. Ch., 21 July 2000, §§ 189-191.
[542] See Lombardi, Greg and Scharf, Michael, *op. cit.* 540, p. 358.
[543] *Prosecutor v. Furundžija, Judgment, Declaration of Judge Shahabuddeen*, Case No. IT-95-17/1-A, App. Ch., 21 July 2000, § 2.

impartiality is a general principle of law,[544] but not a customary rule as the Appeals Chamber had concluded.[545] That also seems to be the view of Lombardi and Scharf, who consider the principle of impartiality of the judiciary 'the cornerstone of all sound legal systems',[546] that is, a general principle of law.

The real issue at stake consisted in ascertaining the standard for the application of the principle of impartiality as laid down in the Statute.[547] If the standard were a customary rule, it should be demonstrated by the ordinary means for the determination of rules of international law, but such customary rule does not exist.[548] In fact, looking for a customary rule on the impartiality of the judiciary was pointless, as the duty of the Appeals Chamber was to interpret and apply the principle of impartiality in accordance with the circumstances of the case. In so doing, the Appeals Chamber could have examined decisions of international courts and tribunals in order to establish how the principle had been applied so far.[549]

Judge Shahabuddeen distinguished between the emergence of a new customary rule reflecting a general principle of law and the judicial interpretation of a general principle of law as to how it applies. Whereas in the first situation the original general principle of law applies as qualified by the new customary rule, in the second situation the original principle applies as interpreted by the courts.[550] The latter situation is consonant with the nature of the general principles of law, which do not consist in specific legal rules but in general propositions underlying such rules.[551]

3.3.1.2.13 Prosecutor v. Delalić et al., Judgment

The Appeals Chamber's judgment of the *Delalić et al.* case touches upon two meaningful issues for this thesis, namely: (i) Are the general principles of law a method of criminalization in international law? And, (ii) is diminished responsibility a defence

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[544] He made that determination on the basis of scholarly writing and decisions of international courts. Ibid., § 1.
[545] Ibid., § 2.
[546] Lombardi, Greg and Scharf, Michael, *op. cit.* 540, p. 357.
[547] *Prosecutor v. Furundžija, Judgment, Declaration of Judge Shahabuddeen*, Case No. IT-95-17/1-A, App. Ch., 21 July 2000, § 3.
[548] Ibid.
[549] Ibid., § 4.
[550] Ibid., § 5.
[551] Ibid., § 6.

under the general principles of law?[552]

Are the general principles of law a method of criminalization in international law?

In the appellate proceedings three of the accused challenged the Trial Chamber's finding that common Article 3 of the Geneva Conventions of 1949 entails individual criminal responsibility under international law. In their view, the Trial Chamber's interpretation of that legal provision violated the principle *nullum crimen sine lege.*[553] However, in the Appeals Chamber's view, common Article 3 had attained customary status and the acts specified therein are 'criminal according to the general principles of law recognized by civilized nations [*sic*]', as provided for Article 15, paragraph 2 of the ICCPR.[554]

Common Article 3 is certainly part of customary law.[555] But the argument based on the general principles of law is unpersuasive, for two reasons.

First, even if the ILC used to interpret the word *lege* of the principle *nullum crimen sine lege* broadly (i.e., encompassing conventional law, customary law, and general principles of law),[556] eventually it set aside the reference to general principles of law in the Draft Code of Offences against Peace and Security of Mankind. In formulating the final version of Article 13, paragraph 2 of the Draft (which reads 'Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or international law'), the ILC intended to prevent prosecutions based on 'too vague' legal grounds. For this reason it employed the expression 'in accordance with international law' in place of less precise expressions such as 'in accordance with

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[552] *Prosecutor v. Delalić et al., Judgment*, Case No. IT-96-21-A, App. Ch., 20 February 2001. For a commentary on the judgment, see Boot, Machteld, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 2000-2001*, Antwerpen/Oxford/New York, Intersentia, Vol. 5, 2003, pp. 600-616.

[553] *Prosecutor v. Delalić et al., Judgment*, Case No. IT-96-21-A, App. Ch., 20 February 2001, § 153 *et seq.*

[554] Ibid., § 173.

[555] The customary status of Article 3 common to the 1949 Geneva Conventions had been ascertained by the ICJ. See *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment, ICJ Reports 1986*, pp. 113-114, § 218.

[556] See, Thiam, Doudou (rapporteur), 'Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind', *Yearbook of the International Law Commission*, 1986, Vol. II, § 163.

the general principles of international law'.[557] Stated differently, criminalization of human conduct on the exclusive basis of general principles of law may jeopardize the specificity required by the principle *nullum crimen sine lege* because of their vagueness.

Second, in spite of the wording of Article 15, paragraph 2 of the ICCPR, this legal provision refers to customary law and not to general principles of law. The general principles referred to in that legal provision are the principles of international law recognized in the Charter and the judgment of the IMT, which possessed customary status at the time of the adoption of the ICCPR.[558]

True, the fact that the Appeals Chamber's supplementary argument is somewhat unconvincing does not invalidate its finding that the conduct described in common Article 3 does entail criminal responsibility under international customary law.

Is diminished mental responsibility a defence under the general principles of law?

At trial one of the accused contended that diminished mental responsibility was a complete defence pursuant to Rule 67(A)(ii) of the ICTY RPE. The Trial Chamber accepted the argument.[559]

However, in the opinion of the Appeals Chamber the provisions of Rule 67(A)(ii) were insufficient to make diminished mental responsibility a defence under international criminal law. It argued that the ICTY does not have the power to adopt rules of procedure and evidence that create new defences. If a defence of diminished mental responsibility existed in international criminal law, 'it must be found in the usual sources of international law –in this case, in the absence of reference to such defence in established customary or conventional law, in the

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[557] 'Report of the ILC on the work of its forty-eighth session, Jun. 5-Aug. 26, 1996', GAOR 51st Session, Supp. No. 10 (A/51/10), p. 72, § 1, 73, p. 73, § 5. See Ambos, Kai, 'General Principles of Criminal Law in the Rome Statute', *CLF*, 1999, Vol. 10, No. 1, p. 5.

[558] See Novak, Manfred, *op. cit.* 9, p. 281. See also O'Keefe, Roger, 'Recourse by the *Ad Hoc* Tribunals to General Principles of Law and to Human Rights Law', in Delmas-Marty, Mireille *et al.* (eds.), *Les sources du droit international pénal*, Paris, Société de législation comparée, 2004, pp. 297-298; Ambos, Kai, *op. cit.* 14, p. 36 (and the authors cited in footnote 17).

[559] The then in force Rule 67(A)(ii) read as follows: 'As early as reasonably practicable and in any event prior to the commencement of the trial … the defence shall notify the Prosecutor of its intent to offer … any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.'

general principles of law recognized by all nations.'[560]

After an overview of national legal systems, the Appeals Chamber declared:

> [T]he relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense. This is the appropriate general legal principle representing the international law to be applied in the Tribunal. Rule 67(A)(ii)(b) must therefore be interpreted as referring to diminished mental responsibility where it is to be raised by the defendant as a matter in mitigation of sentence.[561]

Therefore, under general principles of law diminished mental responsibility might be a mitigating factor in sentencing, but not a ground for excluding criminal responsibility. The holding was reaffirmed in other cases.[562] It is also consonant with the provisions of the ICC RPE.[563]

The Appeals Chamber ascertained the principle after having reviewed the law of Scotland, England, Australia, Hong Kong, Singapore, Barbados, Bahamas, France, Germany, Italy, the Russian Federation, Turkey, Japan, South Africa, the former Yugoslavia, and Croatia.[564] Although the number of national legal systems examined by the Appeals Chamber is relatively significant, it did not examine any national legal system from Latin America and it looked at only one from Africa. Even if their evaluation would not have changed the outcome of the research, it would have rendered it truly international and thus more consonant with the spirit of universality that are at the heart of the general principles of law as a source of international (criminal) law.

3.3.1.2.14 Prosecutor v. Kunarac et al., Judgment

The Trial Chamber's judgment of the *Kunarac et al.* case relates to

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[560] *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-A, App. Ch., 20 February 2001, § 583.
[561] Ibid., § 590.
[562] See *Prosecutor v. Banović, Sentencing Judgment*, Case No. IT-02-65/1-S, T. Ch. III, 28 October 2003, § 79-81; *Prosecutor v. Češić, Sentencing Judgment*, Case No. IT-95-10/1-S, T. Ch. I, 11 March 2004, § 93. See also Werle, Gerhard, *op. cit.* 294, pp. 159-160, §§ 467-468.
[563] See Rule 145(2)(a)(i).
[564] Ibid., §§ 585-588.

the issue of general principles of law in two respects.[565] First, analogously to the *Furundžija* judgment examined above, it dealt with the definition of the crime of rape under general principles of law. Second, it expressed that the presumption of innocence laid down in Article 21, paragraph 3 of the Statute and the provisions of Rule 87(A) embody a general principle of law.

Rape under general principles of law

For the Trial Chamber, the definition of the crime of rape as formulated in the *Furundžija* case required some clarification with regard to the second objective element of the crime, namely the coercion or force or threat of force against the victim or a third person.[566] The second objective element of the crime of rape had been 'more narrowly stated than is required by international law.'[567] That definition 'does not refer to other factors which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim', which is, for the Trial Chamber, the real scope of the definition of the crime of rape under international law.[568]

Then the Trial Chamber stated:

> As observed in the *Furundžija* case, the identification of the relevant international law on the nature of the circumstances in which the defined acts of sexual penetration will constitute rape is assisted, in the absence of customary or conventional international law on the subject, by reference to the general principles of law common to the major national legal systems of the world. The value of these sources is that they may disclose 'general concepts and legal institutions' which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject. In considering these national legal systems the Trial Chamber does not conduct a survey of the major legal systems of the world in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider,

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[565] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23-T & IT-96-23/1-T, T. Ch. II, 22 February 2001. For a commentary on the judgment, see Askin, Kelly, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 2000-2001*, Antwerpen/Oxford/New York, Intersentia, Vol. 5, 2003, pp. 806-817.

[566] See subsection 3.3.1.2.7, above.

[567] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23-T & IT-96-23/1-T, T. Ch. II, 22 February 2001, § 438.

[568] Ibid.

> from an examination of national systems generally, whether it is possible to identify certain basic principles, or in the words of the *Furundžija* Judgment, 'common denominators', in those legal systems which embody the *principles* which must be adopted in the international context.[569]

That passage of the judgment illustrates not only the gap-filing function that general principles of law may play as a source of international (criminal) law but also that, in searching for a general principle of law, an international court or tribunal must identify a general principle or concept underlying national legal rules and not a legal rule common to national legal systems.

It also reaffirms that the existence of a general principle of law is determined if a *broad* range of national legal systems –not *all* the national legal systems- recognizes the underlying legal principle at stake. Interestingly, the description of the legal regime of the general principles of law made by the Trial Chamber does not refer to the requirement of consistency with international law and with international criminal trials, which had been repeatedly recalled by some ICTY's chambers.

The Trial Chamber found that 'the basic underlying *principle* common to [national legal systems is] that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim.'[570] Thus, 'the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual *autonomy*'.[571]

The circumstances that make the sexual acts criminal may be categorized in three classes: '(i) the sexual activity is accompanied by force or threat of force to the victim or a third party; (ii) the sexual activity is accompanied by force *or* a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or (iii) the sexual activity occurs without the consent of the victim.'[572] The second element was thus reformulated and later adopted by the Appeals Chamber.[573] Yet, as acknowledged by the Trial Chamber, the Furundžija's and its own formulation are not

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[569] Ibid., § 439 (footnotes omitted).
[570] Ibid,, § 440.
[571] Ibid.
[572] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23-T & IT-96-23/1-T, T. Ch. II, 22 February 2001, § 442.
[573] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23 & IT-96-23/1-A, App. Ch., 12 June 2002, § 128.

substantially different.[574] In the end, both formulations lead to the same result.[575]

Another relevant aspect of the holding resides in the fact that the Trial Chamber was aware that any general principle of law on the definition of the crime of rape had to be derived from 'The relevant law in force in different jurisdictions at the time relevant to these proceedings'.[576] Stated differently, the prohibition of retroactive criminal law to the detriment of the accused had to be safeguarded.

Finally it is worth noting that thirty-three national legal systems were examined in order to formulate the objective element of the crime of rape under general principles of law. The systems were representative of the main legal families, law conceptions, and regions of the world.[577]

Presumption of innocence. Guilt must be proved beyond reasonable ground

Before stating its factual and legal findings, the Trial Chamber made some general considerations regarding the evaluation of evidence. And it stated,

> The Trial Chamber has applied to the accused the presumption of innocence stated in Article 21(3) of the Statute, which embodies a general principle of law, so that the Prosecution bears the onus of establishing the guilt of the accused, and – in accordance with Rule 87(A), which also embodies a general principle of law – the Prosecution must do so beyond reasonable doubt.[578]

The presumption of innocence is a basic principle of procedural criminal law. It is recognized in Article 14, paragraph 2 of the ICCPR and in provisions of regional human

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[574] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23-T & IT-96-23/1-T, T. Ch. II, 22 February 2001, § 459.
[575] See Werle, Gerhard, *op. cit.* 294, p. 249.
[576] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23-T & IT-96-23/1-T, T. Ch. II, 22 February 2001, § 442.
[577] The national legal systems examined are the following: Bosnia and Herzegovina, Germany, Korea, China, Norway, Austria, Spain, Brazil, Sierra Leone, USA (California, Maryland and Massachusetts), Switzerland, Portugal, France, Italy, Denmark, Sweden, Finland, Estonia, Japan, Argentina, Costa Rica, Uruguay, Philippines, England and Wales, Canada, New Zealand, Australia (New South Wales and Victoria), India, Bangladesh, South Africa, Zambia, Belgium, and Nicaragua.
[578] *Prosecutor v. Kunarac et al., Judgment,* Case No. IT-96-23-T & IT-96-23/1-T, T. Ch. II, 22 February 2001, § 559.

rights treaties;[579] it thus may well be considered to be a general principle of international criminal law as well. It is also a general principle of law, for the reason that it is generally recognized in national law.[580] As the Trial Chamber correctly stated, one of the corollaries of the presumption of innocence is that the burden of proof rests upon the prosecutor, itself a general principle of law as determined by another Trial Chamber previously.[581] True, the role to be played by the presumption of innocence as a general principle of law in the context of the ICTY is restrained, because the presumption is provided for in a particular legal provision of the Statute, namely Article 21, paragraph 3.

A more controversial contention is that under general principles of law guilt must be proved beyond reasonable doubt. In fact, while the standard usually employed in the Common Law legal family is that guilt must be proved beyond reasonable doubt, in the Romano-Germanic legal family guilt is established on 'the intimate conviction of the judge'.[582] Yet, some scholars have contended that those are two different approaches,[583] whereas some others have suggested that the differences are merely terminological (the intimate conviction being more a rule pertaining to the evaluation of evidence with regard to the guilt of the accused).[584]

In any case, it should be noted that in the ICTY's legal framework the issue of whether the reasonable doubt test is a general principle of law is a mere theoretical matter, as such standard of proof is prescribed in Rule 87(A) and there is thus no need to resort to the general principles of law in order to regulate the standard of proof of guilt. The case is the same as far as the other present international criminal courts and tribunals are concerned, as their statutes or rules of procedure and evidence also stipulate that test.[585]

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[579] For instance, in Article 2, paragraph 2 of the American Convention on Human Rights.
[580] See Zappalà, Salvatore, 'The Rights of the Accused', in Cassese, Antonio *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, New York, Oxford University Press, 2002, pp. 1340-1341.
[581] See subsection 3.3.1.2.6.
[582] See Cryer, Robert *el al.*, *op. cit.* 463, p. 356; Zappalà, Salvatore, *op. cit.* 580, pp. 1346-1347.
[583] See Cryer, Robert *et al.*, ibid.
[584] Zappalà, Salvatore, *op. cit.* 580, p. 1347, footnote 76.
[585] See Rule 87(A), ICTR RPE; Article 66, paragraph 3, ICC Statute; Rule 87(A), SCSL RPE.

3.3.1.2.15 Prosecutor v. Kordić & Čerkez, Judgment

This judgment dealt *inter alia* with the issue of self-defence as a ground for excluding international criminal responsibility.[586]

At trial, the Defence had argued that since the Bosnian Croats –among whom stood the accused- had been victims of aggression by the Muslim in Central Bosnia, the acts described in the indictment by the Prosecutor were committed in self-defence.[587]

Self-defence 'may be broadly defined as providing a defence to a person who acts to defend or protect himself or his property (or another person or person's property) against attack, provided that the acts constitute a reasonable, necessary and proportionate reaction to the attack.'[588] In spite of the lack of reference to self-defence in the Statute as a ground for excluding criminal responsibility, defences in general are 'general principles of criminal law' that the ICTY must consider in adjudging the cases before it.[589] In this train of thought the Trial Chamber asserted, 'The principle of self-defence enshrined in [Article 31, paragraph 1(c) of the ICC Statute] reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law.'[590] Then it ascertained the two conditions for the application of this defence, namely imminence and proportionality, in the light of that legal provision.[591] However it did not apply the defence to the case, for the reason that the conditions for its application were not met.[592]

The holding illustrates that international criminal courts and tribunals sometimes confuse general principles of law with customary rules.[593] In this example it is clear that the reference to the recognition of the defence of self-defence by 'most national criminal codes' is proof of its existence as a general principle of law rather than of its customary status. Other scholars too acknowledge self-defence as a general principle of law rather than as a customary rule of international law.[594] While it is true that

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[586] *Prosecutor v. Kordić & Čerkez, Judgment,* Case No. IT-95-14/2-T, T. Ch. III, 26 February 2001.
[587] Ibid., § 448.
[588] Ibid., § 449.
[589] Ibid.
[590] Ibid., § 451.
[591] Ibid.
[592] Ibid., § 827.
[593] See subsection 3.3.1.2.4, above.
[594] See Scaliotti, Massimo, 'Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility, Part 1', *ICLR,*

nevertheless self-defence could have attained customary status, it is also true that the Trial Chamber's reference to the recognition of self-defence in national criminal laws is not enough for determining a rule of customary law to that effect. For such purpose the Trial Chamber should have had recourse to the usual means for the determination of rules of international law, i.e., judicial decisions and scholarly writing, or have determined itself the relevant general State practice and *opinio iuris*.

3.3.1.2.16 Prosecutor v. Milutinović et al, Decision on Jurisdiction

In this decision the Appeals Chamber dealt with the issue of whether the application of the Doctrine of Joint Criminal Enterprise (or Common Purpose) by the ICTY violates the principle *nullum crimen nulla poena sine lege*.[595]

The Appeals Chamber first noted that *nullum crimen nulla poena sine lege* is a 'principle of justice',[596] which requires that 'a criminal conviction can only be based on a norm which existed at the time the acts or omission with which the accused is charged were committed'.[597] Most importantly, the principle also requires that 'the criminal liability in question was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time' to uphold a criminal conviction and sentencing pursuant to the charges formulated in the indictment.[598] In short, the ICTY must be sure that the crime or the form of criminal responsibility with which the accused is charged was foreseeable and that the law providing for such form of criminal responsibility was accessible at the relevant time, considering the specificity of international law when adjudging.[599]

The requirements of 'foreseeability' and 'accessibility' were developed by the European Court of Human Rights, as revealed by the Appeals Chamber itself.[600] As for the specific features of international law that may impact in the process of determining whether a given crime or form of criminal responsibility was foreseeable and accessible to the accused, it pointed to the

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Vol. 1, No. 1, 2001, pp. 159-161; Pradel, Jean, *op. cit.* 15, p. 327, § 223; Ambos, Kai, *op. cit.* 14, p. 88.

[595] *Prosecutor v. Milutinović et al., Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction –Joint Criminal Enterprise-,* Case No. IT-99-37-AR72, App. Ch., 21 May 2003, § 34 *et seq.*

[596] Ibid, § 37.

[597] Ibid.

[598] Ibid.

[599] Ibid, § 38.

[600] Ibid, §§ 38-39.

absence of a universal legislature and the fact that international law is made by treaties, customs, and judicial decisions.[601] Customary law may provide enough guidance with regard to the standard the breach of which could entail criminal responsibility, notwithstanding its unwritten nature.[602]

Although the Appeals Chamber's conclusion is grounded in good reasons, it should be noted the danger of convicting individuals of conduct criminalized by customary law. Not always customary law provides enough guidance to individuals as to what conduct is criminal under international law. Consider, for example, the conduct amounting to violations of Article 3 common to the 1949 Geneva Conventions.[603] What is more, practice shows that even international judges disagree on whether a given conduct amounted to an international crime at a given time.[604] For these reasons, international criminal courts and tribunals should be very careful in assessing whether in a particular case customary law provided sufficient guidance; it seems too demanding expecting ordinary people being aware of the customary rules of international criminal law in all circumstances. Whether or not ignorance of criminal law should exclude criminal responsibility is a very related but different matter.[605]

3.3.1.2.17 Prosecutor v. Stakić, Judgment

This judgment is germane to the thesis because it delimits the scope of application of the principle *in dubio pro reo.*[606]

At trial, the Defence had submitted that the Trial Chamber should apply the principle in question in order to interpret certain issues pertaining to substantive criminal law. However,

> The Trial Chamber explicitly distances itself from the Defence submission that the principle *in dubio pro reo* should apply as a principle for the interpretation of the substantive criminal law of the Statute. As this principle

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[601] Ibid, § 39.
[602] Ibid, § 41.
[603] See *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* Case No. IT-94-1-AR72, App. Ch., 2 October 1995, §§ 128-136.
[604] Consider, for example, *Prosecutor v. Norman et al., Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Dissenting Opinion of Justice Robertson,* Case No. SCSL-04-14-AR72(E), App. Ch., 31 May 2004.
[605] On ignorance of the criminal law see the literature cited in Werle, Gerhard, *op. cit.* 294, p. 152, footnotes 349 and 350. With regad to the ICC, see Esser, Albin, "Mental Elements –Mistake of fact and Mistake of Law', in Cassese, Antonio *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1, New York, Oxford University Press, 2002, p. 934 *et seq.*
[606] *Prosecutor v. Stakić, Judgment,* Case No. IT-97-24-T, T. Ch. II, 31 July 2003.

> is applicable to findings of fact and not of law, the Trial Chamber has not taken it into account in its interpretation of the law.[607]

The Trial Chamber was correct. The principle *in dubio pro reo* was conceived as a standard regulating the evaluation of evidence, and is a corollary of the presumption of innocence. As explained earlier,[608] the principle *in dubio pro reo* was not laid down in the Statute or the RPE of the ICTY; it is one of the consequences of the presumption of innocence stipulated in Article 21, paragraph 3 of the Statute.

3.3.1.2.18 Prosecutor v. Nikolić, Sentencing Judgment

The next example is provided by the Trial Chamber's sentencing judgment and the Appeals Chamber's judgment of the *Nikolić* case.[609] They are pertinent to the thesis because they deal with the principle of *lex mitior*,[610] probably as a general principle of law.[611]

At trial the Defence had submitted that the principle in question should apply in his case. In 1992, year of the commission of the alleged crimes by the accused, the Penal Code of the SFRY laid down a maximum term of imprisonment of fifteen years, except for crimes punishable with the death penalty. Thus, if the principle were applicable in proceedings before the ICTY, the extent of the penalty would be always limited to an inflexible term (fifteen years, as provided for the Penal Code of the SFRY), instead of a term up to and including life imprisonment, as stipulated in Rule 101(A) of the ICTY RPE.[612]

The Statute and the RPE do not provide for the principle of *lex mitior*, but is enshrined in national legal systems and international human rights treaties.[613] According to the Trial Chamber, the principle only applies to cases where the

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[607] Ibid., § 416 (footnote omitted).
[608] See subsection 3.3.1.2.4, above.
[609] *Prosecutor v. Nikolić, Sentencing Judgment,* Case No. IT-94-2-S, T. Ch. II, 18 December 2003; *Prosecutor v. Nikolić, Judgment on Sentencing Judgment,* Case No. IT-94-2-A, App. Ch., 4 February 2005.
[610] 'The principle of *lex mitior* is understood to mean that, if the law relevant to the offence of the accused has been amended, the less severe law should be applied.' *Prosecutor v. Nikolić, Judgment on Sentencing Judgment,* Case No. IT-94-2-A, App. Ch., 4 February 2005, para. 81.
[611] *Prosecutor v. Nikolić, Sentencing Judgment,* Case No. IT-94-2-S, T. Ch. II, 18 December 2003, § 157-165.
[612] Ibid., § 158-159.
[613] The Trial Chamber surveyed the Criminal Codes of Sweden, Germany, Bosnia and Herzegovina, Republika Srpska, and Switzerland; and the ICCPR, ACHR, and the ECHR.

commission of a crime and the subsequent imposition of a penalty take place in the same jurisdiction[614] and thus not to cases before the ICTY.

It is likely that the Trial Chamber evaluated the applicability of the principle of *lex mitior* as a general principle of law, given the silence of the Statute and the RPE on the matter. Another reason is the fact that it turned to domestic legal systems in order to ascertain the scope of application of the principle.

Only two out of the five national legal systems examined by the Trial Chamber (the Swiss and the Swedish ones) expressly stipulate that the *lex mitior* applies to cases where the crime takes place in a different jurisdiction from the one where the convicted person receives the punishment, as was the case with *Nikolić*. For this reason it considered that the scope of application of the principle in those two national legal systems 'does not form part of the principle of *lex mitior* as an internationally recognized standard'.[615] This, together with the fact that according to the Trial Chamber under general international law States are not bound to apply the scale of penalties of the State where the crime took place,[616] led the Trial Chamber to the conclusion that the ICTY, having primacy over the courts of the former Yugoslavia, is not obliged to apply their lighter penalties.[617]

In brief, the Trial Chamber accepted the principle of *lex mitior* as an internationally recognized standard but did not apply it to the case. This was because the crime of the accused was committed in a jurisdiction that is not the one where he was going to receive the punishment, and because the ICTY has primacy over domestic courts.

The Trial Chamber's holding is not fully persuasive for at least three reasons. First, it is not correct to contend, as the Trial Chamber did, that the ICCPR requires the application of the principle only in cases where the commission of a crime and the following imposition of a penalty take place in the same jurisdiction. The ICCPR does not lay down that condition. Article 15, paragraph 1 of the ICCPR –which lays down the principle of *lex mitior*- prescribes that no one shall be imposed

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[614] *Prosecutor v. Nikolić, Sentencing Judgment,* Case No. IT-94-2-S, T. Ch. II, 18 December 2003, § 163.
[615] *Prosecutor v. Nikolić, Sentencing Judgment,* Case No. IT-94-2-S, T. Ch. II, 18 December 2003, § 164.
[616] Ibid.
[617] Ibid., § 165.

a heavier penalty than the one provided by law at the time of the commission of the crime; also, that if after the commission of the crime the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

Second, the Trial Chamber's examination of national legal systems could have carried more weight if the range of systems investigated had been broader. That could have permitted to determine whether the scope of application of the principle of *lex mitior* as laid down in the Swiss and the Swedish criminal codes (favourable to the arguments of the accused) was generally recognized in national law or just peculiar to these two criminal codes.

Thirdly, primacy of the ICTY over national courts does not mean that the ICTY is not bound to apply the lighter penalites of the courts of the former Yugoslavia. According to Article 9, paragraph 2 of the Statute, primacy means that 'At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.'

The Appeals Chamber gave better reasons at its turn. While the issue of primacy is one of jurisdictional powers, the issue of *lex mitior* is not.[618] What matters is the law more favourable to the accused binding upon the ICTY. The principle is thus only applicable if the law binding upon the ICTY is changed to a more favourable law to the accused.[619]

3.3.2 The ICTR

This subsection provides an overview of the relevant applicable law of the ICTR (3.3.2.1) and examines three decisions relating to the application of general principles of law (3.3.2.2).

3.3.2.1 The applicable law

The UN Security Council established the ICTR and adopted its Statute on 8 November 1994.[620] In spite of some subsequent adjustments, the provisions of the Statute are still analogous to those of the Statute of the ICTY.

The ICTR has the power to prosecute persons responsible for serious violations of international humanitarian law

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[618] *Prosecutor v. Nikolić, Judgment on Sentencing Judgment,* Case No. IT-94-2-A, App. Ch., 4 February 2005, § 80.
[619] Ibid., § 81.
[620] S/RES/955 (1994), 8 November 1994.

perpetrated in the territory of Rwanda in 1994. It also has the power to prosecute Rwandan citizens responsible for such violations committed in the territory of neighbouring States in 1994 (Article 1).

The competence *ratione materiae* of the ICTR covers the crime of genocide (Article 2), crimes against humanity (Article 3), and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4).

Similarly to the ICTY, the ICTR has jurisdiction only over natural persons (Article 5). The provisions on individual criminal responsibility are identical to those of the ICTY Statute. Thus, an individual who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime within the competence *ratione materiae* of the ICTR shall be held criminally responsible. Neither the official position of a defendant nor the fact of acting pursuant to a superior order is a ground for exluding criminal responsibility. The fact that a subordinate committed a crime within the competence *ratione materiae* of the ICTR does not relieve his or her superior of criminal responsibility, in the circumstances described in the Statute (Article 7).

Finally, as far as the enforcement of sentences is concerned, imprisonment shall be served in Rwanda or in any other State that has consented to accept convicted persons (Article 26). If the convicted person is elegible for pardon or commutation of sentences, the President of the ICTR decides 'on the basis of the interests of justice and the general principles of law' (Article 27).

As their counterparts of the ICTY, the judges of the ICTR adopt the RPE (Article 14). At present, they have amended the RPE in fourteen opportunities.[621] These rules, likewise the RPE of the ICTY, lay down the residual evidentiary rule whereby 'In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.' (Rule 89(C))

3.3.2.2 Three decisions

The following three decisions cover a greater number of instances relating to the application of general principles of law. Two of

[621] The last version of the RPE can be found in http://69.94.11.53/ENGLISH/rules/070605/070605.pdf (last visited on 19 June 2006).

these decisions are judgments; the other is a decision on a request for review or reconsideration. The decisions are ordered chronologically.

3.3.2.2.1 Prosecutor v. Akayesu, Judgment

This judgment is germane to the thesis because it considers the following legal issues in the light of the general principles of law: (i) the principle *unus testis, nullus testis*; (ii) the principle of individual criminal responsibility or personal culpability; and (iii) the principle *favor rei.*[622]

Unus testis, nullus testis

The Prosecutor had charged Akayesu with genocide, crimes against humanity, and violations of Article 3 common to the 1949 Geneva Conventions. At trial, the Prosecutor presented a single testimony as the evidence of certain facts alleged in the indictment. For this reason, the Trial Chamber examined whether 'the principle found in Civil Law systems *unus testis, nullus testis*' –which requires the corroboration of a single testimony- should apply to the case.[623]

In the Trial Chamber's view, the ICTR has the power to decide a legal issue on the basis of a single testimony if this is 'relevant and credible'.[624] The Trial Chamber advanced two arguments in that respect. First, pursuant to Rule 89(A), the ICTR is not bound to apply national rules of evidence. Second, as far as evidentiary matters are concerned, the ICTR is bound to apply the provisions of the Statute and the RPE; in particular, Rule 89.[625]

Although the Trial Chamber's conclusion is correct, its legal reasoning is somewaht disappointing. Actually, it is misleading to contend that *unus testis, nullus testis* is a 'Civil Law principle', if by this it is meant a legal principle generally recognized in the national legal systems of the Romano-Germanic

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[622] *Prosecutor v. Akayesu, Judgment*, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998. For a general commentary on the judgment, see Amann, Diane, 'Prosecutor v. Akayesu. Case ICTR-96-4-T', *AJIL*, Vol. 93, No. 1, 1999, pp. 195-199; Schabas, William, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals*: *The International Criminal Tribunal for Rwanda 1994-1999*, Antwerpen/Groningen/Oxford/Vienna, Intersentia/Hart Publishing/Verlag Österreich, Vol. 2, 2001, pp. 539-554.

[623] *Prosecutor v. Akayesu, Judgment*, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, § 132.

[624] Ibid., § 135.

[625] Ibid., § 133.

legal family. As indicated earlier,[626] an ICTY's Trial Chamber had already demonstrated that, at present, the principle *unus testis, nullus testis* is not generally recognized in that legal family. Considering that the ICTR's Trial Chamber's was aware of that ICTY's Trial Chamber's decision, as revealed by the fact that the former recalled certain parts of the latter's decision to sustain its own *dictum* on the issue of the admissibility of a single testimony, its statement was a bit unexpected.

Individual criminal responsibility

As far as the issue of individual criminal responsibility is concerned, the Trial Chamber declared that Article 6, paragraph 1 of the Statute lays down 'basic principles of individual criminal liability, which are undoubtedly common to most national criminal jurisdictions'.[627] In other words, the principle of individual criminal responsibility is a general principle of law.

It is clear that by invoking individual criminal responsibility as a general principle of law, the Trial Chamber did not aim at filling any legal gaps. In fact, there was none to be filled. It did not intend to interpret Article 6, paragraph 1 of the Statute either. It seems that the Trial Chamber rather purported to show the consistency of Article 6, paragraph 1 with international law, to demonstrate that this legal provision is not the outcome of a capricious decision of the UN Security Council, and that the accused could not ignore that his deeds were criminal according not only to international law but also to the criminal laws of the generality of the nations of the world. In brief, the Trial Chamber resorted to the general principles of law in order to reinforce the legal reasoning underlying its decision.

Favor rei

Before dwelling into the legal findings of the case, the Trial Chamber deemed it necessary to concisely state the law applicable of the ICTR. In this vein, it observed that the English version of Article 2, paragraph 2(a) of the Statute says 'killing', while the French version of this legal provision says *meurtre*. *Meurtre*, differently from killing, requires an additional element of intent.[628]

According to the Trial Chamber, the version more favourable to the accused should be endorsed, because of 'the presumption of innocence of the accused, and pursuant to the

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[626] See subsection 3.3.1.2.4, above.
[627] *Prosecutor v. Akayesu, Judgment*, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, § 471.
[628] Ibid., § 500.

general principles of criminal law'.[629]

The Trial Chamber's *obiter dictum* –the accused had not been charged with any crime listed in Article 2, paragraph 2(a) of the Statute-[630] is correct. As indicated earlier,[631] in issues of statutory interpretation a doubt must be interpreted in favour of the accused, as a consequence of the presumption of innocence. The principle *favor rei* is part of general international criminal law, more precisely, a general principle of law pertaining to criminal law. Hence, it applies in international criminal proceedings regardless of whether it has been laid down in the regulatory instruments of the international tribunal concerned.

3.3.2.2.2 Barayagwiza v. Prosecutor, Decision

This decision regards a request for review or reconsideration.[632] It is relevant to the thesis because the declaration appended to it by Judge Nieto-Navia dealt with the principle *res iudicata.*[633]

In this case, the Prosecutor had submitted a motion for review or reconsideration of the Appeals Chamber's decision rendered on 3 November 1999. In this decision the Appeals Chamber upheld the appeal of the accused against the decision of Trial Chamber II that had dismissed his preliminary motion challenging the legality of his arrest and detention. In upholding the appeal, the Appeals Chamber dismissed the indictment against the accused with prejudice to the Prosecutor and directed his immediate release.[634] Ultimately the Appeals Chamber reviewed its decision rendered on 3 November 1999.[635]

In their written briefs, the Prosecutor and the Defence had

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[629] Ibid., § 501. A similar reasoning with regard to the same legal provision is found in *Prosecutor v. Kayishema and Ruzindana, Judgment,* Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999, §§ 101-103; and in *Prosecutor v. Musema, Judgment and Sentence,* Case No. ICTR-96-13-T, T. Ch. I, 27 January 2000, § 155.

[630] See *Prosecutor v. Akayesu, Judgment*, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, § 6.

[631] See subsection 3.3.1.2.7, above.

[632] *Barayagwiza v. Prosecutor, Decision (Prosecutor's Request for Review or Reconsideration)*, Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000. For a commentary on the decision, see Schabas, William, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 2000-2001*, Antwerp/Oxford/New York, Intersentia, Vol. 6, 2003, pp. 261-266.

[633] *Barayagwiza v. Prosecutor, Decision (Prosecutor's request for review or reconsideration)*, *Declaration of Judge Nieto-Navia*, Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000, § 19-26.

[634] *Barayagwiza v. Prosecutor, Decision (Prosecutor's Request for Review or Reconsideration)*, Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000, §§ 1-2.

[635] Ibid., § 75.

invoked the *res iudicata* principle. However, the Appeals Chamber did not address the issue of the applicability of the principle to the case. In contrast, Judge Nieto-Navia did consider it in his declaration.

According to him, *res iudicata* is one of the general principles of law referred to in Article 38 of the Statute of the ICJ; therefore, it should be applied as such by the ICTR if the conditions for its application are met. The principle prescribes that 'once a case has been decided by a final and valid judgment rendered by a competent tribunal, the same issue may not be disputed again between the same parties before a court of law'.[636] Only final judgments are to be considered *res iudicata*; judgments rendered by lower courts are usually subject to appeals.[637]

In Judge Nieto-Navia's view, reviews of final decisions pursuant to Article 25 of the Statute do not violate the *res iudicata* principle. If the Appeals Chamber deemed its decision of dismissing the indictment against the accused with prejudice to the Prosecutor to be final, Article 25 of the Statute opens up the possibility for review of final decisions, provided that the conditions laid down in this legal provision are met.[638]

In brief, the effects of the *res iudicata* are not unlimited. They can be limited –and usually they are limited- by the legal regime where they have been laid down.[639] In the case of the ICTR the limitation is laid down in Article 25 of the Statute, which regulates the review proceedings before the tribunal.

3.3.2.2.3 Kambanda v. The Prosecutor, Judgment

In this judgment,[640] the Appeals Chamber invoked and applied the principle *iura novit curia*.

On 1 May 1998 former Primer Minister Kambanda had pleaded guilty to counts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide,

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[636] *Barayagwiza v. Prosecutor, Decision (Prosecutor's Request for Review or Reconsideration), Declaration of Judge Nieto-Navia,* Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000, § 19.
[637] Ibid., § 21.
[638] Ibid., § 25.
[639] See Pradel, Jean, *op. cit.* 15, p. 628 *et seq.*
[640] *Kambanda v. The Prosecutor, Judgment,* Case No. ICTR97-23-A, App. Ch., 19 October 2000. For a commentary on the judgment, see Nemitz, Jan, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals*: *The International Criminal Tribunal for Rwanda 2000-2001*, Antwerp/Oxford/New York, Intersentia, Vol. 6, 2003, pp. 681-686.

complicity in genocide, and murder and extermination as crimes against humanity.[641] The Trial Chamber accepted the guilty plea. A pre-sentencing hearing was held on 3 September 1998 and the judgement pronounced on the following day. The Trial Chamber sentenced Kambanda to life imprisonment.

During the appellate proceedings, Kambanda submitted that should the Appeals Chamber reject his main request to overturn the guilty verdict and order a retrial, it should revise the entire sentence on five specific grounds. The Defence however did not advance any legal argument. The Prosecution, at its turn, contended that the Defence's failure to advance legal arguments was enough ground for dismissing *in limine* Kambanda's submissions.[642]

After hearing the arguments of the parties, the Appeals Chamber stated:

> [I]n the case of errors of law, the arguments of the parties do not exhaust the subject. It is open to the Appeals Chamber, as the final arbiter of the law of the Tribunal, to find in favour of an Appellant on grounds other than those advanced: *iura novit curia*. Since the Appeals Chamber is not dependent on the arguments of the parties, it must be open to the Chamber to consider an issue raised on appeal even in the absence of substantial argument. The principle that an appealing party should advance arguments in support of his or her claim is therefore not absolute: it cannot be said that a claim *automatically* fails if no supporting arguments are presented.[643]

From the preceding paragraph of the judgment, it follows that the Appeals Chamber applied the principle *iura novit curia*, a well-established general principle of law.[644] The principle was applied in order to fill the gap left by the absence of pertinent rules in the ICTR RPE.

This example shows that legal issues settled by international criminal courts and tribunals in the light of general principles of law may lead to the subsequent adoption of

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[641] *Kambanda v. The Prosecutor, Judgment,* Case No. ICTR97-23-A, App. Ch., 19 October 2000, § 2.
[642] Ibid., § 96.
[643] Ibid., § 98.
[644] See, for example, *Lotus, Judgment No. 9, 1927, PCIJ, Series A, No. 10,* p. 31; *Brazilian Loans, Judgment No. 15, 1929, PCIJ, Series A, No. 21,* p. 124; *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, PCIJ, Series A, No. 23*, pp. 18-19..

appropriate legal rules to regulate such issues. In fact, in 2002 the President of the ICTR Appeals Chamber adopted the Practice Direction on Formal Requirements for Appeal from Judgments.[645] One of such requirements is advancing legal arguments with regard to the grounds of appeal (Article 4, paragraph a). If a party to the appellate proccedings does not comply with the formal requirements laid down in the Practice Direction, a Pre-Trial Judge or the Appeals Chamber may, 'within its discretion, decide upon an appropriate sanction, which can include an order for clarification or re-filing. The Appeals Chamber may also reject a filing or dismiss submissions therein' (Article 13).

3.3.3 The ICC

The ICC is the first permanent international criminal court and is a treaty-based international organization. Its Statute was adopted on 17 July 1998 and entered into force on 1 July 2002. The jurisdiction and functioning of the ICC is regulated by the provisions of its Statute and RPE.[646]

This subsection provides a brief examination of Article 21 of the Statute, which sets forth the applicable law of the ICC (3.3.3.1). It also analyses three decisions where the ICC has dealt, implicitly or explicitly with the applicability of certain general principles of law (3.3.3.2).

3.3.3.1 The applicable law

Differently from the statutes of past and other present international criminal courts and tribunals, the ICC Statute lays down a specific rule stating the applicable law.

Article 21 of the Statute reads as follows:[647]

> 1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

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[645] The text of the Practice Direction is available at the website of the ICTR. See http://69.94.11.53/ENGLISH/basicdocs/pracdirections/formalreqe.htm.

[646] The amount of literature on the ICC is immense. See, e.g., Schabas, William, *op. cit.* 301, *passim*.

[647] For a commentary on Article 21 of the ICC Statute, see McAuliffe de Guzmán, Margaret, *op. cit.* 22, pp. 435-446; Pellet, Alain, *op. cit.* 10, pp. 1051-1084; Verhoeven, Joe, *op. cit.* 22, pp. 3-22.

> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
>
> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
>
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

The ICC is bound to apply the legal rules and principles derived from the sources listed in paragraph 1. In contrast, it is allowed –but not bound- to apply the 'principles and rules of law as interpreted in its previous decisions' mentioned in paragraph 2. Pellet and Verhoeven are right in affirming that paragraph 2 states the obvious,[648] as the principle *stare decisis* is not part of general international law.[649]

Setting aside the so-called 'proper law' of the ICC,[650] i.e. the Statute, the Elements of the Crimes, and the RPE,[651] one may identify the traditional sources of international law, namely conventions,[652] custom,[653] and general principles of law,[654] notwithstanding the peculiar wording employed by the drafters of the Statute.

Whatever the utility of Article 21 might be,[655] this legal provision lays down four requirements for the application of general principles of law by the ICC, which I call (i) subsidiarity, (ii) abstraction, (iii) representativity, and (iv) consistency.

With regard to the first requirement, the Statute prescribes the ICC to apply general principles of law if the rules derived from

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[648] Pellet, Alain, *op. cit.* 10, p. 1066; Verhoeven, Joe, *op. cit.* 22, p. 13.
[649] See Shahabuddeen, Mohamed, *Precedent in the World Court*, Cambridge, Grotius Publications/Cambridge University Press, 1996, *passim*.
[650] See Pellet, Alain, *op. cit.* 10, pp. 1053-1054.
[651] Article 21, paragraph 1(a), ICC Statute.
[652] Article 21, paragraph 1(b), ICC Statute.
[653] Ibid.
[654] Article 21, paragraph 1(c), ICC Statute.
[655] See Verhoeven, Joe, *op. cit.* 22, pp. 15-19, 21.

the sources listed in paragraphs 1(a) and (b) fail. This means that the drafters of the ICC Statute had a somewhat narrow conception of the functions that general principles of law may play in judicial decisions. In their conception, general principles of law appear to be useful only to fill legal gaps. However, there is no doubt that the ICC may turn to general principles of law for other purposes, such as interpreting rules of the Statute and the RPE[656] or enhancing legal reasoning.

As for the requirement of abstraction, it means that the ICC must abstract principles from legal rules, rather than to applying particular national legal rules. This is consistent with the traditional methodology for determining general principles of law.[657]

The requirement of representativity prescribes that the legal principle at stake must be generally recognized in national law to be considered a general principle of law. The French version of the Statute is clearer than the English and the Spanish versions in that respect.[658] It reads, *'les lois nationales représentant les différents systèmes juridiques du monde'*. The test to be applied by the ICC to choose the national laws object of the comparison remains an open question; the only guidance provided by the Statute is that among the national laws should be included 'as appropriate, the national laws of States that would normally exercise jurisdiction over the crime'.[659] According to Saland, the inclusion of that segment of the rule is the price paid in the Rome Conference to reach a compromise between those who believed that national laws could apply directly and those who considered that these laws could only apply via the general principles of law.[660]

Yet, the wording employed by the drafters of the Statute is

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[656] See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo*, Case No.: ICC-01/04-01/06, PT Ch. I, 24 February 2006, § 42. In this decision, the Pre-Trial Chamber declared that it could resort to general principles of law in order to determine the content of the gravity threshold sets out in Article 17, paragraph 1(d) of the Statute. Eventually, it did not.

[657] See subsection 2.6.3, above.

[658] The Spanish version refers to 'principios generales del derecho que derive la Corte del derecho interno de los sistemas jurídicos del mundo'.

[659] See Article 21, paragraph 1(c), ICC Statute.

[660] Saland, Per, 'International Criminal Law Principles', in Lee, Roy (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, The Hague/London/Boston, 1999, pp. 214-215.

a bit vague. Article 21, paragraph 1(c) does not stipulate when it is 'appropriate' to take account of the 'national laws of States that would normally exercise jurisdiction over the crime'. It does not explain which such States are either. Apparently, the negotiating States referred to the States that may exercise jurisdiction in accordance with the traditional connecting criteria of criminal jurisdiction, in particular, territory and nationality of the offender. In fact, the Draft Statute presented by the Preparatory Committee in 1998 mentioned the 'general principles of law derived form the Court from national laws or specific national laws from specific States as listed'; the list mentioned the territorial State and the State of the offender's nationality.[661]

As for the requirement of consistency, it means that the legal principles thus derived must be compatible with the Statute and international law. In Verhoeven's view, the reasons for laying down this requirement is 'rather mysterious'.[662] For this scholar, considering that general principles of law are to be applied in the absence of rules and principles derived from the sources listed in Article 21, paragraph 1(a) and (b), 'it is difficult to understand how they could be contradicting a -by hypothesis- non-existent rule.'[663] Pellet, in contrast, the prescription of that requirement is fully justified, because of the special structure of international law and international criminal trials.[664] Pellet based his view on Judge Cassese's dissenting opinion in the *Erdemović* case.

The four conditions for the application of general principles of law by the ICC do not add anything new to the legal regime of the general principles of law under general international law. Nevertheless, the explicit reference to these conditions has the merit of making clear their existence.

3.3.3.2 Three decisions

The number of decisions adopted by the ICC so far is rather small, if compared with the amount of decisions taken by the ICTY or the ICTR. The reason is its recent institution and the fact that it has not hold any trial so far. Still, there are three decisions that relate to the application of general principles of law and are thus germane to this thesis.

The decisions are ordered chronologically.

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[661] See Pellet, Alain, *op. cit.* 10, p. 1075.
[662] See Verhoeven, Joe, *op. cit.* 22, p. 12.
[663] Ibid.
[664] Pellet, Alain, *op. cit.* 10, pp. 1075-1076.

3.3.3.2.1 Situation in Uganda, Decision on Prosecutor's Position

This decision regards *inter alia* a motion for reconsideration submitted by the Prosecutor in the context of the situation in Uganda.[665] In that motion the Prosecutor had requested the Pre-Trial Chamber 'to reconsider [the Pre-Trial Chamber's] decision to redact from the warrants of arrest the dates, locations, and characteristics of the attacks', because, among other reasons, the redaction impeded the Prosecutor's 'ability to maximize the potential for garnering international support for the execution of the warrants'.[666] He also requested 'clarification' of a particular issue identified in a document relating to the motion.[667] The Pre-Trial Chamber rejected the motion because the Statute and the RPE 'make no provision for such a broad remedy'.[668]

A contrario sensu, the Pre-Trial Chamber held that recourses exist if the regulatory instruments of the ICC provide for them. Stated differently, it implicitly applied the general principle of law that no appeal lies unless conferred by statute.[669] In so doing, it filled the gap left by the absence of rules in the Statute or the RPE prescribing that the recourses available to the parties are only those conferred by the regulatory instruments of the ICC.[670]

3.3.3.2.2 Situation in the Democratic Republic of the Congo, Judgment on Application for Extraordinary Review

This decision is about a Prosecutor's application for extraordinary review of a Pre-Trial Chamber's decision denying leave to appeal a previous Pre-Trial Chamber's decision allowing victims to

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[665] *Situation in Uganda, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification*, Case No.: ICC-02/04-01/05, PT. Ch. II, 28 October 2005.
[666] Ibid., § 8.
[667] Ibid., § 9.
[668] Ibid., § 18.
[669] See subection 3.3.1.2.1, above.
[670] The same principle was applied following the same legal reasoning in a later decision adopted by another Pre-Trial Chamber. See *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecution Motion for Reconsideration*, Case No.: ICC-01/04-01/06, PT. Ch. I, 23 May 2006, p. 3. The holding was reaffirmed in a later decision: *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal*, Case No.: ICC-01/04-01/06, PT. Ch. I, 23 June 2006, § 9.

participate in the proceedings.[671] The review was 'extraordinary' in that it was provided neither for the Statute nor for the RPE.[672] In the Prosecutor's view, the interpretation of Article 82, paragraph 1(d) of the Statute left a lacuna apt to be filled by the general principles of law mentioned in Article 21, paragraph 1(c).[673]

The Prosecutor asserted that many national legal systems of the main legal families of the world allow the reviewability of decisions of a hierarchically lower court rejecting an appeal to a higher court.[674] He gave the examples of fourteen national legal systems of the Romano-Germanic legal family,[675] five of the Common Law,[676] and three of the Islamic conception of law,[677] as he classified them.

At its turn the Appeals Chamber observed that in all the Romano-Germanic and Common Law legal systems referred to by the Prosecutor, the right to review decisions of lower courts is vested by statutory law. This means that appellate courts do not have an inherent power to review decisions of subordinate courts disallowing an appeal.[678]

It also explained that the alleged general principle of law is not such, for the reason that it is not generally recognized in the Romano-Germanic legal family. For instance, the French legal system does not provide for review of decisions disallowing a right to appeal. Another given example is the German legal system, which does not provide for review of decisions similar to those envisaged in Article 82, paragraph 1(d) of the ICC Statute. The Appeals Chamber also said that in all the national legal systems invoked by the Prosecutor, the modalities for the exercise of such right differ and vary from one national legal system to another.[679] For these reasons the Appeals Chamber concluded that no general principle of law prescribes the review of decisions of hierarchically subordinate courts disallowing or not permitting

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[671] *Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, Case No.: ICC-01/04, App. Ch., 13 July 2006.
[672] Ibid., § 3.
[673] Ibid., §§ 5, 22.
[674] Ibid., § 25.
[675] Argentina, Chile, Ecuador, El Salvador, Finland, Germany, Mexico, Portugal, Spain, Guatemala, Honduras, Nicaragua, Panama, and Uruguay. Ibid., § 26.
[676] USA, United Kingdom, Canada, Sierra Leone, and Australia. Ibid., § 28.
[677] Malaysia, Philippines, and Singapore. Ibid., § 31.
[678] Ibid., §§ 26, 28.
[679] Ibid., §§ 27-29, 31.

an appeal.[680] It also contended that Article 82 of the Statute contains no lacuna to be filled by general principles of law, since this legal instrument defines thoroughly the right to appeal against decisions of the Pre-Trial and Trial Chambers.[681]

It thus follows that while the Appeals Chamber denied the existence of a general principle of law whereby review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal is permissible, it implicitly applied the principle that no appeal lies unless conferred by statute.

The Appeals Chamber's holding is right. Two aspects of the decision deserve special consideration.

First, the Appeals Chamber went too far in arguing that there was no general principle of law on the matter because the rules regulating the right to appeal in the various countries are not uniform. As explained above, Article 21, paragraph 1(c) of the Statute defines the general principles of law as principles derived from national legal rules; not as legal rules common to the generality of national legal systems. Therefore, the existence of uniform national legal rules in the main legal families of the world was not a condition for deriving a relevant general principle of law. Actually, declaring that no appeal lies unless conferred by statute would have been a sufficient explanation for dismissing the Prosecution's submission.

Second, the comparative research made by the Appeals Chamber did not include any national legal system from Africa. Even if the outcome of the research remained the same, including national legal systems of Africa would have rendered the research truly international and evidenced the ICC's commitment to a pluralistic conception of international criminal law.

3.3.3.2.3 Situation in the Democratic Republic of the Congo, Decision on Witness Familiarization and Proofing

This decision dealt with the issue of the admissibility of the practice of witness proofing.[682] According to the Pre-Trial Chamber, witness proofing is not allowed under general principles of law.[683]

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[680] Ibid., § 32.
[681] Ibid., § 39.
[682] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Practices of Witnesses Familiarization and Witness Proofing,* Case No.: ICC-01/04-01/06, PT. Ch. I, 8 November 2006.
[683] Ibid., § 42.

In this case the Prosecution had asserted (and the Defence denied) that witness proofing is 'a widely accepted practice in international criminal law'.[684] The measures covered by the Prosecution's definition of witness proofing may be divided in two categories, namely witness familiarization and witness proofing.[685] The first category includes measures aimed to familiarize the witnesses with the framework of the ICC, the sequence of witness interrogations, the role of the participants at the hearing, etc. The second encompasses measures intended to help the process of recollection, such as comparing witness statements to identify inconsistencies and telling the witness the questions that the Prosecution's Trial Lawyer intends to put during the hearing.[686]

The Statute and the RPE regulate certain measures of familiarization of witnesses with the ICC.[687] Some of such measures are not only permitted, but also mandatory for the Court.[688] In contrast, the Pre-Trial Chamber deemed the practice of witness proofing inadmissible. This practice is not governed by any provision of the Statute, the RPE, or the Regulations of the Court. In addition it is not 'a widely accepted practice in international criminal law', as asserted by the Prosecution. For these reasons, the Pre-Trial Chamber resorted to general principles of law as a source of international criminal law.[689]

At the outset the Pre-Trial Chamber observed that any general principle of law applicable to the issue at stake should be derived from 'national laws of the legal systems of the world including, as appropriate, the national laws of the Democratic Republic of the Congo'.[690] Then it found a great discrepancy in the various national legal systems examined.[691] Witness proofing is unethical or unlawfull in nine of the ten national legal systems investigated by the Pre-Trial Chamber.[692] Accordingly, the Pre-Trial Chamber concluded that there is no general principle of law allowing the practice of witness proofing.[693] It went on to declare, 'if any general principle of law were to be derived from the national laws of the legal systems of the world on this particular matter, it

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[684] Ibid., §§ 1-6.
[685] Ibid., § 18.
[686] Ibid., §§ 14-17.
[687] Ibid., §§ 20-22.
[688] Ibid., § 23.
[689] Ibid. §§ 28-33.
[690] Ibid., § 35.
[691] Ibid., § 36.
[692] Ibid.. § 37.
[693] Ibid.. § 42.

would be the duty of the Prosecution to refrain from undertaking the practice of witness proofing'.[694] For these reasons, the Pre-Trial Chamber ordered the Prosecution not to practice witness proofing.[695]

The Pre-Trial Chamber's decision was correct, even if at odds with the practice of the ICTY and the ICTR. These international tribunals accept the practice of witness proofing in certain circumstances.[696] In the context of the ICTY and the ICTR, the practice is not based on any particular general principle of law but on Rule 89(B) of their respective rules of procedure and evidence.

Notwithstanding the appearances, the Pre-Trial Chamber did not affirm the existence of a general principle of law whereby the Prosecution must refrain from proofing witnesses. In fact, the Pre-Trial Chamber did not intend to proclame the existence of such a principle; it used a conditional clause ('if any general principle of law were to be derived…') as a rethorical tool aimed at reinforcing the legal reasoning of the decision that had already taken on the basis of other legal ground.

A peculiar aspect of the decision under examination is the broad interpretation made by the Pre-Trial Chamber of the term 'national laws' of Article 21, paragraph 1(c) of the Statute. In fact, it examined not only national legislation and case-law, but also codes of conducts of national bar associations (in particular the Code of Conduct of the Bar Council of England and Wales).[697] Such a way to proceed was justified in the circumstances of the case, for the reason that in some States the relations between lawyers and witnesses is partially or entirely regulated in deontological codes adopted by bar associations and not in legislation.[698]

The national laws covered by the comparative study were the laws from Brazil, Spain, France, Belgium, Germany, Scotland,

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[694] Ibid.

[695] Ibid., disposition.

[696] See the practice cited by the Prosecution in ibid, § 32. A more recent ICTY decision authorizing witness proofing is *Prosecutor v. Milutinović et al., Decision on Ojdanić Motion to Prohibit Witness Proofing*, Case No. IT-05-87-T, T. Ch., 12 December 2006. As for the ICTR, see *Prosecutor v. Karemera et al., Decision on Interlocutory Appeal Regarding Witness Proofing*, Case No. ICTR-98-44-AR73.8, App. Ch., 11 May 2007.

[697] Ibid., §§ 38-39.

[698] See, for example, Article 705 of the Code of Conduct of the Bar Council of England and Wales, reproduced in ibid. § 38. See also Article 39 of the *Normas de Etica Profesional del Colegio de Abogados de la Provincia de Buenos Aires*, availble at www.calp.org.ar/Instituc/regladisci.asp.

Ghana, England and Wales, Australia, and the the USA. It should be noted that the Pre-Trial Chamber did not take cognizance of the national laws of the Democractic Republic of the Congo. Even if the inclusion of these laws would have not modified the outcome of the research, at least it would have contributed to give *effet utile* to the words 'including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime' of Article 21, paragraph 1(c) of the Statute or, alternatively, it would have contributed to ascertain when it is appropriate to look at such laws in the search for general principles of law.

3.3.4 The SCSL

The SCSL was established by agreement concluded between the UN and the government of Sierra Leone, pursuant to Security Council Resolution 1315 of 14 August 2000.[699]

This subsection provides an overview of the applicable law of the SCSL (3.3.4.1) and three examples of resort to general principles of law by the SCSL (3.3.4.2).

3.3.4.1 The applicable law

The main regulatory instruments of the SCSL are its Statute and RPE. Pursuant to the former, the SCSL has the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since 30 November 1996 (Article 1).

The crimes within the jurisdiction of the SCSL are crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, other serious violations of international humanitarian law, and certain crimes under Sierra Leonean law (Articles 2-5, respectively). Article 5 is a particular rule of conventional international law that derogates from the general rule of international law prescribing international courts and tribunals not to apply national law as such. Legal provisions such as Article 5 of the SCSL Statute are peculiar to the statutes of the so-called 'internationalized criminal courts and tribunals'.[700]

The rules of the SCSL Statute on individual criminal

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[699] See Frulli, Micaela, 'The Special Court for Sierra Leone: Some Preliminary Comments', *EJIL,* Vol. 11, No. 4, 2000, pp. 857-869; Beresford, Stuart and Muller, Alexander, 'The Special Court for Sierra Leone: An Initial Comment', *LJIL*, Vol. 14, No. 3, 2001, pp. 635-651.

[700] See Swart, Bert, 'Internationalized Courts and Substantive Criminal Law', in Romano, Cesare *et al.* (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia,* Oxford, Oxford University Press, 2004, pp. 295-298.

responsibility are identical to those of the ICTY and the ICTR. Yet, with regard to crimes under Sierra Leonean law, the applicable rules on individual criminal responsibility are those established under Sierra Leonean law (Article 6).

A provision peculiar to this Statute is Article 7. According to it, the SCSL does not have jurisdiction over persons who were under the age of fifteen at the time of the perpetration of the crime.[701]

Another unusual provision is Article 10. This provision prescribes that amnesties in respect of the crimes listed in Articles 2-4 are not a bar to prosecutions before the SCSL. In contrast, amnesties are a bar to prosecutions in respect of crimes under Sierra Leonean law.[702]

The SCSL can impose upon convicted persons imprisonment for a specified number of years (Article 19). Therefore, it can impose neither the death penalty nor life imprisonment. Imprisonment shall be served in Sierra Leone or in any State that has concluded an agreement with the SCSL for the enforcement of sentences. If the convicted person is eligible for pardon or commutation of sentence, the President of the SCSL shall decide the matter 'on the basis of the interests of justice and the general principles of law' (Article 22).

3.3.4.2 Three decisions

The SCSL has rendered only one judgment on the merits of a case so far, in which there is no explicit recourse to general principles of law as a source of international criminal law.[703] Furthermore it is difficult to come across examples of the application of these principles in the other decisions. Even so, three examples were detected. These examples are analysed below. They are ordered chronologically.

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[701] See Corriero, Michael, 'The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone', *NYJHR*, Vol. 18, No. 3, 2002, pp. 337-360; Smith, Alison, 'Child Recruitment and the Special Court for Sierra Leone', *JICJ*, Vol. 2, N. 4, 2004, pp. 1141-1153; Custer, Michael, 'Punishing Child Soldiers: The Special Court for Sierra Leone and the Lessons to be Learned from the United States's Juvenile Justice System', *TICLJ,* Vol. 19, No. 2, 2005, pp. 449-476.

[702] See Macaluso, Daniel, Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lomé Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone", *BJIL*, Vol. 27, No. 1, 2001, pp. 347-380; Meisenberg, Simon, "Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone", *IRRC*, Vol. 86, No. 856, 2004, pp. 837-851.

[703] *Prosecutor v. Brima et al., Judgment,* Case No. SCSL-04-16-T, T. Ch. II, 20 June 2007.

3.3.4.2.1 Prosecutor v. Norman et al., Decision on Lack of Jurisdiction

The first example relates to the *Norman el al.* case. It concerns crimes against humanity, violations of Article 3 common to the 1949 Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law allegedly committed by members of the former Civil Defence Forces of Sierra Leone. In this decision the Appeals Chamber dealt with a motion on lack of jurisdiction with regard to the crime of child recruitment. In so doing, it resorted to the principles *nullum crimen sine lege* and *nullum crimen sine poena*.[704]

The fundamental Defence's submission consisted in that the SCSL had no jurisdiction over the accused under Article 4(c) of the Statute (crime of child recruitment), as this crime was not part of customary international law at the times germane to the indictment. Thus, a conviction of the crime of child recruitment would violate the principle *nullum crimen sine lege* to the prejudice of the accused.[705] The Prosecution opposed the Defence's submission.[706] Hence, the Appeals Chamber had to decide on whether the customary rule prohibiting child recruitment entailed criminal responsibility at the time relevant to the indictment.[707]

From the outset the Appeals Chamber stated,

> It is the duty of this Chamber to ensure that the principle of non-retroactivity is not breached. As essential elements of all legal systems, the fundamental principle *nullum crimen sine lege* and the ancient principle *nullum crimen sine poena*, need to be considered.[708]

Given the reference to their essence and recognition by all legal systems, it is likely that the Appeals Chamber conceived of the principles *nullum crimen sine lege* and *nullum crimen sine poena* as general principles of law. While there is no doubt that a violation to the prohibition of retroactive criminal law breaches the principle *nullum crimen nulla poena sine lege*,[709] the link made by the Appeals Chamber between the prohibition of retroactive criminal law and the principle *nullum crimen sine poena* (no crime without punishment) is not entirely clear. The Appeals Chamber

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[704] *Prosecutor v. Norman et al., Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment),* Case No. SCSL-04-14-AR72(E), App. Ch., 31 May 2004.
[705] Ibid., § 1.
[706] Ibid., § 2.
[707] Ibid., § 24.
[708] Ibid., § 24.
[709] See subsection 3.3.1.2.6, above. See also Article 15 of the ICCPR.

did not consider the issue notwithstanding its previous announcement.

Anyway, as far as the first above-mentioned principle is concerned, it suffices to say that the Appeals Chamber also recognized the requirement of *lex certa* as being an essential element of the principle *nullum crimen sine lege*, by pointing to the jurisprudence of the ICTY.[710] Eventually, in the light of various international legal instruments and national laws the Appeals Chamber concluded that, at the time relevant to the indictment, child recruitment entailed criminal responsibility under international law. Consequently, it dismissed the Defence's motion.[711]

3.3.4.2.2 Prosecutor v. Norman et al., Decision on Judicial Notice and Admission of Evidence

In this decision, an SCSL Trial Chamber resorted to the principle that courts have the power to take judicial notice of facts of common knowledge.[712]

Before considering the merits of the Prosecutor's motion for judicial notice, the Trial Chamber deemed it necessary to examine the nature and scope of application of judicial notice under national and international laws. According to the Trial Chamber, the institution of judicial notice enjoys universal recognition. Although the institution originated in the Common Law legal family, later was adopted the Romano-Germanic.[713] Given the reference to the recognition of the institution by the main legal families of the world, it is highly probable that the Trial Chamber considered the courts' power to take judicial notice of facts of common knowledge to be a general principle of law. A similar *obiter dictum* is found in another decision of the SCSL.[714]

In ascertaining the contents and scope of application of the principle, the the Trial Chamber provided the examples of the German and the Russian penal codes as being national criminal laws recognizing the institution of judicial notice. On the other

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[710] *Prosecutor v. Norman et al., Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment),* Case No. SCSL-04-14-AR72(E), App. Ch., 31 May 2004, § 25.
[711] Ibid., §§ 30-56.
[712] *Prosecutor v. Norman et al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-14-PT, T. Ch., 2 June 2004.
[713] Ibid., § 15.
[714] *Prosecutor v. Sesay el al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-15-PT, T. Ch., 24 June 2004, § 26.

hand, it gave the examples of the Austrian Penal Code and the Eslovenian Criminal Act as examples to the contrary.[715] It seems a bit contradictory affirming that the courts' power to take judicial noticie of facts of common knowledge enjoys universal recognition and at the same time giving examples of national legal systems that do not recognize such power. Even so, there is no doubt that this power is recognized under general principles of law. As stated above, the recognition of a given legal principle in national law must not be unanimous in order to make it a general principle of law, but general.[716] Moreover, the teaching of learned publicists confirms the recognition of judicial notice as a general principle of law.[717]

The question comes up as to why the Trial Chamber dealt with the institution of judicial notice as a general principle of law, considering that Rule 94(A) gives the power to the chambers of the SCSL to take judicial notice of facts of common knowledge. It is by no means difficult to find out the justification: the Trial Chamber did not intende to ascertain the existence of the principle in question, but its contents and scope of application; in particular, under which circumstances a given fact is deemed to be of common knowledge.

The Trial Chamber declared that it would examine 'Common and Civil Law perspectives' for that purpose,[718] but eventually it only examined decisions of English courts and procedural law of the USA.[719] Yet, in the end it relied upon the relevant jurisprudence of the ICTR.[720]

3.3.4.2.3 Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal to Attend Hearing

In this decision,[721] a SCSL's Trial Chamber dealt with the principle that an accused should be tried in his presence.

The principal issue at stake was whether the trial could proceed in the absence of one of the accused. Having considered

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[715] *Prosecutor v. Norman et al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-14-PT, T. Ch., 2 June 2004, § 15.
[716] See subsection 2.6.2.
[717] See, e.g., Cheng, Bin, *op. cit.* 25, pp. 303-304.
[718] *Prosecutor v. Norman et al., Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, Case No. SCSL-04-14-PT, T. Ch., 2 June 2004, p. 7.
[719] Ibid., §§ 18-20.
[720] Ibid., § 30.
[721] *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days*, Case No. SCSL-04-15-T, T. Ch., 12 July 2004.

Article 17 of the Statute and Rule 60 of the RPE,[722] the Trial Chamber arrived at the conclusion that a trial *in absentia* in the context of the SCSL is permissible and lawful in certain circumstances.[723] Then it affirmed:

> Consistent with this reasoning, the Chamber also notes that in most national law systems, the general rule is that an accused person should be tried in his or her presence, but that exceptionally, courts of justice can have recourse to trial of an accused person in his absence where such an option becomes imperative but in limited circumstances.[724]

Considering that Rule 60 of the SCSL RPE regulates the circumstances in which a trial may proceed in the absence of the accused, it is thus highly probable that the Trial Chamber resorted to general principles of law in order to show the consistency of that legal provision with international law. True, the spectrum of national laws examined by the Trial Chamber was extremely limited, since it merely looked at Canadian law.[725] Nevertheless, the deficiency was somewhat compensated by having recourse to decisions of the ICTR.[726] Finally, the Trial Chamber confirmed that the right of the accused to be tried in his presence is subject to limitations, as Rule 60 does prescribe.

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[722] Article 17, paragraph 4(d) of the SCSL Statute grants to accused persons the right to be tried in his or her presence. Rule 60 of the SCSL REP reads as follows: 'An accused may not be tried in his absence, unless: (i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do; or (ii) the accused, having made his initial appearance, is at large and refuses to appear in court.'

[723] *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days*, Case No. SCSL-04-15-T, T. Ch., 12 July 2004, § 8.

[724] Ibid., § 9. A similar decision was adopted in *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Accused, Sesay and Kallon to Appear for their Trial*, Case No. SCSL-04-15-T, T. Ch., 12 January 2005, § 12.

[725] *Prosecutor v. Sesay el al., Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days*, Case No. SCSL-04-15-T, T. Ch., 12 July 2004, § 9.

[726] Ibid., § 10.

Chapter 4 Analysis of the foregoing practice and relevant scholarly writing

4.1 The autonomy of general principles of law as a source of international criminal law

The decisions of international criminal courts and tribunals examined in the foregoing two sections confirm the autonomy of general principles of law as a formal source of international law, that is, a source distinct from international conventions and custom (section 4.1.1). Besides, general principles of law are a meaningful material source of international criminal law (subsection 4.1.2).

Finally, considering that the ICTY has suggested the existence of three different sets of general legal principles (general principles of criminal law, general principles of international criminal law, and general principles of law consonant with the basic requirements of international justice), the issue arises as to whether there are substantial differences between them (subsection 4.1.3).

4.1.1 General principles of law as a formal source of international criminal law

International criminal law is a branch of public international law. Thus it draws upon the same formal sources, namely conventions, custom, and general principles of law. The ICTY, for example, has explicitly referred to Article 38 of the ICJ Statute[727] and 'the usual sources of international law'[728] as the places where to find its applicable law.

Scholars are of the same opinion. Among them we find Simma, Paulus, Cassese, Degan, and Ambos. Below I provide a brief overview of their opinion on this matter.

Simma and Paulus affirm that the sources of international criminal law are identical to those of general international law. For this reason they refer to the sources listed in Article 38

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[727] See *Prosecutor v. Delalić et al., Judgment*, Case No. IT-96-21-T, T. Ch. II*quater*, 16 November 1998, § 414; *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 40.

[728] *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-AR77, App. Ch., 31 January 2000, § 13; *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-A, App. Ch., 20 February 2001, § 583.

of the ICJ,[729] as being the sources of international criminal law.

Cassese, too, explains that general principles of law are a source of international criminal law because this is a branch of general international law. His classification of the sources of international criminal law is quite detailed. He classifies the sources as follows: primary sources (treaties and custom); secondary sources (which are envisaged in conventional rules, such as binding resolutions of the UN Security Council); general principles of international criminal law, or general principles of law; and general principles of law recognized by the community of States.[730] According to Cassese, international criminal courts and tribunals should look at the sources in the following order. First, conventional rules and the rules stipulated in secondary sources if these have laid down the provisions that confer jurisdiction on the court or tribunal and that organize the procedure (such as the Statutes and the RPE of the ICTY, the ICTR, the SCSL, and the ICC). Second, if such rules are absent or contain gaps, then international criminal courts and tribunals should have recourse to customary law or to conventions explicitly or implicitly referred to in the above-mentioned rules. Thirdly, if such rules do not exist or do not regulate the legal issue at stake, international criminal courts and tribunals should resort to general principles of international criminal law, or to general principles of law. Finally, if a legal gap still exists, then international criminal courts and tribunals should turn to general principles of criminal law common to the nations of the world.[731]

It should be noted that Cassese's classification of the sources of international criminal law does not differ from the usual sources of general international law, namely conventions, custom, and general principles of law. First, a secondary source is a conventional source of second degree; as far as the binding resolutions of the UN Security Council are concerned, their source of validity is not other than the UN Charter, i.e., an international convention.[732] Second, the general principles of international criminal law are likely to have attained customary status. Thirdly, the general principles of criminal law common to the nations of the world are general principles of law; instead of relating to law in general, i.e., Law –what Cassese calls 'general principles of law'-,

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[729] Simma, Bruno and Paulus, Andrea, *op. cit.* 12, p. 55, §§ 1-2.
[730] Cassese, Antonio, *op. cit.* 12, p. 26.
[731] Ibid.
[732] On Article 25 of the UN Charter, see Suy, Erik and Angelet, Nicolas, 'Article 25', in Cot, Jean-Pierre *et al.* (eds.), *La Charte des Nations Unies: Commentaire article par article*, 3rd edition, Paris, Economica, 2005, pp. 909-918.

they relate to criminal law in particular.

Degan too, at his turn, holds the view that international criminal law flows from the sources listed in Article 38, paragraph 1 of the ICJ Statute.[733] General principles of law are thus an autonomous source of international (criminal) law provided that they are not transformed into customary law.[734]

Ambos as well identifies the sources of international criminal law in Article 38 of the ICJ Statute.[735] In his view general principles of law as understood in their traditional sense (that is, as derived from national legal systems) may be taken into account to verify or deny the existence of customary rules *in statu nascendi* still not consolidated. Moreover they may be found in the so-called 'soft law' (decisions of international quasi-judicial organs, statements made in diplomatic conferences, etc.), as a sort of 'universal *opinio iuris* without State practice', which, in Ambos' opinion, leads to an assimilation between custom and general principles of law, in the sense of 'principles and rules of international law' as laid down in Article 21, paragraph 1(b) of the ICC Statute. He gives the example of the ICTY declaring the prohibition of reprisals in case of attacks to civilian in the battlefield, based on 'demands of humanity and the dictates of public conscience, as manifested in *opinio necessitatis*'.[736]

In my opinion it is a bit unclear whether international criminal courts and tribunals have applied general principles of law to corroborate or reject the existence of customary rules *in statu nascendi*. The international practice scrutinized in the preceding chapter apparently does not provide any examples in that regard. Nevertheless, there is no doubt that general principles of law are able to play such function. As stated by the drafters of the PCIJ Statute,[737] in deciding a given legal issue a judge may resort to more than one source of international law simultaneously; and we have seen that in several occasions the ICTY and the ICTR have applied rules of their statutes or RPE simultaneously with general principles of law. As regards the ICTY's example offered by Ambos, there is some doubt as to whether it is partially based on customary law and partially on general principles of law, or entirely based on custom understood

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[733] Degan, Vladimir, *op. cit.* 13, p. 50.
[734] Ibid.
[735] Ambos, Kai, *op. cit.* 14, p. 35.
[736] Ibid., pp. 37-38.
[737] See subsection 2.3.1, above.

as *opinio necessitatis*.[738]

4.1.2 General principles of law as a formal and material source of international criminal law

The frequent application of general principles of law by international criminal courts and tribunals revealed the necessity to better regulate certain legal issues. What is more, some of those principles later transformed into specific legal rules. Therefore, general principles of law are not only a formal source of international criminal law, but also an important material source.

As an illustration of what has been said, I furnish seven examples of the transformation of general principles of law into rules of international criminal law: (i) the principle that courts have the power to take judicial notice of facts of common knowledge is reflected by Article 21 of the IMT Charter, Article 13, paragraph d of the IMTFE Charter, Rule 94 of the ICTY's RPE, Rule 94 of the ICTR's RPE, and Rule 94 of the SCSL's RPE; (ii) the principle of personal culpability has attained customary status[739] and is also reflected in the principle of individual criminal responsibility laid down in Article 7, paragraph 1 of the ICTY Statute, Article 6, paragraph 1 of the ICTR Statute, Article 25 of the ICC Statute, and Article 6, paragraph 1 of the SCSL Statute; (iii) the principle *nullum crimen sine lege* has attained customary status and is also laid down in Article 22 of the ICC Statute;[740] (iv) the principle *nulla poena sine lege* is reflected by Article 23 of the ICC Statute;[741] (v) the prohibition of retroactive criminal laws to the detriment of the accused (*nullum crimen sine lege praevia*) is a general principle of international criminal law and is also laid down in Article 24, paragraph 1 of

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[738] As explained by Cassese, practice and *opinio iuris* play a different role in international humanitarian law, because of the Martens Clause, which puts on equal footing State practice and the 'laws of humanity' and the 'dictates of public conscience'. As a result, the requirement of State practice may not need to apply to the formation of a rule or principle based on the laws of humanity or the dictates of public conscience. For the same reason, the requirement of *opinio iuris* or *opinio necessitatis* may take particular importance. Consequently, a general *opinio iuris* about the binding character of a particular rule or principle may lead to the formation of a customary rule or principle, even when there is no general and consistent State practice or no practice at all. See Cassese, Antonio, *op. cit.* 170, pp. 160-161.

[739] See, for instance, *Prosecutor v. Blaškić, Judgment,* Case No. IT-95-14-T, T. Ch. I, 3 March 2000, § 264.

[740] See Dupuy, Pierre-Marie, 'Normes internationales pénales et droit impératif', in Ascensio, Hervé *et al.* (eds.), *Droit international pénal*, Paris, Centre de droit international de l'Université Paris X-Nanterre, 2000, p. 73.

[741] Ibid.

the ICC Statute;[742] (vi) the principle *lex mitior* is laid down in Article 24, paragraph 2 of the ICC Statute; and (vii) the principle that an accused shall be tried in his presence is reflected by Article 21, paragraph 4(d) of the ICTY Statute, Article 20, paragraph 4(d) of the ICTR Statute, Article 67, paragraph 1(d) of the ICC Statute, and Article 17, paragraph 4(d) of the SCSL Statute.

To be clear, not only the effective application of general principles of law by international criminal courts and tribunals bears significant importance in the development of international criminal law by identifying areas where specific legal rules are needed; also the mere consideration of the applicability of general principles of law with regard to a particular issue may prompt the States to legislate on such areas. Consider, for example, the issue of duress as a ground for excluding criminal responsibility, which, probably as a result of the discussion held by the ICTY Appeals Chamber on the matter,[743] prompted the drafters of the ICC Statute to regulate the issue by inserting a precise provision in that legal instrument (Article 31, paragraph 1(d)).

4.1.3 A difference between three sets of legal principles?

A Trial Chamber of the ICTY mentioned the existence of three kinds of general legal principles upon which the tribunal may rely in the following circumstances:

> [A]ny time the Statute does not regulate a specific matter, and the *Report of the Secretary-General* does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice. It must be assumed that the draftspersons intended the Statute to be based on international law, with the consequence that any possible *lacunae* must be filled by having recourse to that body of law.[744]

The question arises as to from which source of international criminal law are those legal principles to be

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[742] Ibid.

[743] See subsection 3.3.1.2.5, above.

[744] *Prosecutor v. Kupreskić et al., Judgment*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 591.

derived. The Trial Chamber did not elaborate on the matter, but it dealt with two principles of the third set of legal principles, namely the requirements that 'the rights of the accused be fully safeguarded' and 'the Prosecutor and, more generally, the International Tribunal be in a position to exercise all the powers expressly or implicitly deriving from the Statute, or inherent in their functions, that are necessary for them to fulfil their mission efficiently and in the interests of justice'.[745]

Cassese, who was the Presiding Judge of the Trial Chamber that made the distinction, later clarified to some extent the issue in his textbook on international criminal law. General principles of international criminal law 'include principles specific to criminal law, such as the principles of legality, and of specificity, the presumption of innocence, the principle of equality of arms, etc.'[746] These principles are applied at the international level because of their transposition from national legal systems to international criminal law; at present, they are embedded in the international legal system.[747] Therefore their determination does not require an exhaustive comparative law study, but it can be made by way of generalization and induction from the principal traits of the international legal order.[748]

The examples provided by Cassese reveal that the general principles of international criminal law have a common origin and are similar in contents and scope of application to the 'general principles of criminal law common to the major legal systems of the world'. Here, two reasons apply. First, principles such as the legality of crimes and penaltes and the presumption of innocence are legal principles 'common to the major legal systems of the world'. Second, both the 'general principles of international criminal law' and the 'general principles of criminal law common to the major legal systems of the world' originate in national law; they need to be transposed into the international realm in order to be applied by international criminal courts and tribunals.

As for the legal basis for the application of 'general principles of criminal law common to the major legal systems of the world' and the 'general principles of international criminal law', there is room to argue that they are to be derived from the very same source of international (criminal) law, namely general principles of law. The only difference between these kinds of

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[745] *Prosecutor v. Kupreskić et al., Judgment*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 739.
[746] Cassese, Antonio, *op. cit.* 12, p. 31.
[747] Ibid.
[748] Ibid.

international legal principles is the following. The former are to be derived by means of comparative law, in the absence of relevant international jurisprudence. The latter, in contrast, may be identified in conventional and customary rules of international criminal law, in particular, in international human rights. Generally speaking, one may identifiy general principles of international criminal law in Articles 14 and 15 of the ICCPR, such as the right to a fair trial, the presumption of innocence, and the prohibition of retroactive criminal laws to the prejudice of the accused.

As far as the 'general principles of law consonant with the basic requirements of international justice' are concerned, they seem to encompass very sweeping principles, which are also to be derived from the same source of international (criminal) law, namely general principles of law. One may include in this category all those classic general principles of law that may fulfil – and indeed have fulfilled, as we saw above- an important normative role in the decisions of international criminal courts and tribunals, such as the *res iudicata* and *iura novit curia* principles.

To be clear, this tripartite classification apparently has not been explicitly endorsed in any other decision of an international court or tribunal or in any other textbook apart of Cassese's textbook. Even if the frontiers between those three kinds of legal principles cannot be clearly delimited, and even if some principles –such as the presumption of innocence- may very well fit in more than one set simultaneously, the tripartite classification of legal principles may help to undertstand why international criminal courts and tribunals ascertain certain general principles of law by means of comparative law and certain others not, why certain general principles of law are more abstract than other, etc.

4.2 A subsidiary source of international criminal law?

International criminal courts and tribunals have conceived general principles of law as a subsidiary source of international criminal law. The ICTY has been clear in this regard, as for instance when one of its Trial Chambers declared that it has the power to resort to to this source when a legal issue cannot be settled in the light of conventional or customary rules of international law.[749] Article 21, paragraph 1(c) of the ICC Statute

[749] *Prosecutor v. Kupreskić et al., Judgment*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 591.

reflects such conception of general principles of law. As we saw earlier, this legal provision authorizes the ICC to have recourse to this source if the sources listed in paragraphs 1(a) and (b) of that legal provision fail to regulate the legal issue at stake.

It is worth recalling that general principles of law have played an important gap-filling function in the decisions of international criminal courts and tribunals, as we saw in the foregoing chapter. For this reason, while subsidiary in nature, general principles of law have not been unimportant in the practice of international criminal courts and tribunals. Consider, for example, the issues of whether duress, diminished mental responsibility, and self-defence constituted valid grounds for excluding criminal responsibility under general international criminal law.[750]

International criminal courts and tribunals have also settled other significant legal issues by resorting to general principles of law as a means for the interpretation of legal rules. To be clear, in interpreting legal rules on the basis of general principles of law international criminal courts and tribunals have not been the mere *'bouche qui prononce les paroles de la loi'*, paraphrasing Montesquieu's idea of the judiciary.[751] In fact, they have sometimes interpreted legal provisions on the basis of value-oriented general principles. Such a way to proceed led to some law-creation, to a kind of *praetorian* law. Think for example of the principle of human dignity as applied by the ICTY in order to define the crime of rape under international criminal law. The application of that principle in the interpretation of Article 3 of the ICTY Statute led to a precise and detailed definition of the objective and subjective elements of this crime.[752] By relying on value-oriented general principles, international criminal courts and tribunals do not base their legal findings on simple speculations but on influential legal arguments. This has the capacity to neutralize a 'charge' of arbitrary interpretation.[753]

Actually, the decisions examined in the preceding chapter shows that general principles of law have occupied a prominent place in the international criminal courts and tribunals' legal reasoning. These have resorted to general principles of law not only to choose one interpretation over another, but also to make more powerful certain legal arguments. In the latter situations,

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[750] See subsections 3.3.1.2.5, 3.3.1.2.13, and 3.3.1.2.15, respectively.
[751] Montesquieu, Charles, *De l'esprit des lois*, Paris, Garnier frères, 1868, livre XI, chapitre VI.
[752] See subsections 3.3.1.2.7 and 3.3.1.2.14, respectively.
[753] See generally Kolb, Robert, *op. cit.* 5, *passim*.

the invocation of general principles of law may purport to reinforce the legal reasoning of a decision primarily taken on the basis of a particular legal rule.[754] Or, what is more, to lay down the foundations of a given legal argument, even if the principle in question is one already embodied in a particular legal provision of the statute of the court or tribunal concerned. To be clear, this 'foundational' role has not been played by every general legal principle; it was reserved to those principles that are general principles of international criminal law at the same time. Examples of such principles are the principles of individual criminal responsibility and proportionality in sentencing.[755]

True, it is not always crystal-clear whether a given general principle of law is playing a gap-filling, interpretative, or supplementary function in a decision. This is due to the fact that the functions sometimes overlap with each other. In any event, the judicial decisions examined in sections 3.2 and 3.3 make clear that, notwithstanding the subsidiary nature of general principles of law as a source of international criminal law, the principles derived therefrom have played an important normative role in the decisions of international criminal courts and tribunals.

4.3 The determination of general principles of law

Leaving aside the general principles of international criminal law, international criminal courts and tribunals have often ascertained the existence, contents, and scope of application of general principles of law by having recourse to decisions of international courts and tribunals and scholarly writing, or by means of comparative law.

4.3.1 Recourse to judicial decisions and scholarly writing

International criminal courts and tribunals turned to decisions of international courts and tribunals and scholarly writing to determine the following principles among others: impartiality of the judiciary,[756] *nullum crimen nulla poena sine lege*;[757] courts have the power to take judicial notice of facts of common knowledge,[758] an accused should be tried in his presence,[759] and no appeal lies unless conferred by statute.[760]

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[754] See subsections 3.3.1.2.11 and 3.3.1.2.14, respectively.
[755] See subsections 3.3.1.2.8 and 3.3.1.2.11, respectively
[756] See subsection 3.3.1.2.12.
[757] See subsection 3.3.1.2.16.
[758] See subsection 3.3.4.2.2.
[759] See subsection 3.3.4.2.3.
[760] See subsection 3.3.3.2.1.

With respect to the ICTY, De Hemptinne has observed that this tribunal refers less and less to external sources of the Statute while, conversely, it recalls more and more its own decisions.[761] Gradoni found in De Hemptinne's words a confirmation of the thesis whereby general principles of law possess a 'recessive' nature as a source of international law, given that conventional and customary rules are prone to absorb the general principles of law after some time.[762]

It should be noted that when international criminal courts and tribunals referred to their own decisions or to decisions of another court or tribunal to determine the existence, contents, and scope of application of general principles of law, they did not apply jurisprudential rules. They applied conventional rules, customary rules, or general principles of law as previously determined by themselves or another other court or tribunal. Therefore, the fact that the ICTY (or any other international criminal court or tribunal) refers more and more to its own jurisprudence does not necessarily mean that it applies less and less general principles of law (and by the same token, conventional and customary rules). It only means that turns more and more to its own judicial decisions as a subsidiary means for the determination of rules and principles of international law. Thus, for example, when the SCSL determined the limits to the right of an accused to be tried in his presence by referring to decisions of the ICTR, actually it applied a general principle of law as interpreted by the ICTR.[763]

Finally, it is worth observing that scholarly writing has also had a role –albeit a little one if compared with judicial decisions- as a means for the determination of general principles of law in the practice of international criminal courts and tribunals. In fact, these have resorted to the writing of publicists in order to ascertain the existence, contents, and scope of application of principles such as the principle of consumption or lesser included offence[764] and the principle of impartiality of the judiciary.[765] Yet, it appears that no general principle of law has been ascertained on the sole basis of this subsidiary means; for such a purpose, scholarly writing has typically been coupled with

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[761] See intervention of De Hemptinne, Jérôme, in round-table presided by Tulkens, Françoise (s.l., s.d.), in Cassese, Antonio and Delmas-Marty, Mireille (eds.), *Crimes internationaux et juridictions internationales*, Paris, Presses Universitaires de France, 2002, pp. 134-135.
[762] Gradoni, Lorenzo, *op. cit.* 23, p. 12, footnote 10.
[763] See subsection 3.3.4.2.3.
[764] See subsection 3.3.1.2.9.
[765] See subsection 3.3.1.2.12.

an analysis of relevant legislation and judicial decisions.

4.3.2 The 'vertical move'

It is apparent from the decisions examined in sections 3.2 and 3.3 that general principles of law have particularly been derived from national laws (constitutions, legislation, and judicial decisions). The ICC has even looked at deontological professional codes. As far as legislation is concerned, they have not only examined legislation enacted by a national parliament or congress, but also legislation passed by the parliament or congress of federated States, regions, etc.

Such a course of action is correct. For a long time, the national sources of criminal law have been custom, legislation, and judicial decisions. At present, national constitutions are an important source of criminal law in many countries as well.[766] On the other hand, the role of custom has decreased. Therefore, in general, the criminal law of the national legal systems of the main legal families of the world is to be found in national constitutions, legislation, and judicial decisions.[767]

As explained in subsection 2.6.1, general principles of law are to be derived from national laws in force. This requirement is particularly important as far as criminal law is concerned, because of the prohibition of the application of retroactive criminal laws *in mala partem*. Thus, there is no doubt that the law to be examined for deriving general principles of law pertaining to criminal law should be the law in force at the time of the commission of the crime. Whether international criminal courts and tribunals have respected this condition is unclear, as, with the exception of one case,[768] they have never expressed that they were examining criminal laws in force. Considering that they often limit their comparative research to information that is right away accessible, especially via Internet,[769] and given that such information normally consists in the law in force at the time of the research, there is a risk that the data thus obtained is not the law in force at the time of the commission of the crime. In short, the examination of national criminal laws that were not in force at the time of the commission of the crimes charged against the accused,

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[766] For example, Article 18 of the Constitution of the Argentine Republic lays down the principle *nullum crimen nulla poena sine lege*, the right against self-incrimination, etc.

[767] See Pradel, Jean, *op. cit.* 15, pp. 53-113.

[768] See subsection 3.3.1.2.14.

[769] See Delmas-Marty, Mireille, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law', *JICJ*, Vol. 1, No. 1, 2003, p. 18.

for the purpose of deriving general principles of law, may infringe upon the prohibition of the application of retroactive criminal laws to the detriment of the accused.

Furthermore, the decisions examined in sections 3.2 and 3.3 also show that international criminal courts and tribunals have resorted to general principles relating to both substantive and procedural criminal law.

With respect to substantive criminal law, they had recourse to principles such as there is no criminal responsibility without moral choice,[770] personal culpability (individual criminal responsibility),[771] the conditions of application of the defences of duress, state of necessity, and superior orders are particularly strict,[772] the severest penalties apply for crimes against humanity,[773] duress is a mitigating factor in sentencing,[774] and proportionality in sentencing.[775]

As far as procedural criminal law is concerned, international criminal courts and tribunals have turned to the following principles among others: *non bis in idem,*[776] *res iudicata,*[777] the burden of proof rests upon the Prosecutor,[778] *in dubio pro reo*,[779] impartiality of the judiciary,[780] no appeal lies unless conferred by statute,[781] courts have the power to take judicial notice of facts of common knowledge,[782] and an accused should be tried in his presence.[783]

It is not surprising that general principles of substantive criminal law have been invoked several times, for the reason that the general part of international criminal law has many gaps to be filled.[784] Also it is worth noting the equally important number of general principles of procedural criminal law invoked by international criminal courts and tribunals, notwithstanding the apparent fully-fledged sets of rules of procedure and evidence

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[770] See subsection 3.2.1.2.2.
[771] See subsections 3.2.1.2.3, 3.3.1.2.11, and 3.3.2.2.1.
[772] See subsection 3.3.1.2.3.
[773] See ibid.
[774] See subsection 3.3.1.2.5.
[775] See subsection 3.3.1.2.11.
[776] See subsections 3.3.1.2.2 and 3.3.1.2.8.
[777] See subsection 3.3.1.2.6.
[778] See ibid.
[779] See ibid.
[780] See subsection 3.3.1.2.12.
[781] See subsections 3.3.1.2.1 and 3.3.3.2.1.
[782] See subsection 3.3.4.2.2.
[783] See subsection 3.3.4.2.3.
[784] See for example, Ambos, Kai, *op. cit.* 14, p. 38.

adopted by these courts and the historical substantial differences between the inquisitorial and adversarial models of criminal procedure. Actually, the convergences between these two models are greater than believed.[785] Such convergences result from the impact of international law (the ICCPR and the different regional human rights treaties) in national criminal procedure,[786] which imposes the respect of certain procedural rights to all States party to these treaties, regardless of the model of criminal procedure that such States have adopted. This is, for example, the case of the principles that courts must be established by law and that an accused should be tried in his presence.[787]

Finally, it should be noted that not all determinations of general principles of law made by international criminal courts and tribunals have been entirely persuasive. Sometimes, the 'principle' derived does not really reflect the legal principle underlying the national legal systems examined, such as the principle determined by the ICTY whereby courts have the inherent power to deal with contempt.[788] Some other times, the principle derived by a court or tribunal lacks the necessary level of abstraction inherent to general principles of law, and it thus looks more like a *praetorian* legal rule than a general legal principle, as for example the principle of reciprocal speciality with respect to the issue of cumulation of offences.[789] And some other times, the principle is not generally recognized in national laws or at least the general recognition by nations has not been demonstrated by the court or tribunal in question; an example of these principles is the principle of speciality, also with regard to the issue of cumulation of offences.[790]

4.3.3 The 'horizontal move'

Now the issue arises as to how international criminal courts and tribunals have verified that a given legal principle is generally recognized in national law.

They have employed different techniques in order to assert the requirement of general recognition. Such techniques

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[785] See Pradel, Jean, *op. cit.* 15, p. 125, § 89. See also Vogler, Richard, *op. cit.* 15, *passim*.
[786] Delmas-Marty holds a similar opinion. See Delmas-Marty, Mireille, 'L'influence du droit comparé sur l'activité des Tribunaux pénaux internationaux', in Cassese, Antonio and Delmas-Marty, Mireille (eds.), *Crimes internationaux et juridictions internationales*, Paris, Presses Universitaires de France, 2002, pp. 98-99.
[787] See, e.g., Article 14, paragraphs 1 and 3(d) of the ICCPR, respectively.
[788] See subsection 3.3.1.2.10.
[789] See subsection 3.3.1.2.9.
[790] See ibid.

oscillated from merely referring to recognition by 'most nations' or other similar formula to undertaking a comparative law study.

4.3.3.1 The 'civilized nations'

International criminal courts and tribunals have rarely employed the expression 'general principles of law recognized by civilized nations' in their decisions, which only appears in some separate opinion or declaration.[791] The reference to the full wording of Article 38, paragraph 1(c) of the ICJ Statute there merely aimed at individualizing the source of international law in question and not to identify the States whose legal systems should be examined for deriving general principles of law. Stated differently, no international criminal court or tribunal has pretended that there are civilized and uncivilized or barbaric nations, and that only the legal systems of the former are to be taken into account for determining the existence, contents, and scope of application of general principles of law.

4.3.3.2 Tests to establish general recognition

International criminal courts and tribunals have referred to (i) 'general principles of law recognized by all nations';[792] (ii) 'general principles of law recognized by the community of nations',[793] (iii) 'general principles of law recognized by the nations of the world';[794] or to (iv) 'general principles of law common to the major legal systems of the world'.[795]

As explained above,[796] expressions such as the four mentioned in the preceding paragraph do not say much about the national legal systems that should be included in a given comparative research. For this reason, the question arises as to what international criminal courts and tribunals mean by 'all nations', 'community of nations', 'the nations of the world', or 'major legal systems of the world'.

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[791] For example, see *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, §§ 56-57; *Barayagwiza v. Prosecutor, Decision (Prosecutor's request for review or reconsideration), Declaration of Judge Nieto-Navia*, Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000, § 20.

[792] *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T, T. Ch. I, 29 November 1996, § 26; *Prosecutor v. Delalić et al., Judgment,* Case No. IT-96-21-A, App. Ch., 20 February 2001, § 583.

[793] *Prosecutor v. Erdemović, Sentencing Judgment*, Case No. IT-96-22-T, T. Ch. I, 29 November 1996, § 40.

[794] *Prosecutor v. Tadić, Judgment,* Case No. IT-94-1-A, App. Ch., 15 July 1999, § 225.

[795] *Prosecutor v. Kupreskić et al., Judgment*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, § 591.

[796] See subsection 2.6.2.2.

4.3.3.3 The main legal families of the world

The decisions examined above show that whatever the expression chosen, in general international criminal courts and tribunals mean the main legal families of the world, i.e., the Romano-Germanic and the Common Law.[797] Once they have additionally referred to the 'criminal law of other States',[798] and another to the 'Marxist legal systems'.[799] The former category indicates that international criminal courts and tribunals sometimes have troubles in deciding in which of the two main legal families they should include a given national legal system.[800] This reveals the shortcomings of relying exclusively on the classification of national legal systems in legal families.

The question comes up as to whether the classification of national legal systems in legal families is appropriate as far as criminal law is concerned.

At the outset it is worth observing that the reference to the Marxist legal family is entirelly inappropriate to derive general principles of law at present, as this legal family does not exist anymore.[801] Perhaps it is for this reason that the criminal laws of the States invoked as representative of the Marxist legal family (the SFRY and China) in that decision, are usually invoked as representative of the Romano-Germanic legal family in the practice of the same international tribunal.[802]

One has the impression that the classification of national legal systems in legal families is somewhat unsuitable as far as criminal law is concerned. The classification of national legal systems in legal families especially concerns the theory of the sources of law.[803] In the past it was suitable for identifying the sources of criminal law within the various national legal

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[797] International criminal courts and tribunals prefer the expression 'Civil Law systems' to 'Romano-Germanic'. For the reasons exposed in footnote 226, I deem the latter term more appropriate.

[798] *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 61.

[799] *Prosecutor v. Tadić, Opinion and Judgment*, Case No. IT-94-1-T, T. Ch. II, 7 May 1997, § 538.

[800] See Gradoni, Lorenzo, *op. cit.* 23, p. 17.

[801] See David, René and Jauffret-Spinozi, Camille, *op. cit.* 11, p. 19, § 20.

[802] With respect to China, see, for example, *Prosecutor v. Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-AR77, App. Ch., 31 January 2000, § 16-17. As regards the SFRY, see, for instance, *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998, §§ 180-181.

[803] See David, René and Jauffret-Spinozi, Camille, *op. cit.* 11, p. 15, § 16; Pradel, Jean, *op. cit.* 15, p. 51, § 38.

systems. Thus, generally, in the Romano-Germanic legal systems the criminal law was to be found in codes, whereas in the Common Law legal systems it was to be found in judicial decisions. The current state of affairs is different. For instance, in England and Wales –a Common Law jurisdiction- most of criminal laws are to be found in statutes (statutory offences) rather than in judicial decisions (common law offences).[804]

Furthemore, the classification of national legal systems in legal families is somewhat irrelevant with respect to procedural criminal law. The reason is that comparative criminal procedure studies have been often undertaken on the basis of the model of criminal procedure (adversarial or inquisitorial) adopted by States.[805] Yet, the classification of criminal procedures in adversarial and inquisitorial models is inappropriate to find out general principles of law pertaining to procedural criminal law, notwithstanding that, historically, the Romano-Germanic legal systems have adopted the inquisitorial model and the Common Law systems the adversarial model. This is due to the fact that, at present, national criminal procedures reflect a convergence between the two models.[806] Therefore, neither the classification of national legal systems in legal families, nor the classification of procedures in inquisitorial and adversarial, seems to be entirelly apt for deriving general principles of law pertaining to substantive and procedural criminal law respectively.

Even so, international criminal courts and tribunals have heavily relied upon the classification of national legal systems in Romano-Germanic and Common Law legal families. Thus, the question arises as to which methodology –if any- they have employed to choose the representative samples of each of those legal families.

4.3.3.4 The representative national systems

The international criminal courts and tribunals have not adopted any particular methodology to choose the national legal systems to be examined for deriving general principles of law. The following reasons may explain why.

First of all, personal knowledge;[807] that is, the research

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[804] Ashworth, Andrew, *op. cit.* 438, p. 6.
[805] See for example Vogler, Richard, *op. cit.* 15, *passim*, who additionally investigates the 'popular justice tradition'.
[806] See Pradel, Jean, *op. cit.* 15, p. 125, § 89. On the impact of adversariality on the criminal procedural laws of Europe and Latin America, see Vogler, Richard, *op. cit.* 15, p. 157 *et seq.*
[807] See Delmas-Marty, Mireille, *op. cit.* 769, p. 18.

usually includes national legal systems with which the judges are acquainted. This explains why many judges include in their researches the legal system of the State of which they are national. For example, in the *Erdemović* case,[808] the research undertaken by Judges McDonald and Vohrah included the laws of the USA and Malaysia, that is, the respective countries of origin of these judges. Another example is found in the *Furundžija* case;[809] here the research included the laws of Zambia, England, and Italy, i.e., the countries of origin of the three members of the Trial Chamber. Likewise, the personal knowledge of the judges' legal officers is also relevant, as they normally are the persons who gather the data to be analysed by the magistrates.

The second reason is accessibility.[810] As stated by Judges McDonald and Vohrah before undertaking a comparative research on the issue of duress, the research would include national legal systems whose jurisprudence 'was, as a practical matter, accessible' to them.[811] However, while this reason could justify why certain national legal systems are included in the researches, it does not explain why other accessible systems are not.

Thirdly, international criminal courts and tribunals are prone to take account of the national legal system where the crimes under their jurisdiction have taken place. This is why the ICTY often scrutinizes the laws of the SFRY, Bosnia & Herzegovina, and Croatia; and, the ICTR, the laws of Rwanda. Such a reasonable behaviour seems to be provoked by the concern of respecting the principle *nullum crimen nulla poena sine lege*, when the issue at stake is one of substantive criminal law.

The decisions examined in sections 3.2 and 3.3 demonstrate that international criminal courts and tribunals have been excessively inclined to select European national legal systems for deriving general principles of law. The chart below illustrates the number of times that national legal systems of the five continents have been cited in those decisions.

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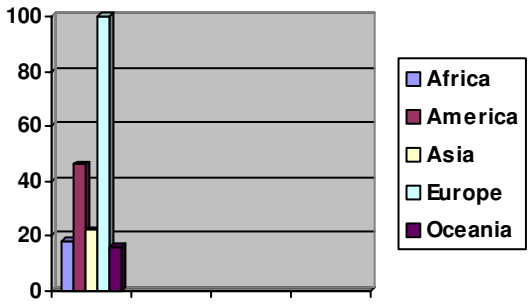
[808] *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997.
[809] *Prosecutor v. Furundžija, Judgment,* Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998.
[810] See Delmas-Marty, Mireille, *op. cit.* 769, p. 18.
[811] *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 57.



It is worth noting that the legal systems of Germany, Australia, France, England and Wales, the USA, Italy, and Canada, in this order, have been the most invoked systems in the researches (15, 14, 14, 13, 12, 10, and 8 times each of them, respectively). Taken all together, they represent the 43% of the national legals systems examined for deriving general principles of law, while the remaining 59 national legal systems represent the other 57%. Reference to those seven national legal systems is definitely systematic.

Curiously enough, although the large majority of the national legal systems of the American continent belong to the Romano-Germanic legal family, the two most invoked national criminal laws of that continent are those of the USA and Canada, which historically have been based on the Common Law and the adversarial model of criminal procedure. This reveals that the national legal systems of Latin America have not often been taken into account for deriving general principles of law.

4.3.4 Last observations on the issue of determination

Despite that the unfortunate expression 'civilized nations' has had very little room in the practice of international criminal courts and tribunals, the national legal systems most frequently examined for deriving general principles of law are, with the exception of the Australian and the Canadian legal systems, still nearly the same as the formerly so-called 'civilized nations'. That is, a handful of European national legal systems and the legal system of the USA. In short, it seems that the formula has changed, but the essence remained.

The decisions examined in sections 3.2 and 3.3 also reveal that comparative law has played a little role as a method for determining general principles of law. As rightly pointed out by

Gradoni, the display of national legal systems in the practice of international criminal courts and tribunals has mimed the method of comparative law at best.[812] Additionally, it seems that it aims at legitimating the judges' decision.[813]

For these reasons, recourse to comparative law as a method for ascertaining general principles of law would be a safeguard against legal imperialism, i.e., the prevalence of a given legal tradition or conception of law over the others. It would also contribute to the consolidation of a pluralist conception of international criminal law.[814]

4.4 The transposition of general principles of law

The question at stake in this section is whether international criminal courts and tribunals have transposed and applied general principles of law directly or, in contrast, they have found legal obstacles hindering the transposition and subsequent application of general principles of law at the international level.

Subsection 4.4.1 submits that national criminal law and international criminal law are substantially analogous and that this circumstance facilitates the transposition of general principles of (criminal) law into the international setting and their subsequent application by international criminal courts and tribunals. Then, subsection 4.4.2 examines the issue of whether notwithstanding the analogies between national criminal law and international criminal law there might be problems hampering the transposition of general principles of law from the former to the latter.

4.4.1 Substantive and procedural criminal law analogies

Likewise to other international judicial bodies, international criminal courts and tribunals apply general principles of law by analogy. They have thus found out answers to problems arisen in the field of international criminal law by referring to similar problems and their solution in national criminal law.

The decisions examined in sections 3.2 and 3.3 indicate that, generally, international criminal courts and tribunals apply general principles of law because they take for granted the existence of analogies between the foundations of individual criminal responsibility at the national and at the international levels, and between national criminal proceedings and

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[812] Gradoni, Lorenzo, *op. cit.* 23, p.16.
[813] Delmas-Marty, Mireille, *op. cit.* 769, p. 18.
[814] Ibid., *passim*.

international criminal proceedings. Those decisions also demonstrate that both substantive criminal law and procedural criminal law have been similarly important as a source of analogies.

International criminal law, as well as national criminal law, purports to regulate the prosecution and trial of individuals suspected of having committed or otherwise participated in the commission of a crime, and, if they are found to be guilty, to impose a penalty on them. In other words, international criminal law obtains its legitimacy as criminal law from the purposes of punishement –especially retribution and deterrence-, which have been transposed from national criminal law.[815] Plainly, this is a basic analogy between substantive national criminal law and international criminal law.[816]

As far as procedural criminal law is concerned, an international criminal trial is an issue of trial of accused persons, as is the case in national trials. Therefore, international criminal trials are not substantially different from the trial of accused persons before national courts.[817] This is another basic analogy between national criminal law and international criminal law.

It is thus not suprising that, generally, international criminal courts and tribunals (i) have not refused to transpose and apply general principles of law to international criminal law and, (ii) have transposed general principles of law from national criminal law into international criminal law without any adjustments, as evidenced by the decisions referred to in sections 3.2 and 3.3.[818]

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[815] See Werle, Gerhard, *op. cit.* 294, p. 30, § 85. Yet, criminal law and international criminal law aim at protecting different values; see Flectcher, George, 'Parochial versus Universal Criminal Law', *JICJ*, Vol. 3, No. 1, pp. 20-34. On the recognition of retribution and deterrence as the main purposes of punishment at the international level, see Raimondo, Fabián, 'La individualización de las penas de prisión en las sentencias de los Tribunales Penales Internacionales *ad hoc* de las Naciones Unidas', *Relaciones Internacionales*, No. 21, 2001, pp. 143-159.

[816] See Gil y Gil, Alicia, *Derecho penal internacional: especial consideración del delito de genocidio*, Madrid, Tecnos, 1999, p. 20; Pastor, Daniel, 'El sistema penal internacional del Estatuto de Roma. Aproximaciones jurídicas críticas', in Baigún, David *et al.*, *Estudios sobre justicia penal. Homenaje al Profesor Julio B. J. Maier*, Buenos Aires, Editores del Puerto, 2005, pp. 701-702.

[817] See Degan, Vladimir, *op. cit.* 13, p. 50; Pastor, Daniel, *op. cit.* 816, p. 702.

[818] The existence of analogies between national criminal law and international criminal law is apparent not only because of the application of general principles of law by international criminal courts and tribunals, but also because of the crystalization of general principles of law and other national criminal law concepts into conventional rules (e.g., Articles 22 to 25 of the ICC Statute) and rules of procedure and evidence of international criminal courts and tribunals (e.g., Rule 94 of the ICTY's RPE, Rule 94 of the ICTR's RPE, and Rule 94 of the SCSL's

The general principles of law applied by international criminal courts and tribunals without any adjustments demonstrate that with respect to substantive criminal law there are analogies between national criminal law and international criminal law as regards, *inter alia*, the following issues: (i) the foundations of criminal responsibility (there is no criminal responsibility without moral choice; personal culpability; the establishment of criminal culpability requires an analysis of the objective and subjective elements of the crime;); (ii) grounds for excluding criminal responsibility (the conditions of application of the defences of duress, state of necessity, and superior orders are particularly strict; self-defence); (iii) the determination of the term of imprisonment (proportionality in sentencing; the severest penalties apply for crimes against humanity; duress and diminished mental responsibility are mitigating factors in sentencing); and (iv) the definition of crimes (such as murder and rape).

Furthermore, the application of general principles of law pertaining to procedural criminal law without any transformation of their contents, shows that there are relevant analogies with respect to matters such as: (i) evidence (the burden of proof rests upon the Prosecutor; *in dubio pro reo*; courts have the power to take judicial notice of facts of common knowledge); (ii) fair trial (presumption of innocence; courts must be established by law; an accused should be tried in his presence); (v) appellate proceedings (no appeal lies unless conferred by Statute).

4.4.2 The problems of transposition

Definitely, Judge Cassese has formulated the most eloquent argument against automatic transpositions of national law concepts –general principles of law are a type of such concepts- into international criminal law.[819] Judge Cassese's opinion was the reaction to Judges McDonald and Vohrah's recourse to 'practical policy considerations' –a doctrine peculiar to the Common Law- in order to settle the issue of whether Erdemović's guilty plea was equivocal.[820]

In Judge Cassese's opinion, 'legal constructs and terms of

Statute). All these are examples of the importance of general principles of law as a material source of international law in general and international criminal law in particular.

[819] *Prosecutor v. Erdemović, Judgment, Separate and Dissenting Opinion of Judge Cassese*, Case No. IT-96-22-A, App. Ch., 7 October 1997.

[820] See *Prosecutor v. Erdemović, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No. IT-96-22-A, App. Ch., 7 October 1997, §§ 73-91.

art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings.'[821] He gave the following reasons to support his contention: (i) international (criminal) courts and tribunals should investigate all the means available at the international level before resorting to national law;[822] (ii) international criminal law is a mixture of Romano-Germanic and Common Law systems, which makes it unique and possess a legal logic that is substantially different from that of each of those two legal families;[823] and (iii) international trials are to some extent different from national criminal proceedings.[824]

According to Pellet, Judge Cassese's opinion is 'absolutely convincing'.[825] While it is true that national law concepts (including general principles of law) should not be automatically applied at the international level, it is also true than the second and third arguments put forward by Judge Cassese are not fully persuasive.

Thus, it is correct to contend that international criminal courts and tribunals should look at international law before turning to national law. The exploration should include the primary and secondary sources of international law, that is, international conventions, binding resolutions of the UN Security Council (such as the Statutes of the ICTY and the ICTR), and customary law (including the general principles of international criminal law and the general principles of international law).

However, the mixture of Romano-Germanic and Common Law systems is not peculiar to international criminal law and international trials. As pointed out by Pastor, national criminal procedures are (to different extents) hybrid everywhere; 'pure' criminal procedures –if they have existed- are part of the past but not of the present.[826] Furthermore, the mixture of Romano-Germanic and Common Law elements would not necessarily prevent the application of general principles of law, for the reason that, by definition, these are legal principles common to both legal families as well as to other conceptions of law.

As far as the 'special features' of international trials are

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[821] *Prosecutor v. Erdemović, Judgment, Separate and Dissenting Opinion of Judge Cassese*, Case No. IT-96-22-A, App. Ch., 7 October 1997, § 2.
[822] Ibid., § 3.
[823] Ibid., § 4.
[824] Ibid., § 5.
[825] Pellet, Alain, *op. cit.* 10, p. 1076. Also, see Simma, Bruno and Paulus, Andreas, *op. cit.* 12, p. 67, § 20.
[826] Pastor, Daniel, *op. cit.* 816, p. 702.

concerned, it is worth observing that neither Judge Cassese nor the ICTY's chambers that endored his opinion have specified what such special features are. In contrast, it should be noted that, as stated above, the essence of national and international trials is the same, i.e. determining whether a crime has been committed, and, in the affirmative, establishing the amount, quality, and modality of the penalty to be imposed on the person found guilty.

To sum up, although it is correct that the transposition of general principles of law into the international setting must not be automatic, it is also correct that international criminal courts and tribunals have rarely rejected the application of general principles of law into international criminal law because of their incompatibility with the structure of the latter. Moreover, the decisions examined in sections 3.2 and 3.3 show that in those rare occasions in which some incompatibility arose, the court or tribunal concerned has adjusted the contents of the general principle of law at stake to the features of international law and applied it to the case.

Notwithstanding the foregoing considerations, the transposition of general principles of law into international criminal law is not always free of difficulties. Even if the ICTY's voices of caution against automatic transpositions sometimes seem to have been overstated or misplaced, it is right that the transpositions of general principles of law into the international realm should be carefully effected. In fact, there might be two types of difficulties for hampering the transposition, namely the inexistence of analogous institutions between national and international criminal laws and the differences on structure and enforcement mechanisms between national legal systems and international law.

From the outset it should be noted that while the first difficulty is rather a barrier to transposition, the second difficulty may be overcome by means of adjustment or adaptation of the contents of the general principle of law concerned to the particular features of the international arena.

The impediment consists in looking for analogies in a field of national criminal law that has no counterpart in international criminal law, such as the law of extradition. A case in point is *Mejakic et al.*, before the ICTY.[827] In this case, the Appeals Chamber confirmed the Trial Chamber's finding that the

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[827] *Prosecutor v. Mejakic et al., Decision on Joint Defence Appeal Against Decision on Referral under Rule 11bis*, Case No.: IT-02-65-AR11*bis*.1, App. Ch., 27 April 2006.

customary law governing the institution of extradition does not apply to the issue of transfer of accused persons to the ICTY. The reason given by the Appeals Chamber is that 'their transfer … is not the result of an agreement between the State and the International Tribunal',[828] as is the case with respect to extradition from one State to another. As the Appeals Chamber rightly went on to explain, 'the obligation upon States to cooperate with the International Tribunal and comply with its orders arises from Chapter VII of the United Nations Charter. Accordingly, a State cannot impose conditions on the transfer of an accused, or invoke the rule of speciality or non-transfer concerning its nationals'.[829] Despite that this example concerns the application of customary law and not of general principles of law, it is relevant to our discussion because it makes clear that national criminal law is not always a source of analogies for international criminal law.

The difficulty referred to above concerns the structural differences between national legal systems and international law, as well as the different nature of their enforcement mechanisms. An appropriate example in this regard is provided by the ICTY's practice. In the *Blaškić* case, the issue arose as to whether the ICTY has the power to issue binding orders to State officials. While Croatia submitted that the ICTY does not have such a power under customary law, the Prosecutor submitted that the ICTY does have it, *inter alia*, because 'Otherwise its powers would be wholly inferior to those of the national criminal courts over whom it has primacy'.[830] The Appeals Chamber rejected the Prosecutor's 'domestic analogy', because

> It is well known that in many national legal systems, where courts are part of the State apparatus and indeed constitute the judicial branch of the State apparatus, such courts are entitled to issue orders to other (say administrative, political, or even military) organs, including senior State officials and the Prime Minister or the Head of State. … The setting is totally different in the international community. It is known *omnibus lippis et tonsoribus* that the international community lacks any central government with the attendant separation of powers and checks and balances. In particular, international courts, including the International

[828] Ibid., § 31.
[829] Ibid.
[830] *Prosecutor v. Blaškić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95-14-AR108 bis, App. Ch., 29 October 1997, § 39.

> Tribunal, do not make up a judicial branch of a central government. The international community primarily consists of sovereign States; each jealous of its own sovereign attributes and prerogatives, each insisting on its right to equality and demanding full respect, by all other States, for its domestic jurisdiction. Any international body must therefore take into account this basic structure of the international community. It follows from these various factors that international courts do not necessarily possess, *vis-à-vis* organs of sovereign States, the same powers which accrue to national courts in respect of the administrative, legislative and political organs of the State. Hence, the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension. In addition to causing opposition among States, it could end up blurring the distinctive features of international courts.[831]

For these reasons, but above all because of the relevant customary law and the provisions of the Statute, the Appeals Chamber concluded that the ICTY does not have the power of issuing binding orders to State officials.[832]

Actually there are two aspects of the decentralized structure of the international society that may hamper the transposition of general principles of law into international law. These are the absence of an international legislature and the fact that international courts and tribunals are not the judicial power of a central government.

Given the absence of an international legislature, there is no legislation *stricto sensu,* i.e., laws directly binding on all international legal subjects. As a result, general principles of law based on the idea of legislation cannot be automatically applied at the international level. However, one should not make a mountain out of a molehill from this circumstance, as international criminal courts and tribunals might have the possibility of adapting the general principle of law at stake to such particular feature of the international setting. The best example in this regard is provided by the principle that courts must be established by law. As illustrated in section 3.3, the ICTY did not reject the application of this principle; it adjusted its contents and applied it to the case.

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[831] Ibid., § 40.
[832] Ibid., §§ 41-45.

The fact that international courts and tribunals are not the judicial power of a central government may result in that international criminal courts and tribunals cannot transpose general principles of law that do not take account of the immunities of States and States officials under general international law, as if they were individuals in national legal systems. The best example in this regard is furnished by the above-referred *Blaškić* case, where the ICTY declared that it does not have the power of issuing binding orders to State officials.

Yet, as far as international criminal law is concerned, the argument that 'the international community primarily consists of sovereign States' and the special position of States under international law should not be exaggerated. As rightly pointed out by Degan, the legal relations between the parties and other participants in international criminal trials are different from the relations among sovereign States.[833] Thus, although is true that in some particular circumstances the structural differences between national legal systems and international law may be an obstacle to the transposition of general principles of law from the former into the latter, it is also true that, in general, it is not. The decisions investigated in sections 3.2 and 3.3 are proof of it.

4.5 Concluding remarks

In summary, a rich jurisprudence on general principles of law emerged from the decisions of international criminal courts and tribunals. These principles have played a very significant role in international criminal proceedings by filling the gaps left by the absence of applicable legal rules. Moreover they fulfilled important functions as means for the interpretation of imprecise legal rules and for enhancing legal reasoning.

International criminal courts and tribunals have ascertained the existence, contents, and scope of application of general principles of law not only by having recourse to the usual subsidiary means for the determination of rules of international law, i.e. decisions of international courts and tribunals and scholarly writing, but also by deriving them directly from national legal systems. Their derivation has normally encompassed two moves, one vertical and the other horizontal. While the first move aims at abstracting a legal principle from national legal rules, the second purports to find out whether the legal principle thus derived is generally recognized by nations.

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[833] Degan, Vladimir, *op. cit.* 13, p. 50.

As far as the transposition of general principles of law from national legal systems into international law is concerned, the practice of international criminal courts and tribunals shows that, generally, the transposition has been effected without any adjustments. When the particular features of international law hampered the direct application of a given general principle of law in the international arena, the international criminal court or tribunal concerned has adjusted the principle as to render it compatible with international law and applicable to the case.

Finally, it is worth observing that general principles of law are not only a formal source of international criminal law, but also a material source of great importance for the development of international criminal law. Proof of this contention is provided by the fact that several general principles of law applied by international criminal courts and tribunals later transformed into conventional and customary rules of international criminal law.

Chapter 5 Conclusions

5.1 Overview of the conclusions

Provocatively speaking, general principles of law were a dormant source of international law, which was revived in international criminal law because there were legal gaps to fill and imprecise legal rules to interpret.

International criminal courts and tribunals have been quite innovative in applying general principles of law, in comparison with the PCIJ and the ICJ.

Only the former had in fact frequent recourse to general principles of law to fill gaps. As evidenced by the *Erdemović* case,[834] the entire outcome of an international trial may depend on the existence or not of a general principle of law. General principles of law are particularly relevant with respect to the grounds for excluding criminal responsibility,[835] as the conviction of an accused may depend on the existence or inexistence of a given defence under general principles of law. Hence, it is clear that even though general principles of law are a subsidiary source of international law (in that they usually come into action to fill legal gaps), they are certainly not unimportant as far as international criminal law is concerned because this is still undeveloped.

It is worth noting that the gap-filling function has not been the only frequent function of the general principles of law in the decisions of international criminal courts and tribunals. These have also often relied upon general principles of law to interpret legal rules and to reinforce legal reasoning. International criminal courts and tribunals have repeatedly turned to general principles of law as a means for the interpretation of provisions of their Statutes and RPE, as well as of rules of customary law.[836] General principles of law played an important interpretative role, *inter alia*, for ascertaining the elements of the crime of rape.[837] As for their confirmative role, they have been the starting point of legal arguments touching upon the basics of criminal law, such as the principle of culpability or individual criminal responsibility,[838] the principle *nullum crimen nulla poena*

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[834] See subsection 3.3.1.2.5.
[835] See subsections 3.3.1.2.5, 3.3.1.2.13, and 3.3.1.2.15.
[836] See section 4.2.
[837] See subsections 3.3.1.2.7 and 3.3.1.2.14.
[838] See subsections 3.2.1.2.3, 3.3.1.2.8, 3.3.1.2.11, and 3.3.2.2.1.

sine lege,[839] and the presumption of innocence.[840] Yet, the invocation of general principles of law does not always make arguments more convincing, as the *Delalić et al.* case indicates.[841]

Differently from the PCIJ and the ICJ, international criminal courts and tribunals have made clear their methodology for ascertaining the existence, contents, and scope of application of general principles of law. If the principle is a basic human right guaranteed by international treaties, such as courts must be established by law, *nullum crimen nulla poena sine lege*, the presumption of innocence, and an accused should be tried in his presence, they point to the relevant provisions of the treaties,[842] or they invoke the principles directly without any concrete legal reference.[843] These kinds of principles are not derived from national laws directly, even if they are generally recognized in national law. Traditional general principles of law such as *res iudicata* and *iura novit curia*, at their turn, are usually identified by relying on international jurisprudence.[844] Finally, other general principles of law pertaining to criminal law are usually derived by means of comparative law.

The national legal systems that are most frequently examined are, by far, those of Western Europe; and, within this group, the legal systems of Germany, France, and England and Wales.[845] International criminal courts and tribunals also frequently invoke the legal systems of the Australia, USA, Italy, and Canada. Referring almost systematically to more or less the same national legal systems is a simplistic way to choose the 'samples' and it runs against a pluralist conception of international law.[846]

This does not mean that those national legal systems are not representative of the Romano-Germanic or the Common Law legal families, i.e., the main legal families of the world, but it means that many other national legal systems are more than often neglected in the search for general principles of law. If international law is the law of the international society, and the

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[839] See subsections 3.2.1.2.1, 3.2.2.2, 3.3.1.2.6, 3.3.1.2.16, and 3.3.4.2.1.
[840] See subsections 3.3.1.2.6 and 3.3.1.2.14.
[841] See subsection 3.3.1.2.13.
[842] See subsection 3.3.1.2.1.
[843] See subsections 3.2.1.2.1, 3.2.2.2, 3.3.1.2.6, 3.3.1.2.16, and 3.3.4.2.1, with regard to the principle *nullum crimen nulla poena sine lege*.
[844] See 3.3.1.2.6, 3.3.2.2.2, and 3.3.2.2.3.
[845] See subsection 4.3.3.4.
[846] See subsection 4.3.4.

international society the society of all societies,[847] general principles of law should not be conceived as being the legal principles common to a handful of States, but as legal principles common to all humanity, that is, to all societies. Therefore, it would be positive if international criminal courts and tribunals choose in a systematic way the national legal systems to be examined for deriving general principles of law. An appropriate way of doing so could be choosing the national legal systems not only on the basis of 'historical titles', but also of a geographically equitable distribution. Even if the inclusion of other national legal systems in the research does not necessarily change the outcome, the legal principles thus derived will enjoy more legitimacy because of the effective demonstration of their worldwide recognition by nations.

Furthermore, international criminal courts and tribunals have transposed general principles of law into international criminal law without great difficulties, despite the differences between national legal systems and international law on structure, legal sources, subjects, and enforcements mechanisms. As follows from a global assessment of the decisions examined in sections 3.2 and 3.3, the large majority of the general principles of law applied by international criminal courts and tribunals had been transposed into the international arena without more because of the basic analogies between national criminal laws and international criminal law.

5.2 The main conclusions

This thesis demonstrates, first, that the ascertainment and application of general principles of law by international criminal courts and tribunals has contributed to the development of international criminal law by shedding light on issues unregulated by conventional and customary international rules. It should be noted that many of those principles are now reflected in the Statute and the RPE of the ICC.[848]

Second, in spite of their subsidiary nature, general

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[847] See Allot, Philip, *The Health of Nations: Society and Law beyond the State*, Cambridge, Cambridge University Press, 2002, *passim*.

[848] For instance, the following principles: (i) Article 25, paragraph 2 of the Statute expresses the principle of individual criminal responsibility; (ii) Article 36, paragraph 3(a) of the Statute reflects the principle of impartiality of the judiciary; (iii) Article 66, paragraph 2 of the Statute lays down the principle that the burden of proof rests upon the Prosecutor; (iv) Rule 69 reflects the principle that courts have the power to take judicial notice of facts of common knowledge; (v) Rule 145 lays down the principles that diminished mental responsibility and duress may be a mitigating factor in sentencing.

principles of law are a meaningful source of general international criminal law because this is full of legal gaps. It is not a mere coincidence that international criminal courts and tribunals resorted to general principles of law first and foremost to fill legal gaps.[849]

Thirdly, in a way different from early international arbitral tribunals and the PCIJ and the ICJ, international criminal courts and tribunals have not only relied upon decisions of international courts and tribunals (and, to a minor extent, upon scholarly writing) as subsidiary means for determining general principles of law, but also upon comparative law research. Nonetheless, the comparative law method as employed by international criminal courts and tribunals may need some improvement; particularly with regard to the selection of the national legal systems to be investigated. These should be representative not only of the main legal families and conceptions of law, but also of the various regions of the world. The principle thus derived will enjoy greater legitimacy as a general principle of law.

Finally, the differences between national legal systems and international law on structure, legal sources, subjects, and enforcement mechanisms have not been a major barrier to the application of general principles of law in the field of international criminal law. If occasionally a difficulty arose, this was solved during the transposition process by adjusting the contents of the principle to the specificities of the international arena.[850]

5.3 Recommendations

What follows below is a list of recommendations regarding the ascertainment of the existence, contents, and scope of application of general principles of law pertaining to criminal law.

First of all, it is advisable to have recourse to decisions of international courts and tribunals and writing of scholars. These are the usual subsidiary means for determining rules and principles of international criminal law and they might already provide the information we are looking for.

Second, if relevant decisions of international courts and tribunals and scholarly writing are of no avail, then a comparative law research may prove necessary. Such a research is something different from the act of superimposing national legal systems for establishing wheter there exists a common legal rule.

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[849] See, for example, subsections 3.3.1.2.1, 3.3.1.2.3, 3.3.1.2.15, 3.3.2.2.3, and 3.3.3.2.2.

[850] See for instance, 3.3.1.2.1.

Thirdly, the research should encompass both legislation and judicial decisions. The latter often sets out the principles that underlie the former. An examination of pertinent scholarly writing may also prove of great assistance.

Fourthly, the research should cover not only national legal systems that are representative of the main world legal families, but also of the different regions of the world. The legitimacy of the general principle of law thus derived will be greater.

Finally, the transposition of general principles of law into international criminal law needs to be effected with caution because of the structural differences between international law and national legal systems. However, caution in this regard should not be pushed too far, because national criminal laws and international criminal law are essentially analogous.

NEDERLANDSE SAMENVATTING

Het onderwerp van dit proefschrift betreft het gebruik van algemene rechtsbeginselen door internationale straftribunalen en -hoven, te weten het Joegoslaviëtribunaal, het Rwandatribunaal, het Speciale Hof voor Sierra Leone en het permanente Internationale Strafhof. Algemene rechtsbeginselen worden genoemd in artikel 38 lid 1, sub (c) van het Statuut van het Internationaal Gerechtshof en zijn algemeen erkend als een bron van het internationaal publiekrecht. Artikel 38 lid 1, sub (a) en (b) noemen de belangrijkste bronnen van het internationaal publiekrecht, namelijk verdragen en internationaal gewoonterecht. Naast deze twee rechtsbronnen worden de algemene rechtsbeginselen traditioneel als subsidiaire bron aangemerkt. In het algemene internationaal publiekrecht spelen algemene rechtsbeginselen voornamelijk een rol in geval van juridische lacunes, dat wil zeggen juridische problemen die niet opgelost kunnen worden aan de hand van regels zoals geformuleerd in verdragen of zoals die voortvloeien uit het gewoonterecht. In het internationale strafrecht zoals gepast door internationale straftribunalen en -hoven spelen algemene rechtsbeginselen een prominente rol. Dit proefschrift onderzoekt de bijdrage van deze specifieke rechtsbron, de algemene rechtsbeginselen, aan de verdere ontwikkeling van het internationale strafrecht, zoals toegepast door internationale straftribunalen en -hoven.

Aan het begrip 'algemene rechtsbeginselen' zijn verschillende betekenissen toegekend in de volkenrechtelijke doctrine. In dit proefschrift wordt de traditionele opvatting aangehangen, die ook thans nog bijval vindt van de meerderheid van de volkenrechtgeleerden. Het begrip 'algemene rechtsbeginselen' heeft in de traditionele opvatting betrekking op rechtsbeginselen, die algemeen erkend zijn in nationale rechtsstelsels.

De toepassing van algemene rechtsbeginselen door internationale straftribunalen en -hoven heeft geleid tot verschillende complexe vraagstukken, die in dit proefschrift worden behandeld. De vraagstukken kunnen gebundeld worden in de volgende probleemstelling:

Hoe bepalen internationale straftribunalen en –hoven het bestaan en de exacte inhoud van specifieke algemene rechtsbeginselen en hoe worden deze vervolgens omgezet vanuit nationale rechtsstelsels naar het internationale recht en toegepast op concrete internationaal-strafrechtelijke vraagstukken zoals die

aan de orde komen in zaken voor de internationale straftribunalen en -hoven?

Het doel van dit proefschrift is om vast te stellen of internationale straftribunalen en –hoven een bepaalde methode hebben ontwikkeld voor de toepassing van internationale rechtsbeginselen op het internationale niveau.

Teneinde het onderzoeksdoel te bereiken en teneinde de probleemstelling te beantwoorden worden twee onderzoeksvragen geformuleerd, namelijk:

(i) Hoe bepalen internationale straftribunalen en –hoven het bestaan en de exacte inhoud van specifieke algemene rechtsbeginselen?

(ii) Bestaan er structurele verschillen tussen nationaal strafrecht en internationaal strafrecht, die omzetting en toepassing van algemene rechtsbeginselen vanuit nationale rechtsstelsels naar het internationale recht belemmeren?

Om bovenstaande onderzoeksvragen te beantwoorden wordt in dit proefschrift eerst aandacht besteed aan rechtsbeginselen als bron van international recht als zodanig (hoofdstuk 2), waarna vervolgens specifiek wordt bestudeerd of, hoe en in hoeverre algemene rechtsbeginselen als bron van recht kunnen dienen in het internationaal strafrecht (hoofdstukken 3 en 4).

Het bepalen van het bestaan en de exacte inhoud van algemene rechtsbeginselen, zoals onderzocht naar aanleiding van de eerste onderzoeksvraag, gebeurt via twee gescheiden bewegingen, die respectievelijk de 'verticale beweging' en de 'horizontale beweging' zullen worden genoemd. De verticale beweging bestaat uit de abstrahering van regels uit nationale rechtsstelsels met als doel het onderliggende beginsel te identificeren. De horizontale beweging betreft vervolgens een vergelijking van verschillende nationale rechtsstelsels om te verifiëren of het rechtsbeginsel, dat via de verticale beweging is geïdentificeerd, algemeen erkend is door staten.

Wat de verticale beweging betreft, kan het volgende worden gesteld. Aangezien algemene rechtsbeginselen per definitie abstracties zijn, zijn zij niet zo precies als de regels van waaruit zij geabstraheerd zijn. Derhalve is het zeer wel mogelijk dat deze abstracte rechtsbeginselen niet geschikt zijn voor directe toepassing; zij zijn mogelijk te onprecies om een specifiek juridisch vraagstuk in zijn geheel op te lossen. Men kan zich in dat kader afvragen of algemene rechtsbeginselen de enkele basis

kunnen zijn voor strafbaarstelling van bepaald gedrag onder internationaal recht. Dit verhoudt zich moeilijk met het legaliteitsbeginsel, nullum crimen nulla poena sine lege, een fundamenteel mensenrecht waarvan niet mag worden afgeweken.

Met betrekking tot de horizontale beweging zijn geleerden het er in het algemeen over eens dat een bepaald beginsel erkend moet worden door de belangrijkste rechtstradities in de wereld, om als 'algemeen rechtsbeginsel' aangemerkt te kunnen worden. In dit kader rijst de vraag of het voldoende is dat een beginsel erkend wordt door nationale rechtsstelsels die de Continentaal-Europese en 'Common Law' (Anglo-Amerikaanse) rechtsfamilies vertegenwoordigen of dat andere rechtsfamilies en rechtsopvattingen ook in ogenschouw genomen zouden moeten worden. Bij de beantwoording van deze vraag wordt duidelijk dat het kwalificeren van nationale rechtsstelsels als behorend bij een bepaalde rechtsfamilie of rechtsopvatting een moeilijke, zo niet onmogelijke, exercitie is. Dit is een gevolg van het feit dat de meeste nationale rechtsstelsels niet in een dergelijk keurslijf kunnen worden gepast. Het Italiaanse rechtsstelsel kan als voorbeeld worden gegeven. Dit stelsel heeft zijn wortels in de Continentaal-Europese rechtsfamilie. De huidige strafrechtprocedure is echter gebaseerd op bepaalde accusatoire beginselen, dat wil zeggen beginselen die normaliter behoren bij een strafrechtmodel dat zijn origine heeft in een 'Common Law' rechtsfamilie. Gemengde rechtsstelsels zoals het Italiaanse kunnen niet gekenmerkt worden als behorend bij de Continentaal-Europese of de 'Common Law' rechtsfamilie. Gelet op het feit dat de tweedeling Continentaal-Europese versus 'Common Law' of inquisitoriaal versus accusatoire niet altijd even strak getrokken kan worden, rijst de vraag of er niet gezocht moet worden naar een ander criterium om de nationale rechtsstelsels te selecteren.

Met betrekking tot de tweede onderzoeksvraag betreffende de omzetting van de beginselen vanuit een nationale naar een internationale context is betoogd door zowel internationale straftribunalen en –hoven als internationaalrechtelijke rechtsgeleerden dat er structurele verschillen bestaan tussen nationale stelsels en het internationale systeem, die directe toepassing van algemene rechtsbeginselen in het internationale recht belemmeren. De verschillen die in dit betoog genoemd worden betreffen de bevoegdheidsverdeling, rechtsbronnen, rechtssubjecten en nalevingsmechanismen. Voorts wordt gewezen op het voor het internationale recht fundamentele beginsel van de staatssoevereiniteit.

Het is de vraag of dergelijke structurele verschillen daadwerkelijk als obstakel moeten worden gezien voor de toepassing van algemene rechtsbeginselen op het internationale niveau. Er zijn twee redenen waarom dat niet het geval is waar het gaat om toepassing op het internationale niveau in een strafrechtelijke context. Ten eerste kan gewezen worden op het feit dat internationale strafprocedures geen interstatelijk karakter hebben. Het beginsel van de staatssoevereiniteit is derhalve niet per definitie relevant. Ten tweede kan worden benadrukt dat internationale strafprocedures analoog zijn aan nationale strafprocedures in de zin dat zij beiden als doel hebben om vast te stellen of er een misdrijf heeft plaats gevonden en of de verdachte daar strafrechtelijk aansprakelijk voor kan worden gehouden.

In vergelijking met het Permanente Internationaal Gerechtshof (1922-1945) en het Internationaal Gerechtshof (1946 tot heden), hebben internationale straftribunalen en –hoven algemene rechtsbeginselen op zeer innovatieve wijze toegepast. De straftribunalen en –hoven gebruiken algemene rechtsbeginselen vaak om gaten in het recht te dichten. Zoals de Erdemović zaak laat zien kan dit er zelfs toe leiden dat de gehele uitkomst van een internationale berechting kan afhangen van het al dan niet bestaan van een bepaald algemeen rechtsbeginsel, in dit geval het beginsel betreffende de strafuitsluitingsgrond 'overmacht'. Op grond van dit voorbeeld kan gesteld worden dat aan algemene rechtsbeginselen groot gewicht kan worden toegekend in het internationale strafrecht, aangezien de vraag of een persoon veroordeeld wordt direct afhangt van het al dan niet bestaan van een strafuitsluitingsgrond op grond van een algemeen rechtsbeginsel. Algemene rechtsbeginselen kunnen dus een belangrijke rol spelen in een internationaal strafproces, zelfs al zijn zij een subsidiaire rechtsbron die alleen geraadpleegd wordt als er een bepaalde juridische lacune bestaat. Het feit dat algemene rechtsbeginselen zo'n prominente rol spelen is mede het gevolg van de rudimentaire staat van het internationale strafrecht.

Naast het dichten van juridische gaten, hebben algemene rechtsbeginselen ook een andere rol gespeeld in de beslissingen van de internationale straftribunalen en -hoven. De tribunalen en hoven hebben herhaaldelijk specifieke algemene rechtsbeginselen ingeroepen om bepaalde bestaande internationaalrechtelijke regels te interpreteren of om hun argumentatie een sterkere juridische basis te verlenen. In het bijzonder het onschuldbeginsel en het legaliteitsbeginsel worden vaak ingeroepen om de interpretatie van statutaire regels inzake de individuele strafrechtelijke aansprakelijkheid kracht bij te zetten.

Bij de toepassing van algemene rechtsbeginselen hebben internationale straftribunalen en –hoven een duidelijke methodologie ontwikkeld om het bestaan, en de exacte inhoud en reikwijdte van bepaalde algemene rechtsbeginselen te bepalen. Als een bepaald strafrechtelijk beginsel gewaarborgd wordt in een mensenrechtenverdrag, zoals het legaliteitsbeginsel, nullum crimen nulla poena sine lege, en het onschuldbeginsel, dan verwijzen de tribunalen en hoven direct naar de betreffende verdragsbepalingen. Dit soort beginselen worden dus niet aan nationale rechtsstelsels ontleend, zelfs al zijn ze wel algemeen erkend in nationale stelsels. De meer traditionele algemene rechtsbeginselen, dat wil zeggen de rechtsbeginselen die niet een directe strafrechtelijke connotatie hebben, zoals res iudicata en iura novit curia, worden doorgaans aan de hand van internationale jurisprudentie geïdentificeerd. Alleen de overige algemene rechtsbeginselen, zoals die betreffende de inherente bevoegdheid van tribunalen en hoven om zich over 'minachting van het hof' uit te spreken, worden afgeleid uit nationale rechtsstelsels door middel van een rechtsvergelijkende exercitie.

De nationale rechtsstelsels die in het laatste geval veruit het meest worden onderzocht zijn West-Europese stelsels. Binnen deze groep kunnen de rechtsstelsels van Engeland en Wales, Duitsland, Frankrijk en Italië als aanvoerders worden aangemerkt. Andere stelsels die vaak worden aangehaald zijn die van Australië, de Verenigde Staten en Canada. Deze wijze van onderzoek, waarbij vaak dezelfde stelsels worden aangehaald, kan als simplistisch worden aangeduid. Een nadeel van deze aanpak is dat het in de weg staat aan een meer pluralistische conceptie van het internationale recht.

Dit betekent niet noodzakelijkerwijs dat de betreffende rechtsstelsels niet representatief zijn voor de belangrijkste rechtstradities, maar het heeft wel tot gevolg dat veel andere nationale rechtsstelsels genegeerd worden in de zoektocht naar het bestaan van algemene rechtsbeginselen. Als we ervan uit gaan dat internationaal recht het recht is van de gehele internationale samenleving, dan kan het niet zo zijn dat algemene rechtsbeginselen worden erkend als de beginselen die een handvol staten gemeenschappelijk hebben. Algemene rechtsbeginselen zouden juist die beginselen moeten zijn, waarvan is vastgesteld dat zij gemeenschappelijke beginselen zijn van de gehele internationale samenleving. Het verdient daarom aanbeveling dat de internationale straftribunalen en –hoven systematisch en op basis van expliciet geformuleerde criteria de te onderzoeken nationale rechtsstelsels selecteren. Een geschikte selectiewijze zou

kunnen zijn om nationale rechtsstelsels niet alleen te selecteren op 'historische titels', mar ook op basis van een gelijkwaardige geografische verdeling. Zelfs als dit de uitkomst van een rechtsvergelijkende exercitie niet direct verandert, zullen de algemene rechtsbeginselen die op die wijze zijn geïdentificeerd meer legitimiteit genieten, aangezien expliciet is aangetoond dat zij wereldwijd zijn erkend.

Internationale straftribunalen en –hoven hebben voorts aangetoond dat het omzetten van algemene rechtbeginselen van nationale systemen naar een international strafrechtelijke omgeving niet tot grote juridische problemen leidt. Hoewel de structurele verschillen tussen nationale stelsels en het internationale recht wat betreft bevoegdheidsverdeling, rechtsbronnen, rechtssubjecten en nalevingsmechanismen worden onderkend, kan worden gesteld dat de praktische effecten van deze structurele verschillen minimaal zijn gebleven.

Bibliography

Akande, Dapo, 'International Organizations', in Evans, Malcolm (ed.), *International Law*, 2nd edition, New York, Oxford University Press, 2006, pp. 277-305.

Akehurst, Michael, 'Equity and General Principles of Law', *ICLQ*, Vol. 25, 1976, pp. 801-825.

Allot, Philip, *The Health of Nations: Society and Law beyond the State*, Cambridge, Cambridge University Press, 2002, 436 pp.

Amann, Diane, 'Prosecutor v. Akayesu. Case ICTR-96-4-T', *AJIL*, Vol. 93, No. 1, 1999, pp. 195-199.

Ambos, Kai, 'General Principles of Criminal Law in the Rome Statute', *CLF*, Vol. 10, No. 1, 1999, pp. 1-32.

Ambos, Kai and Wirth, Steffen,'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals*: *The International Criminal Tribunal for Rwanda 1994-1999*, Antwerpen/Groningen/Oxford/Vienna, Intersentia/Hart Publishing/Verlag Österreich, Vol. 2, 2001, pp. 701-708.

Ambos, Kai, 'Other Grounds for Excluding Criminal Responsibility', in Cassese, Antonio *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, New York, Oxford University Press, 2002, pp. 1003-1048.

Ambos, Kai, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung*, Berlin, Duncker en Humblot, 2002, 1058 pp.

Ambos, Kai, *La parte general del derecho penal internacional: bases para una elaboración dogmática*, Montevideo/Bogotá, Duncker & Humboldt/Konrad Adenauer Stiftung/Temis, 2005, pp. 592.

Ambos, Kai, '*Nulla Poena sine Lege* in International Criminal Law', in Haveman, Roelof and Olusanya, Olaoluwa (eds.), *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, Antwerp/Oxford, 2006, pp. 17-35.

Amerasinghe, Chattharanjan, 'International Administrative Law in the Twenty-First Century: A Critical Appraisal and a Look into the Crystal-Ball', in Anghie, Anthony and Sturgess, Gary (eds.), *Legal Visions of the Twenty-First Century: Essays in Honour of Judge Christopher Weeramantry,* The Hague, Kluwer law International, 1998, pp. 477-495.

Amerasinghe, Chattharanjan, *Principles of the Institutional Law of International Organizations*, 2nd edition, Cambridge, Cambridge University Press, 2005, 535 pp.

Anzilotti, Dionisio, *Corso di Diritto Internazionale*, 3ª edizione riveduta e messa al corrente, Roma, Atheneum, 1928, 474 pp.

Arangio-Ruiz, Gaetano, 'The "Federal Analogy" and UN Charter interpretation: A Crucial Issue', *EJIL*, Vol. 8, No. 1, 1997, pp. 1-28.

Ascensio, Hervé, 'La banalité des sources du droit international pénal par rapport aux sources du droit international général', in Delmas-Marty, Mireille *et al.* (eds.), *Les sources du droit international pénal*, Paris, Société de législation comparée, 2004, pp. 403-409.

Ashworth, Andrew, *Principles of Criminal Law*, 4th edition, Oxford, Oxford University Press, 2003, 512 pp.

Askin, Kelly, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 2000-2001*, Antwerpen/Oxford/New York, Intersentia, Vol. 5, 2003, pp. 806-817.

Balladore-Pallieri, Giorgio, *I 'principi generali del diritto riconosciuti dalle nazioni civili' nell'articolo 38 dello Statuto della Corte permanente di Giustizia internazionale*, ("Serie II, Memoria XI"), Torino, Istituto Giuridico della R. Università, 1931, 89 pp.

Bancroft Davis, John, *Treaties and Conventions Concluded Between the United States of America and Other Powers Since July 4, 1776*, Washington, Government Printing Office, 1889, pp. 1434.

Barberis, Julio, 'Los principios generales de derecho como fuente del derecho internacional', *RIIDH*, No. 14, 1991, pp. 11-41.

Barberis, Julio, *Formación del Derecho Internacional*, Buenos Aires, Editorial Ábaco de Rodolfo Depalma, 1994, 324 pp.

Barile, Giuseppe, 'La structure de l'ordre juridique international. Règles générales et règles conventionnelles', in *RCADI*, Vol. 161 (1978-III), pp. 9-126.

Bartoš, Milan, 'Transformation des principes généraux en règles positives du droit international', in Ibler, Vladimir (ed.), *Mélanges offerts à Juraj Andrassy*, La Haye, Martinus Nijhoff, 1968, pp. 1-12.

Bassiouni, Cherif, 'A Functional Approach to "General Principles of International Law"', *MJIL*, Vol. 11, No. 3, 1990, pp. 768-818.

Bassiouni, Cherif and Manikas, Peter, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Irvington-on-Houston (New York), Transnational Publishers, 1999, 1092 pp.

Battaglini, Giovanni, 'Il riconoscimento internazionale dei principi generali di diritto', in Ago, Roberto (ed.), *Le droit international à l'heure de sa codification: études en l'honneur de Robert Ago*, Milano, Giufrè, 1987, Vol. 1, pp. 97-140.

Beccaria, Cesare, *Dei delitti e delle pene*, a cura di Franco Venturi, Torino, Einaudi, 1994 (prima edizione 1965), 680 pp.

Beresford, Stuart, 'Unshackling the Paper Tiger -The Sentencing Practices of the *Ad Hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda', *ICLR*, Vol. 1, No. 1, 2001, pp. 33-90.

Beresford, Stuart and Muller, Alexander, 'The Special Court for Sierra Leone: An Initial Comment', *LJIL*, Vol. 14, No. 3, 2001, pp. 635-651.

Binder, Alberto, *Introducción al Derecho Penal*, Buenos Aires, Ad Hoc, 2004, 318 pp.

Binder, Alberto, *Introducción al Derecho Procesal Penal*, 2ª edición, 3ª reimpresión, Buenos Aires, Ad Hoc, 2004, 364 pp.

Blondel, André, 'Les principes généraux de droit devant la Cour permanente de Justice internationale et la Cour Internationale de Justice', in Battelli, Maurice *et al.*, *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève, Tribune, 1968, pp. 201-236.

Bokor-Szegö, Hanna, 'Les principes généraux du droit', in Mohammed Bedjaoui (ed.), *Droit international : bilan et perspectives*, Paris, Pedone, 1991.

Boot, Machteld, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1993-1998*, Antwerpen/Groningen/Oxford/Vienna, Intersentia/Hart Publishing/Verlag Österreich, Vol. 1, 1999, pp. 452-456.

Boot, Machteld, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former*

Yugoslavia 2000-2001, Antwerpen/Oxford/New York, Intersentia, Vol. 5, 2003, pp. 600-616.

Brackman, Arnold, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials,* New York, William Morrow and Company Inc., 1987, 432 pp.

Brownlie, Ian, 'International Law at the Fiftieth Anniversary of the United Nations. General Course on Public International Law', in *RCADI*, Vol. 255 (1995), pp. 9-228.

Brownlie, Ian, *Principles of Public International Law*, 6th ed. (expanded and revised), Oxford, Oxford University Press, 2003, 742 pp.

Calvocoressi, Peter, *Nuremberg: The Facts, the Law and the Consequences,* London, Chatto and Windus, 1947, 176 pp.

Capotorti, Francesco, 'Cours général de droit international public', in *RCADI*, Vol. 248 (1994), pp. 9-344.

Cassese, Antonio, 'The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations', in Sienho Yee et Wang Tieya (eds.), *International Law In The Post-Cold World*, London, Routledge, 2001, pp. 43-55.

Cassese, Antonio, *International Law*, Oxford, Oxford University Press, 2nd edition, 2005 (1st edition, 2001), 558 pp.

Cassese, Antonio and Delmas-Marty, Mireille (eds.), *Crimes internationaux et juridictions internationales*, Paris, Presses Universitaires de France, 2002, pp. 267.

Cassese, Antonio, *International Criminal Law*, New York, Oxford University Press, 2003, 472 pp.

Charney, Jonathan, 'Is International Law Threatened by Multiple International Tribunals?', in *RCADI*, Vol. 271 (1998), pp. 101-382.

Cheng, Bin, *General Principles of Law as Applied by International Courts and Tribunals*, London, Stevens & Sons Limited, 1953, 490 pp.

Cockayne, James, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1999-2000*, Antwerpen/Oxford/New York, Intersentia, Vol. 4, 2002, pp. 191-200.

Conforti, Benedetto, *The Law and Practice of the United Nations*, 3rd revised edition, Martinus Nijhoff Publishers, Leiden/Boston, 2005, 330 pp.

Corriero, Michael, 'The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone', *NYJHR*, Vol. 18, No. 3, 2002, pp. 337-360.

Crawford, James, 'The Drafting of the Rome Statute', in Sands, Philippe (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge, Cambridge University Press, 2003, pp. 109-156.

Cryer, Robert *et al.*, *International Criminal Law and Procedure*, New York, Cambridge University Press, 2007, 477 pp.

Custer, Michael, 'Punishing Child Soldiers: The Special Court for Sierra Leone and the Lessons to be Learned from the United States's Juvenile Justice System', *TICLJ,* Vol. 19, No. 2, 2005, pp. 449-476.

Daillier, Patrick and Pellet, Alain, *Droit international public*, 7e édition, Paris, Librairie Générale de Droit et Jurisprudence, 2002, 1510 pp.

David, René and Jauffret-Spinosi, Camille, *Les grands systèmes de droit contemporains*, 11e édition, Paris, Dalloz, 2002, 553 pp.

De Frouville, Olivier, 'Les Tribunaux pénaux internationaux et les principes généraux de droit. Quelques commentaires', in Delmas-Marty, Mireille *et al.* (eds.), *Les sources du droit international pénal*, Paris, Société de législation comparée, 2004, pp. 389-393.

Degan, Vladimir, 'General Principles of Law (A Source of General International Law)', *FYIL*, Vol. 3, 1992, pp. 1-102.

Degan, Vladimir, 'On the Sources of International Criminal Law', *CJIL*, Vol. 4, No. 1, 2005, pp. 44-83.

De la Pradelle, Albert and Politis, Nicolas (eds.), *Recueil des arbitrages internationaux*, 2ème édition, Paris, Les Éditions Internationales, 1957, Vol. I-III.

Delmas-Marty, Mireille, 'L'influence du droit comparé sur l'activité des Tribunaux pénaux internationaux', in Cassese, Antonio and Delmas-Marty, Mireille (eds.), *Crimes internationaux et juridictions internationales*, Paris, Presses Universitaires de France, 2002, pp. 95-128.

Delmas-Marty, Mireille, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law', *JICJ*, Vol. 1, No. 1, 2003, pp. 13-25.

Delmas-Marty, Mireille, 'Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC', *JICJ*, Vol. 4, No. 1, 2006, pp. 2-11.

Del Vecchio, Giorgio, *Sui principi generali del diritto*, Modena, Società Tipografica Modenese (Antica Tipografica Soliani), 1921, 62 pp.

De Martens, Georg, *Recueil des principaux traités d'alliance, de paix, de trêve, de neutralité, de commerce, de limites, d'échange, etc., conclus par les puissances de l'Europe tant entre elles qu'avec les puissances et États dans d'autres parties du monde depuis 1761 jusqu'à présent*, seconde édition revue et augmentée par de Martens, Charles de, Gottingue, Dieterich, 1817-1835, Vol. 1 (1761-1770)-T. 8 (1803-1808).

De Wet, Erika, *The Chapter VII Powers of the United Nations Security Council*, Oxford, Hart, 2004, 413 pp.

De Wet, Erika, *The International Constitutional Order*, Amsterdam, Vossiuspers UvA, 2005, 34 pp.

Diez de Velasco, Manuel, *Las Organizaciones Internacionales*, 9ª edición, Madrid, Tecnos, 1995, 706 pp.

Diez de Velasco, Manuel, *Instituciones de Derecho Internacional Público*, 10ª edición, Madrid, Tecnos, 1994, reimpresión, 1996, Vol. I, 989 pp.

Dupuy, René-Jean, 'Communauté internationale et disparités de développement. Cours général de droit international public', in *RCADI*, Vol. 165 (1979-IV), pp. 9-232.

Dupuy, Pierre-Marie, 'Normes internationales pénales et droit impératif', in Ascensio, Hervé *et al.* (eds.), *Droit international pénal*, Paris, Centre de droit international de l'Université Paris X-Nanterre, 2000, pp. 71-80.

Dupuy, Pierre-Marie, 'L'unité de l'ordre juridique international. Cours général de droit international public (2000)', in *RCADI*, Vol. 297 (2002), pp. 9-490.

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

Esser, Albin, "Mental Elements –Mistake of fact and Mistake of Law', in Cassese, Antonio *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1, New York, Oxford University Press, 2002, pp. 889-948.

Favre, Antoine, 'Les principes généraux du droit, fonds commun du droit des gens', in Battelli, Maurice *et al.*, *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève, Institut Universitaire de Hautes Études Internationales, 1968, pp. 366-390.

Fassbender, Bardo, 'The Meaning of International Constitutional Law', in St. John Macdonald, Ronald and Johnston, Douglas (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Leiden, Brill, 2005, pp. 837-851.

Fernández Liesa, Carlos, 'El Tribunal para la antigua Yugoslavia y el desarrollo del derecho internacional (Decisión de la Sala de Apelación, de 2 de octubre de 1995, en el Asunto Tadić-competencia)', *REDI,* Vol. 48, No. 2, 1996, pp. 11-44.

Fischer, Horst, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals*: *The International Criminal Tribunal for the Former Yugoslavia 1993-1998*, Antwerpen/Groningen/Oxford/Vienna, Intersentia/Hart Publishing/Verlag Österreich, Vol. 1, 1999, pp. 140-142.

Fitzmaurice, Gerald, 'Some Problems Regarding the Formal Sources of International Law', in Koskenniemi, Martti (ed.), *Sources of International Law*, Aldershot, Dartmouth/Ashgate, 2000, pp. 57-80 (or in *Symbolae Verzijl*, La Haye, Nijhoff, 1958, pp. 153-176).

Fitzmaurice, Malgosia, 'The Practical Working of the Law of Treaties', in Evans, Malcolm (ed.), *International Law*, 2nd edition, New York, Oxford University Press, 2006, pp. 187-213.

Flectcher, George, 'Parochial versus Universal Criminal Law', *JICJ*, Vol. 3, No. 1, pp. 20-34.

Freeman Jalet, Frances, 'The Quest for the General Principles of Law Recognized by Civilized Nations-A Study', *UCLAR*, Vol. 10, 1962-1963, pp. 1041-1086.

Friedmann, Wolfgang, 'The Uses of "General Principles" in the Development of International Law', *AJIL*, Vol. 57, 1963, pp. 279-299.

Friedmann, Wolfgang, *The Changing Structure of International Law*, New York, Columbia University Press, 1964, 410 pp.

Friedmann, Wolfgang, 'General Course in Public International Law', in *RCADI*, Vol. 127 (1969-II), pp. 39-246.

Frulli, Micaela, 'The Special Court for Sierra Leone: Some Preliminary Comments', *EJIL,* Vol. 11, No. 4, 2000, pp. 857-869.

Garner, Bryan (ed.), *Black's Law Dictionary,* 8th edition, St. Paul, Thomson / West, 2004, 1810 pp.

Gil y Gil, Alicia, *Derecho penal internacional: especial consideración del delito de genocidio*, Madrid, Tecnos, 1999, 389 pp.

Gill, Terry, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Antwerpen/Oxford/New York, Intersentia, Vol. 3, 2001, pp. 868-875.

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

Gradoni, Lorenzo, 'L'exploitation des principes généraux de droit dans la jurisprudence des Tribunaux internationaux pénaux *ad hoc*', in Fronza, Emanuela et Manacorda, Stefano (eds.), *La justice pénale internationale dans les décisions des tribunaux ad hoc/Études des Law Clinics en droit pénal international*, Dalloz, Paris, Giufrè, Milano, 2003, pp. 10-40.

Green, Leslie, 'Comparative law as a "Source"of International Law', *TLR*, Vol. 42, 1967, pp. 52-66.

Greenwood, Christopher, 'International Humanitarian Law and the Tadić Case', *EJIL,* Vol. 7, No. 2, 1996, pp. 265-283.

Gutiérrez Posse, Hortensia, 'La maxime *ut res magis valeat quam pereat* (interpretation en fonction de l'effet utile): les interprétations "extensives" et "restrictives"', *OZOR*, Vol. 23, 1972, pp. 229.254.

Herczegh, Géza, *General Principles of Law and the International Legal Order*, Budapest, Akadémiai Kiadó, 1969, 129 pp.

Herrero de la Fuente, Alberto, *La equidad y los principios generales en el derecho de gentes*, Valladolid, Universidad de Valladolid, Cuadernos de la Cátedra "J. B. Scott", 1973, 86 pp.

Hosoya, Chihiro *et al.* (eds.), *The Tokyo War Crimes Trial: An International Symposium*, Tokyo, Kodansha Ltd., 1986, 226 pp.

Hudson, Manley, *The Permanent Court of International Justice: A Treatise*, New York, The Macmillan Company, 1934, 731 pp.

International Court of Justice, *The International Court of Justice*, The Hague, United Nations, 1996, 4th edition, 231 pp.

International Criminal Tribunal for the Former Yugoslavia, *The Path to The Hague*, s.l., UN, 1995, 102 pp.

International Law Commission, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (Memorandum, Submitted by the Secretary-General),* New York, United Nations, 1949, 99 pp.

Janeczek, Edward, *Nuremberg Judgment in the Light of International Law,* Thèse No. 67, Université de Genève, Genève, Imprimeries Populaires, 1949, 142 pp.

Jescheck, Hans-Heinrich, 'The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute', *JICJ*, Vol. 2, No. 1, 2004, pp. 38-55.

Joseph, Sarah *et al., The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd edition, Oxford, Oxford University Press, 2005, 985 pp.

Klafkowski, Alfons, *The Nuremberg Principles and the Development of International Law*, Warsaw, Western Press Agency, 1966, 56 pp.

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

Kolb, Robert, 'Principles as Sources of International Law (With Special Reference to Good Faith', *NILR*, Vol. LIII, No. 1, 2006, pp. 1-36.

Kooijmans, Pieter, *Internationaal publiekrecht in vogelvlucht*, 9th edition, Deventer, Kluwer, 2002, 391 pp.

Lachs, Manfred, 'The Development and General Trends of International Law in Our Time. General Course in Public International Law', in *RCADI,* Vol. 169 (1980-IV), pp. 9-377.

La Fontaine, Henri, *Pasicrisie internationale, 1794-1900, Histoire documentaire des arbitrages internationaux*, The Hague/Boston/London, Martinus Nijhoff Publishers, 1997, 670 pp.

Lagodny, Otto, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1993-1998*, Antwerpen/Groningen/Oxford/Vienna,

Intersentia/Hart Publishing/Verlag Österreich, Vol. 1, 1999, pp. 152-153.

Lahti, Raimo, 'Towards Harmonization of the General Principles of International Criminal Law', *NEP*, No. 19, 2004, pp. 345-351.

Lamb, Susan, *Nullum Crimen, Nulla Poena sine Lege in International Criminal Law*, in Cassese, Antonio *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, New York, Oxford Univeristy Press, 2002, pp. 733-766.

Lambert-Abdelgawad, Elisabet, 'Les Tribunaux pénaux pour l'ex-Yougoslavie et le Rwanda et l'appel aux sources du droit international des droits de l'homme', in Delmas-Marty, Mireille *et al.* (eds.), *Les sources du droit international pénal*, Paris, Société de législation comparée, 2004, pp. 97-134.

Lammers, Johan, 'General Principles of Law Recognized by Civilized Nations', in Kalshoven, Frits *et al.* (eds.), *Essays in the Development of the International Legal Order: In Memory of Haro F. Van Panhuys*, Alphen aan den Rijn, The Netherlands, Rockville, Maryland, USA, 1980, pp. 53-75.

Larin, Aleksandr, 'The Trial of the Major War Criminals', in Ginsburgs, George and Kudriavtsev, *The Nuremberg Trial and International Law*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1990, pp. 76-88.

Larin, Aleksandr, 'The Verdict of the International Military Tribunal', in Ginsburgs, George and Kudriavtsev, *The Nuremberg Trial and International Law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, pp. 88-98.

Lauterpacht, Hersch, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)*, London, Longman, Green and Co., 1927, 326 pp.

Lauterpacht, Hersch, 'Some Observations on the Prohibition of "*Non Liquet*" and the Completeness of the Law', in Koskenniemi, Martti (ed.), *Sources of International Law*, Aldershot, Dartmouth/Ashgate, 2000, pp. 433-458 (or in *Symbolae Verzijl*, La Haye, Nijhoff, 1958, pp. 196-221).

Le Fur, Louis, 'La coutume et les principes généraux du droit comme sources du droit international public', in Appleton, Charles *et al.*, *Recueil d'études sur les sources du droit en l'honneur de François Gény,* Paris, Sirey, 1934, T. III, pp. 363-374.

Lombardi, Greg and Scharf, Michael, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of*

International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 2000-2001, Antwerpen/Oxford/New York, Intersentia, Vol. 5, 2003, pp. 357-368.

Maki, Linda, 'General Principles of Human Rights Law Recognized by All Nations: Freedom from Arbitrary Arrest and Detention', *CWILJ*, Vol. 10, 1980, pp. 272-303.

Mantovani, Ferrando, 'The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer', *JICJ*, Vol. 1, No. 1, 2003, pp. 26-38.

Marek, Krystina *et al.*, *'Les sources du droit international',* in Guggenheim, Paul (ed.), *Répertoire des décisions et des documents de la procédure écrite et orale de la Cour permanente de Justice internationale et de la Court internationale de Justice,* Vol. II, Genève, Institut Universitaire de Hautes Études Internationales, 1967, pp. 9-30.

Mbaye, Kéba, 'Article 2, paragraphe 1', in Cot, Jean-Pierre and Pellet, Alain (eds.), *La Charte des Nations Unies, Commentaire article par article*, 2nd edition, Economica, Paris, 1991, pp. 79-96.

McAuliffe de Guzmán, Margaret, 'Article 21–Applicable Law', in Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Baden-Baden, Nomos, 1999, pp. 435-446.

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

McNair, Arnold, 'The General Principles of Law Recognized by Civilized Nations', *BYIL*, Vol. XXXIII, 1957, pp. 1-19.

Mendelson, Maurice, 'The International Court of Justice and the Sources of International Law', in Lowe, Vaughan and Fitzmaurice, Malgosia. (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Cambridge, Cambridge University Press, 1996, pp. 63-89.

Meron, Theodor, 'Is International Law Moving towards Criminalization?', *EJIL*, No. 9, 1998, pp. 18-31.

Meron, Theodor, 'International Law in the Age of Human Rights. General Course on Public International Law', in *RCADI*, Vol. 301 (2003), pp. 9-490.

Minear, Richard, *Victors' Justice: The Tokyo War Crimes Trial*, Princeton, Princeton University Press, 1971, 229 pp.

Montesquieu, Charles, *De l'esprit des lois*, Paris, Garnier frères, 1868, 680 pp.

Mosler, Hermann, 'The International Society as a Legal Community', in *RCADI*, Vol. 140 (1974-IV), pp. 1-320.

Mosler, Hermann, 'To What Extent does the Variety of Legal Systems of the World Influence the Application of the General Principles of Law Within the Meaning of Article 38(1)(c) of the Statute of the International Court of Justice?', in T.M.C. Asser Instituut (ed.), *International Law and the Grotian Heritage*, The Hague, T.M.C. Asser Instituut, 1985, pp. 173-185.

Mosler, Hermann, 'General Principles of Law', in Bernhardt, Rudolf (ed.), *Encyclopedia of Public International Law*, North-Holland, Elsevier, 1995, Vol. II, pp. 511-527.

Murphy, John, 'Norms of Criminal Procedure at the International Military Tribunal', in Ginsburgs, George and Kudriavtsev, Vladimir (eds.), *The Nuremberg Trial and International Law*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1990, pp. 61-75.

Nemitz, Jan, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals*: *The International Criminal Tribunal for Rwanda 2000-2001*, Antwerp/Oxford/New York, Intersentia, Vol. 6, 2003, pp. 681-686.

Nollkaemper, André, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY', in Boas, Gideon and Schabas, William (eds.), *International Criminal Law Developments in the Case-law of the ICTY,* Leiden, Nijhoff, 2003, pp. 277-296.

Nollkaemper, André, *Kern van het internationaal publiekrecht*, tweede druk, Den Haag, Boom Juridische uitgevers, 2005, 481 pp.

Novak, Manfred, *U.N. Covenant on Civil and Political Rights / ICCPR Commentary,* Kehl/Strasbourg/Arlington, N.P. Engel Publisher, 1993, 947 pp.

O'Keefe, Roger, 'Recourse by the *ad Hoc* Tribunals to General Principles of Law and to Human Rights Law', in Delmas-Marty, Mireille *et al.* (eds.), *Les sources du droit international pénal*, Paris, Société de législation comparée, 2004, pp. 297-302.

Papa, Michele, 'Harmonization of General Principles of Criminal Law: A Critical Report on the Debate', *NEP*, No. 19, 2004, pp. 353-360.

Pastor, Daniel, 'El sistema penal internacional del Estatuto de Roma. Aproximaciones jurídicas críticas', in Baigún, David *et al.*, *Estudios sobre justicia penal. Homenaje al Profesor Julio B. J. Maier*, Buenos Aires, Editores del Puerto, 2005, pp. 699-727.

Pellet, Alain, 'Applicable Law', in Cassese, Antonio *et al.*, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, Vol. II, pp. 1051-1084.

Permanent Court of International Justice/Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee*, June 16th–July 24th, The Hague, Van Langenhuysen Brothers, 1920, 779 pp.

Piccigallo, Philip, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951*, Austin and London, University of Texas Press, 1979, 292 pp.

Piragoff, Donald and Clarke, Paula, 'The Emergence of Common Standards of "Due Process" in International and National Criminal Proceedings', *NEP,* No. 19, 2004, pp. 363-395.

Podestá Costa, Luis Alberto and Ruda, José María, *Derecho Internacional Público*, Buenos Aires, TEA, segunda reimpresión de la edición actualizada de 1985, Vol. 1, 656 pp.

Pradel, Jean, *Droit pénal comparé*, 2e édition, Paris, Dalloz, 2002, 803 pp.

Raimondo, Fabián, 'La individualización de las penas de prisión en las sentencias de los Tribunales Penales Internacionales *ad hoc* de las Naciones Unidas', *Relaciones Internacionales*, No. 21, 2001, pp. 143-159.

Raimondo, Fabián, 'Les principes généraux de droit dans la jurisprudence des tribunaux *ad hoc* : Une approche fonctionnelle', in Delmas-Marty, Mireille *et al.* (eds.), *Les sources du droit international pénal*, Paris, Société de législation comparée, 2004, pp. 75-95.

Reuter, Paul, *Droit international public,* Paris, Presses Universitaires de France, 1983, 595 pp.

Ripert, Georges, 'Les règles du droit civil applicables aux rapports internationaux (Contribution à l'étude des principes généraux du droit visés au Statut de la Court permanente de Justice internationale', in *RCADI*, Vol. 44 (1933-II), pp. 565-664.

Rivello, Roberto, 'Les principes généraux de droit et le droit international pénal', in Chiavario, Mario (ed.), *La justice pénale internationale entre passé et avenir*, Milano, Giuffrè, 2003, pp. 89-111.

Röling, Bert, 'The Nuremberg and the Tokyo Trials in Retrospect', in Bassiouni, Cherif and Nanda, Ved (eds.), *A Treatise in International Criminal Law*, Springfield, Illinois, Charles Thomas Publisher, 1973, Vol. I, Crimes and Punishment, pp. 591-608.

Röling, Bert and Rüter, Christiaan (eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948*, Amsterdam, University Press Amsterdam, 1977, Volume I, 515 pp.

Röling, Bert and Cassese, Antonio, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, Cambridge, Polity Press, 1993, 143 pp.

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

Rosenne, Shabtai, 'The Perplexities of Modern International Law. General Course on Public International Law', in *RCADI*, Vol. 291 (2001), pp. 9-472.

Rousseau, Charles, 'Principes de droit international public', in *RCADI*, Vol. 93 (1958-I), pp. 369-550.

Roxin, Claus, *Derecho Penal: Parte General*, Vol. I (Fundamentos. La estructura de la Teoría del Delito), traducción de la 2° edición alemana y notas por D. Luzón Peña *et al.*, Madrid, Civitas, reimpresión 2003 (1° edición en Civitas, 1997), 1071 pp.

Safferling, Christoph, *Towards an International Criminal Procedure,* Oxford, Oxford University Press, 2003 (first published in 2001), 395 pp.

Saland, Per, 'International Criminal Law Principles', in Lee, Roy (ed.), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results*, The Hague/London/Boston, Kluwer Law International, 1999, pp. 189-216.

Sassòli, Marco, 'La première décision de la Chambre d'Appel du Tribunal Pénal International pour l'Ex Yougoslavie : Tadić (compétence)', *RGDIP,* Vol. 100, No. 1, 1996, pp. 101-134.

Sassòli, Marco and Olson, Laura, 'Prosecutor v. Tadić. Case No. IT-94-1-A', *AJIL,* Vol. 94, No. 3, 2000, pp. 571-578.

Scaliotti, Massimo, 'Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility, Part 1', *ICLR,* Vol. 1, No. 1, 2001, pp. 111-172.

Scerni, Mario, *I principi generali di diritto riconosciuti dalle nazioni civili nella gjurisprudenza della Corte Permanente di Giustizia Internationale*, Padova, CEDAM, 1932, 195 pp.

Schabas, William, 'Barayagwiza v. Prosecutor. Decisions of the Appeals Chamber of the International Criminal Tribunal for Rwanda on prolonged detention prior to indictment and appearance before the Tribunal', *AJIL,* Vol. 94, 2000, pp. 563-571.

Schabas, William, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2001, 406 pp.

Schabas, William, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals*: *The International Criminal Tribunal for Rwanda 1994-1999*, Antwerpen/Groningen/Oxford/Vienna, Intersentia/Hart Publishing/Verlag Österreich, Vol. 2, 2001, pp. 539-554.

Schabas, William, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Antwerpen/Oxford/New York, Intersentia, Vol. 3, 2001, pp. 753-760.

Schabas, William, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1999-2000*, Antwerpen/Oxford/New York, Intersentia, Vol. 4, 2002, pp. 888-892.

Schabas, William, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 2000-2001*, Antwerp/Oxford/New York, Intersentia, Vol. 6, 2003, pp. 261-266.

Schabas, William, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*, New York, Cambridge University Press, 2006, 711 pp.

Schachter, Oscar, 'International Law in Theory and Practice. General Course on Public International Law', in *RCADI,* Vol. 178 (1982-V), pp. 9-396.

Scharf, Michael, 'Prosecutor v. Tadić. Case No. IT-94-1-T. ICTY, May 7, 1997', *AJIL,* Vol. 91, No. 4, 1997, p. 718-721.

Schlesinger, Rudolf, 'Research on the General Principles of Law Recognized by Civilized Nations', *AJIL*, Vol. 51, 1957, pp. 734-753.

Scott, James Brown (ed.), *The Hague Court Reports*, New York, Oxford University Press, Carnegie Endowment for International Peace, 1916, 664 pp.

Sereni, Angelo Piero, *Principi generali di diritto e processo internazionale*, ('Quaderni della Rivista di Diritto Internazionale', 1), Milano, Giuffrè, 1955, 98 pp.

Shahabuddeen, Mohamed, 'Municipal Law Reasoning in International Law', in Lowe, Vaughan and Fitzmaurice, Malgosia (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings,* Cambridge, Cambridge University Press, 1996, pp. 90-103.

Shahabuddeen, Mohamed, *Precedent in the World Court*, Cambridge, Grotius Publications/Cambridge University Press, 1996, 245 pp.

Shany, Yuval, *The Competing Jurisdictions of International Courts and Tribunals*, New York, Oxford University Press, 2003, 348 pp.

Simma, Bruno, 'The Contribution of Alfred Verdross to the Theory of International Law', *EJIL,* Vol. 6, No. 1, 1995, pp. 33-54.

Simma, Bruno et Paulus, Andreas, 'Le rôle relatif des différentes sources du droit international public : dont les principes généraux du droit', in Ascensio, Hervé *et al.* (eds.), *Droit international pénal*, Paris, Pedone, 2000, pp. 55-69.

Sinagra, Augusto, 'I principi generali di diritto nelle concezioni socialiste del diritto internazionale', in *Comunicazioni et Studi*, Milano, Giuffrè, 1978, Vol. 15, pp. 417-468.

Sluiter, Göran, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1993-1998*, Antwerpen/Groningen/Oxford/Vienna, Intersentia/Hart Publishing/Verlag Österreich, Vol. 1, 1999, pp. 282-285.

Sluiter, Göran, *International Criminal Adjudication and Collection of Evidence: Obligations of States*, Antwerpen, Intersentia, 2002, 441 pp.

Sluiter, Göran, 'The ICTR and the Protection of Witnesses', *JICJ*, Vol. 3, No. 4, 2005, pp. 962-976.

Smith, Alison, 'Child Recruitment and the Special Court for Sierra Leone', *JICJ*, Vol. 2, N. 4, 2004, pp. 1141-1153.

Smith, Bradley, *Reaching Judgment at Nuremberg*, New York, Basic Books Inc. Publishers, 1977, 349 pp.

Sorensen, Max, 'Principes de droit international public. Cours général', in *RCADI*, Vol. 101 (1960-III), pp. 1-254.

Strupp, Karl, 'Les règles générales du droit de la paix', in *RCADI*, Vol. 47 (1934-I), pp. 259-595.

Suy, Erik and Angelet, Nicolas, 'Article 25', in Cot, Jean-Pierre *et al.* (eds.), *La Charte des Nations Unies: Commentaire article par article*, 3rd edition, Paris, Economica, 2005, pp. 909-918.

Swaak-Goldman, Olivia, 'Prosecutor v. Erdemović, Judgment. Case No. IT-96-22-A', *AJIL,* Vol. 92, No. 2, 1998, pp. 282-287.

Swaak-Goldman, Olivia, 'Prosecutor v. Delalić. No. IT-96-21-T', *AJIL*, Vol. 93, No. 2, 1999, pp. 514-519.

Swart, Bert, 'Internationalized courts and substantive criminal law', in Romano, Cesare *et al.* (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia,* Oxford, Oxford University Press, 2004, pp. 291-316.

Thierry, Hubert, 'L'évolution du droit international. Cours général de droit international public', in *RCADI,* Vol. 222 (1990-III), pp. 9-186.

Thirlway, Hugh, 'The Law and Procedure of the International Court of Justice', *BYIL*, 1990, Vol. 61, pp. 1-133.

Thirlway, Hugh, 'The Sources of International Law', in Evans, Malcolm (ed.), *International Law*, 2nd edition, Oxford, Oxford University Press, 2006, pp. 115-140.

Tomuschat, Christian, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law', in *RCADI*, Vol. 281 (1999), pp. 9-438.

Tunkin, Grigory, '"General Principles of Law" in International Law', in René Marcic et al. (eds.), *Internationale Festchrift für Alfred Verdross zum 80. Geburstag*, München / Salzburg, Wilhelm Fink Verlag, 1971, pp. 523-532.

Tunkin, Grigory, 'International Law in the International System', in *RCADI*, Vol. 147 (1975-IV), pp. 1-218.

Tusa, Ann and Tusa, John, *The Nuremberg Trial,* London, Macmillan, 1983, 519 pp.

Van den Herik, Larissa, 'The Contribution of the Rwanda Tribunal to the Development of International Law', Leiden/Boston, Martinus Nijhoff Publishers, 2005, 324 pp.

Van der Wilt, Harmen, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1993-1998*, Antwerpen/Groningen/Oxford/Vienna, Intersentia/Hart Publishing/Verlag Österreich, Vol. 1, 1999, pp. 534-536.

Van der Wilt, Harmen, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1993-1998*, Antwerpen/Groningen/Oxford/Vienna, Intersentia/Hart Publishing/Verlag Österreich, Vol. 1, 1999, pp. 654-656.

Van der Wilt, Harmen, 'Commentary', in Klip, André and Sluiter, Göran (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Antwerpen/Oxford/New York, Intersentia, Vol. 3, 2001, pp. 669-683.

Verdross, Alfred (rapporteur), 'Les principes généraux de droit comme source du droit des gens', *AIDI*, Bruxelles, Librairie Falk et Fils, Paris, Pedone, Vol. 37, 1932, pp. 283-328.

Verdross, Alfred, 'Les principes généraux du droit dans la jurisprudence internationale', in *RCADI*, Vol. 52 (1935-II), pp. 191-251.

Verdross, Alfred, 'Les principes généraux de droit dans le système des sources du droit international public', in *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève, Institut Universitaire de Hautes Études Internationales, 1968, pp. 521-530.

Verhoeven, Joe, 'Article 21 of the Rome Statute and the Ambiguities of Applicable Law', in *NYIL*, Vol. XXXIII, 2002, pp. 3-22.

Virally, Michel, 'Panorama du droit international contemporain. Cours général de droit international public', in *RCADI*, Vol. 183 (1983-V), pp. 9-382.

Virally, Michel, 'Le rôle des "principes" dans le développement du droit international', in Battelli, Maurice et al., *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève, Institut Universitaire de Hautes Études Internationales, 1968, pp. 531-554.

Vitányi, Bela, 'La signification de la généralité des principes de droit', *RGDIP*, Vol. 80, 1976, pp. 536-545.

Vitányi, Bela, 'Les positions doctrinales concernant le sens de la notion de "principes généraux de droit reconnus par les nations civilisées"', *RGDIP*, Vol. 86, 1982, pp. 48-116.

Vogler, Richard, *A World of Criminal Justice*, Aldershot, Ashgate, 2005, 330 pp.

Waldock, Humphrey, 'General Course on Public International Law', in *RCADI*, Vol. 106 (1962-II), pp. 1-251.

Walther, Susanne, 'Cumulation of Offences', in Cassese, Antonio *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, New York, Oxford University Press, 2002, pp. 475-495.

Warbrick, Colin, 'States and Recognition in International Law', in Evans, Malcolm (ed.), *International Law*, 2nd edition, New York, Oxford Univeristy Press, 2006, pp. 217-275.

Weigend, Thomas, 'The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR, and the ICC: An Overview', *NEP*, No. 19, 2004, pp. 319-335.

Weil, Prosper, 'Le droit international en quête de son identité. Cours général de droit international public', in *RCADI*, Vol. 237 (1992-VI), pp. 9-370.

Weil, Prosper, '"The Court Cannot Conclude Definitively …" : N*on Liquet* Revisited', *CJTL*, Vol. 36, No. 1/2, pp. 109-119.

Weinreb, Lloyd, *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge, Cambridge University Press, 2005, 184 pp.

Werle, Gerhard, *Principles of International Criminal Law*, The Hague, TMC Asser Press, 2005, 485 pp.

Woetzel, Robert, *The Nuremberg Trials in International Law,* London/New York, Stevens & Sons Limited/Frederic Praeger Inc., 1960, 287 pp.

Wolff, Karl, 'Les principes généraux du droit applicables dans les rapports internationaux', in *RCADI*, Vol. 36 (1931-II), pp. 479-553.

Wright, Quincy, 'The Law of the Nuremberg Trial', in Mueller, Gerhard and Wise, Edward (eds.), *International Criminal Law*, South Hackensack / London, Fred Rothman & Co./Sweet & Maxwell Limited, 1965, pp. 239-278.

Zappalà, Salvatore, 'The Rights of the Accused', in Cassese, Antonio *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, New York, Oxford University Press, 2002, pp. 1319-1354.

Zemanek, Karl, 'The Legal Foundations of the International System. General Course on Public International Law', in *RCADI*, Vol. 266 (1997), pp. 9-336.