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# General Principles and Comparative Law

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## Abstract

*This article explores the source 'general principles of international law' from the point of view of comparative law scholarship. The currently accepted definition of general principles and methodology for identifying such principles are critiqued. The criterion of the representativeness of the major families of legal systems, to which courts and tribunals tend to pay lip service rather than applying rigorously, is meant to anchor general principles in state consent, but is not a sound technique either for identifying principles of relevance to international law or for preventing judges from referring only to the legal systems they know best. Furthermore, the emphasis on extracting the essence of rules results in leaving behind most of what is interesting and useful in what judges may have learned by studying municipal legal systems. Comparative scholarship is an obvious, rich, and strangely neglected source of guidance for international judges who wish to draw insights from legal systems outside international law.*

## 1 Introduction

Given the interdependence of domestic and international law, most obviously in areas such as human rights, environment, criminal liability, and commerce, international law has a good deal to learn from municipal legal systems. One important point of contact between international and municipal law is the source general principles of international law, as laid out in Article 38(1)(c) of the Statute of the International Court of Justice. Yet this source is highly controversial and largely neglected. One obvious reason for both the controversy and the neglect lies in difficulties with the underlying sources of validity of general principles: how can judges justify reliance on

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rules or concepts taken from other systems of law without arrogating to themselves law-making power? More in particular, how can such borrowing of rules from municipal systems be justified, given the astonishing diversity of legal systems and cultures of the world?

The principle that international adjudicators are entitled to draw on municipal legal systems to fill lacunae or for assistance in interpretation of international rules is a venerable one and is generally regarded as being anchored in international customary law. There are two striking features to the history of this principle, however. The first is that, despite the fact that both the ICJ and its predecessor, the Permanent Court of International Justice, have frequently made reference to this source of law, and judges have from time to time identified rules as ‘general principles’, neither Court has made use of this principle to decide a case based on a rule that has been ‘borrowed’ from a domestic legal system. The second is that the methodology for identifying general principles of international law, recognized and accepted in international doctrine and jurisprudence, represents a remarkably unsophisticated approach to interactions among legal systems. The vast scholarship on comparative law seems to have had little influence on most international jurists contemplating general principles of international law.

This article addresses two questions: first, why, given the obvious importance of domestic law to international law, have general principles as a source of law been exploited to such a limited extent? Secondly, what does recent scholarship on comparative law have to offer international jurists seeking to understand the interplay between these two levels? Particular attention will be paid to debates among comparatists regarding ‘borrowing’ or ‘transplanting’ of rules between legal systems and their pertinence to general principles of international law. Following a brief discussion of the relevance of general principles, and of municipal law more generally, to international law in section 2, I turn to a critical analysis of doctrinal approaches to general principles of law (section 3). I then present, in section 4, a comparative law approach to general principles and discuss its implications, with reference to jurisprudence of the International Criminal Tribunal for the former Yugoslavia, before concluding with section 5.

## 2 Domestic Law’s Relevance

As Sir Hersch Lauterpacht pointed out almost a century ago, international law has, throughout its history, drawn heavily on domestic law.<sup>1</sup> Many international legal norms are inspired by or directly derived from municipal norms, a fact that may escape our notice because they have become such a familiar part of the international landscape. Today, as international law expands into new areas that were previously thought to belong to the exclusive domestic jurisdiction of states, municipal law becomes an even more important touchstone for international law.<sup>2</sup> This is patently

<sup>1</sup> H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), at 38 ff.

<sup>2</sup> Schachter notes the relevance of municipal law for filling in gaps in emerging areas of international law: O. Schachter, *International Law in Theory and Practice* (1991), at 53.

true in the domain of criminal law: that body of law at the international level is of very recent vintage, while municipal legal systems have centuries of experience with this subject. One must, of course, recognize the particularities of criminal law at the international level, but this does not mean treating the international stage as a *tabula rasa* upon which criminal norms must be created from whole cloth and established as customary or conventional norms. The vast and rich experience of municipal legal systems is invaluable, and it is not surprising to see judges on international criminal tribunals making extensive use of this source.<sup>3</sup> The field of criminal law is instructive for another reason: in this field, the dangers and pitfalls posed by reliance on general principles are brought into sharp focus. Concern with the pedigree of norms remains prominent, but to the usual reasons for such concern is added another, particularly compelling reason: the principle *nulla crimen sine lege* requires judges to take great care to anchor their legal reasoning in posited rules.

Much less attention has been paid to general principles in other areas of law such as environment.<sup>4</sup> It is true that environmental law is a relatively new field in municipal as well as international law, and true as well that in some states environmental law is not at all well developed, so for these reasons it is perhaps not surprising that general principles have not been relied on very heavily in this area.<sup>5</sup> One must also recall that there are precious few environmental disputes the substance of which has been adjudicated at the international level. However, environmental disputes pose myriad problems relating not only to substance but to decision-making procedures, questions of evidence, standards and burdens of proof, or approaches to liability. Early environmental cases in particular were concerned with transboundary flows of pollutants, and heavy reliance was placed on analogies with domestic law: state territory was assimilated to property; emissions of pollutants were assimilated to various torts and delicts.<sup>6</sup> In the literature on transboundary environmental damage, one finds extensive debates on the relative merits of nuisance, trespass, negligence, good neighbourliness, and strict or absolute liability as jurists struggle to understand how transboundary pollution events should be understood in international law. As witnessed in the *Pulp Mills* case,<sup>7</sup> international environmental disputes often turn on arguments about

<sup>3</sup> Schachter made this prediction in 1991: *ibid.*, at 53.

<sup>4</sup> But see Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law', 27 *Ecology LQ* (2000–2001) 1295. The author is not discussing the mining of municipal environmental law for general principles of international law, but rather reference to municipal law in the process of drafting international conventions.

<sup>5</sup> But see the separate opinion of Judge Cançado Trindade, which describes a number of well-known environmental principles, such as prevention, precaution, and sustainable development, as general principles. It should be remarked that Cançado Trindade's approach departs to some extent from the general consensus regarding the definition of general principles within the meaning of Art. 38(1)(c), and from the accepted method, based on a voluntarist conception of international law, for deriving them. His position is more akin to natural law thinking, looking for general principles in an objective idea of law: *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ judgment of 20 Apr 2010, Separate Opinion of Judge Trindade, available at: [www.icj-cij.org/docket/files/135/15885.pdf](http://www.icj-cij.org/docket/files/135/15885.pdf).

<sup>6</sup> *Trail Smelter Arbitration (United States v. Canada)* [1941] 3 UNRIAA 1907.

<sup>7</sup> *Case concerning Pulp Mills on the River Uruguay*, *supra* note 5.

decision-making processes by national authorities, with the result that municipal norms of administrative law and judicial review come to be highly relevant. Given the wide array of municipal rules, institutions, and experience in these and other matters, it makes sense for international judges and arbitrators to turn to municipal law in ruling on international environmental cases. Taking a more expansive approach, the substance of international environmental law could be greatly enriched through enhanced contact with chthonic legal traditions, built on the paradigm of the living of an ecological life.<sup>8</sup> Justice Weeramantry's invocation of historical and contemporary law and policy in Ceylon/Sri Lanka is perhaps one of the most well-known steps in this direction.<sup>9</sup> Scholarship and legal development in many areas of international environmental law, notably in the area of biological diversity, have taken seriously the contributions of chthonic societies.

A question raised by this multitude of intersections between municipal and international law is where are these two systems of law situated in relation to one another?<sup>10</sup> In many important respects, international and municipal law occupy the same space. First, and most obviously, international law and municipal law are applicable in the same territorial space simultaneously. Secondly, the issues addressed by the respective systems increasingly overlap. And while at one time it may have seemed obvious that the subjects of international and municipal law are different – states for the former, primarily individuals for the latter – this is no longer apparent.<sup>11</sup> In criminal law, for example, there is no distinction on this point: both domestic and international law are concerned with the criminal liability of individuals. Similarly, regarding human rights norms, the legal fiction that states not individuals are the relevant subjects is becoming increasingly tenuous. In a growing number of fields, such as trade law and environmental law, international law is coming to have fairly or very direct ramifications for firms, organisations and individuals. Scholars who analyse the phenomena of global administrative law and the exercise of international public authority have argued that this expanding reach of international law has given rise to a need for principles, derived in large measure from municipal law, that govern the exercise of authority *vis-à-vis* individuals.<sup>12</sup>

<sup>8</sup> H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (4th edn, 2010), at 63; E. Goldsmith, *The Way: An Ecological World View* (1992).

<sup>9</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, Separate opinion of Judge Weeramantry.

<sup>10</sup> I have taken this question from Karen Knop, who posed it in a different context, namely the domestic application of international law. She argued for a comparative approach, treating international law as akin to foreign law: Knop, 'Here and There: International Law in Domestic Courts', 32 *NYUJ Int'l L & Pol* (1999) 501, at 525.

<sup>11</sup> Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-state Actors', in J. Petman and J. Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (2003), at ch 5; Klabbers *et al.*, *The Constitutionalization of International Law* (2009), at 157ff.

<sup>12</sup> See, e.g., Kingsbury *et al.*, 'The Emergence of Global Administrative Law', 68 *NYU J L and Contemporary Problems* (2005) 15; Von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field', 9 *German LJ* (2008) 1909.

If these conclusions about the relevance, actual and potential, of municipal law to international law are sound, then international jurists should focus attention on the theoretical underpinnings of and the methodological approaches to general principles of international law. The current state of both doctrine and case law is deeply unsatisfactory. Yet the subject is a fraught one. The connection between sources doctrine and the validity of international law is comparable to the connection between democratic procedures and the validity of municipal law. Because the questions that comparatists regularly grapple with bear such strong similarities to the issues raised by general principles, it seems appropriate to turn to that body of scholarship for insights.<sup>13</sup>

### 3 General Principles – A Brief Overview

#### A Theoretical Underpinnings

As is made clear from the debates regarding the inclusion of general principles among the sources of law in the ICJ Statute,<sup>14</sup> there are two main contending theories that seek to explain this source, based respectively on natural law and positivism. The latter school of thought has prevailed, at least for now: general principles of international law are today understood as principles derived from municipal law. Two main positivist approaches which are not always distinguished are formalism and voluntarism. A good example of the former is offered by Hart: a series of secondary rules exists in international law<sup>15</sup> that establishes how legal rules are to be constituted. According to this approach, general principles are a source of law for the purposes of the ICJ by virtue of their having been enshrined in its statute, an international convention, and for members of international society generally by virtue of international customary law. Voluntarist approaches, by contrast, place greater emphasis on the consent of states to be bound by rules, and here general principles encounter difficulties: it is the international judge not the state who establishes the rule's existence, 'discovering' it in domestic law. However, general principles can be justified by a voluntarist approach, provided that the rule in question is anchored in a sufficiently large number of domestic legal systems as to be essentially universal. Evidence that the rule exists in a number of states whose legal systems are representative of the world's 'families' of legal systems is often taken as sufficient for purposes of establishing a general principle.

<sup>13</sup> This approach is not novel. The relationship between comparative law and general principles has been commented on by, among others, Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations', 51 *AJIL* (1957) 734; Delmas-Marty, 'L'influence du droit comparé sur l'activité des Tribunaux pénaux internationaux', in A. Cassese and M. Delmas-Marty (eds), *Crimes internationaux et juridictions internationales* (2002), at 465; Schwarzenberger, 'Foreword' in B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (2002), at xi; Green, 'Comparative Law as a "Source of International Law"', 42 *Tulane L Rev* (1967–1968) 52.

<sup>14</sup> On the debates surrounding the inclusion and definition of general principles of law in the PCIJ Statute see Cheng, *supra* note 13, at 6–21; P. Guggenheim, *Traité de droit international public* (1967), at 294 ff.

<sup>15</sup> Hart famously denied that international law has secondary rules: H.L.A. Hart, *The Concept of Law* (2nd edn, 1994), at 213. But the doctrine of sources provides a perfect example of such rules.

In this manner, the source of validity of the rule can, by a somewhat circuitous route, be anchored in state consent rather than in the judge's authority.

While I do not espouse the voluntarist approach, one cannot deny the important legal and political reasons for wishing to ensure the consent of a large and varied body of states to an international rule. In a heterogeneous society defined by significant power imbalances, in which law-making processes can be described as democratic only in a very loose sense of that word, one has good reason to be wary of general principles as a source of law. At the same time, this source arguably<sup>16</sup> has a very important role to play both in the settlement of individual disputes and in the development of international law.

## B Methodology

The methodology indicated in doctrinal writings is generally described as involving two steps: first, the identification of a principle that is common to municipal legal orders belonging to the main legal systems of the world; secondly, the distillation of the essence of the principle.<sup>17</sup> To these is often added a third, namely modifying the principle to suit the particularities of international law.<sup>18</sup> This methodology is a fairly good reflection of the voluntarist approach to general principles, which, as I have noted, is the object of a reasonably solid doctrinal and jurisprudential consensus. However, the manner in which general principles have been handled by the ICJ and its predecessor, the PCIJ, reveals a disjuncture between doctrine and the practice of judges. While positivism, and more in particular the voluntarist approach, appears to have prevailed, an analysis of the jurisprudence reveals that, in fact, an approach tinged with natural law thinking has generally been employed. Alfred Verdross's classification of general principles describes well the approach taken: general principles may be understood as principles derived directly from the concept of law, such as good faith; as principles

<sup>16</sup> This position has its detractors: J. Verhoeven, *Droit international public* (2000), at 349. On the other hand, M. Cherif Bassiouni asserts that 'it is quite likely that "General Principles" will become the most important and influential source in this decade'. He refers to the need for general principles to flesh out international law in the domains of environment, economic development, and international and transnational criminal law: Bassiouni, 'A Functional Approach to "General Principles of International Law"', 11 *Michigan J Int'l L* (1989–1990) 769. Wolfgang Friedmann, writing in 1963, also stated his belief that general principles would grow in importance: Friedmann, 'The Uses of "General Principles" in the Development of International Law', 57 *AJIL* (1963) 279, at 279–280. He predicted that general principles formed through comparative law studies would be particularly influential in emerging areas of international law having to do with welfare, such as health, food, transportation, and management of resources as well as economic development: *ibid.*, at 282–283. Rudolph B. Schlesinger describes the task of identifying general principles as 'perhaps more important than any other to which the collected wisdom and experience of scholars trained in comparative law can be devoted': Schlesinger, *supra* note 13, at 734.

<sup>17</sup> On the customary validity of this rule of reception see: J. Combacau and S. Sur, *Droit international public* (8th edn, 2008), at 109–110; Verdross, 'Les principes généraux du droit dans la jurisprudence internationale', III *RCADI* (1935) 195, at 200.

<sup>18</sup> Schachter, *supra* note 2, at 52; Raimondo, 'Les principes généraux de droit dans la jurisprudence des Tribunaux ad hoc: une approche fonctionnelle', in M. Delmas-Marty *et al.* (eds), *Les sources du droit international pénal: L'expérience des tribunaux pénaux internationaux et le statut de la Cour pénale internationale* (2004), at 79.

derived from the nature of a legal institution, such as principles necessary for conventions; or as principles derived from municipal law.<sup>19</sup> In fact, judges of the PCIJ did not refer directly to municipal law to support their assertions of the existence of a principle, contenting themselves instead with a general reference to municipal law.<sup>20</sup> The same pattern has emerged in decisions of the ICJ,<sup>21</sup> whose statute reproduces the wording of that of the PCIJ nearly word for word. The voluntarist approach is acknowledged in judgments of the ICJ but the methodology indicated is not used. Judges of that Court have continued to assert the existence of general principles without reference to comparative studies of domestic law, often making reference to concepts much more at home in a natural law conception.<sup>22</sup>

### 1 Commonality or representativeness

As noted, one of the conditions for the identification of a general principle is its presence in a large number and variety of domestic legal systems. This requirement of the *generality* of a general principle can be justified in very different ways. First, as pointed out by Verdross, it is consonant with natural law thinking, according to which certain principles may be derived from the idea or concept of law itself.<sup>23</sup> The source of validity is here the objective idea of law, evidenced by the presence of a given rule or principle in a large number of legal systems. Within a formalistic approach to positivism, the immediate source of validity is the Statute of the ICJ and/or the customary rule permitting reception into international law of principles widely recognized in municipal law,<sup>24</sup> while a voluntarist approach would take the source of validity to be the presence of the principle in municipal systems, which serves as a proxy for state consent.<sup>25</sup>

For many scholars who do not espouse a strictly voluntarist approach, state consent is important for reasons of a different order, having to do with respect for democratic principles. In a post-colonial setting, in a heterogeneous society marked by gross imbalances of wealth and power, in a legal system in which the legitimacy of courts and tribunals and the validity of their findings rests on a thin consensus and can never be taken for granted, international jurists must take great care when they mine

<sup>19</sup> Verdross, *supra* note 17, at 204.

<sup>20</sup> Guggenheim, *supra* note 14, at 299–300.

<sup>21</sup> Joe Verhoeven asserts that '*la CIJ n'a jamais fait explicitement application d'un principe général de droit ainsi compris* [that is, as a result of a survey of municipal law], *même dans les matières principalement procédurales où leur utilité est réputée la plus manifeste. Elle s'est contentée, le cas échéant, de les écarter expressément*': Verhoeven, *supra* note 16, at 348. It is striking that the most quoted passage from the ICJ on general principles is drawn from a separate opinion: *International Status of South West Africa (Advisory Opinion)* [1950] ICJ Rep 128, Separate Opinion of Lord McNair, at 148. Whereas in the judgment itself, the Court declined to apply the concept of mandate as a general principle: *ibid.*, at 132.

<sup>22</sup> Verhoeven, *supra* note 16, at 348.

<sup>23</sup> Verdross, *supra* note 17, at 202–203.

<sup>24</sup> Combacau and Sur, *supra* note 17, at 109.

<sup>25</sup> Grounding the validity of general principles in the international conventional or customary rule of reception is consonant with a formal approach, such as that espoused by Hans Kelsen. However, this will probably not be sufficient from the point of view of a voluntarist conception of validity in international

municipal systems for potential international legal norms.<sup>26</sup> Fairness, democratic principles, rule of law, and self-determination all demand that the validity of a norm found in a number of municipal legal systems not be taken for granted. However, the representativeness of general principles is little more than a legal fiction, although the approach taken by many judges of the International Criminal Tribunal for the former Yugoslavia (ICTY) indicates that this may be changing, as will be discussed below.<sup>27</sup> Many scholars conclude that the dearth of references to a wide variety of domestic legal systems is problematic<sup>28</sup> and undermines the credibility of general principles as a source.<sup>29</sup> A smaller number conclude that such wide-ranging comparative scholarship is not necessary.<sup>30</sup>

Various questions present themselves regarding this requirement of commonality or representativeness. First, carrying out a comprehensive survey of the municipal

law, which requires states to consent to be bound. See Fastenrath, 'Relative Normativity in International Law', 4 *EJIL* (1993) 305, at 324 ff.

<sup>26</sup> For a very compelling defence of positivism based not so much on the soundness of this approach and more on insights into the nature of international society and the resulting limitations for international law see Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413, at 420 ff.

<sup>27</sup> Raimondo, *supra* note 18; Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY', in G. Boas and W. Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (2003), at 277. Examples of cases in which an attempt has been made to survey a wide range of municipal legal orders include *Prosecutor v. Erdemović* (1997), IT-92-22-A, ICTY Appeals Chamber, Joint Separate Opinion of Judge McDonald and Judge Vohrah, at para. 59 ff, addressing the availability of the defence of duress for murder (the reasons set out in this separate opinion were adopted by the Tribunal in its judgment); *Prosecutor v. Delalić* (2001), IT-96-21-A, ICTY Appeals Chamber, at paras 580 ff on diminished mental responsibility as a defence; *Prosecutor v. Furundžija* (1998), Case no. IT-95-17/1-T, ICTY Trial Chamber, at paras 177 ff on the *actus reus* element of the crime of rape; *Prosecutor v. Kunarac* (2001), IT-96-23-T and IT-96-23/1 T, ICTY Trial Chamber, at paras 436 ff, on the *mens rea* element of rape. *Kunarac* is interesting in that significant variety was found in the very large number of jurisdictions surveyed, but the Tribunal was able to extract a 'common denominator' regarding the absence of consent: *ibid.*, at para. 460. In *Erdemović* and *Furundžija*, the Tribunal reached the conclusion that no general principle could be derived from municipal law due to divergences among national legal orders.

<sup>28</sup> Raimondo notes that the judges of the PCIJ and the ICJ did not and do not undertake comparative research to determine whether a given principle is common to a range of legal systems: Raimondo, *supra* note 19, at 79. See also Schachter, *supra* note 2, at 51; Raimondo, *supra* note 18, at 79; De Frouville, 'Les tribunaux pénaux internationaux et les principes généraux de droit: Quelques commentaires', in Delmas-Marty *et al.* (eds), *supra* note 18, at 392.

<sup>29</sup> Verhoeven, *supra* note 16, at 348. Georg Schwarzenberger, in his foreword to Bin Cheng's study of general principles, calls upon comparatists to inform international jurists of commonalities among municipal legal systems: Schwarzenberger, *supra* note 13, at xii. Rudolph Schlesinger, who notes that judges tend to proceed on the basis of hunches, concurs with Schwarzenberger: Schlesinger, *supra* note 13 at 735.

<sup>30</sup> De Frouville draws a distinction between comparative law and the identification of general principles, noting that the methodology of the former requires rigorous and comprehensive research because its purpose is to enhance knowledge of law, while the judge seeking to fill a gap in international law through reference to general principles is performing a normative rather than a scientific function: De Frouville, *supra* note 28, at 392. While I generally agree with De Frouville's characterization of both comparative law and the identification of general principles, I note that there is another aspect to comparative law, namely the processes through which legal systems influence one another. In this respect in particular, international jurists have a good deal to learn from comparatists.



legal systems of the world on a particular issue is beyond the capacity of international courts and tribunals. As a result, doctrine and jurisprudence refer to the notion of representativeness, which is to be attained by determining whether a given principle is common to the major legal systems of the world. In practice, particularly since the end of the Cold War, this has meant looking at two legal orders, common law and civilian. Judges sitting on the ICTY have paid greater attention to geographic representativeness, but little serious effort has been invested in addressing the problems with this 'systems' approach: how best to identify the major legal systems of the world and group domestic legal orders within these categories? And if we are able to come up with a satisfactory categorization, what have we established in demonstrating that a particular legal rule is found in states belonging to each of these categories?

It is not clear how best to address the problem of representativeness. We could conclude that the methodology currently employed does not permit international judges to satisfy themselves as to the generality of potential general principles, notably due to serious flaws in the conception of categories of legal systems. Scholars occasionally make reference to other possible approaches,<sup>31</sup> notably HP Glenn's approach based on legal traditions.<sup>32</sup> Nevertheless, while the flaws of the 'legal systems' approach are widely acknowledged, this approach continues to be relied upon. One reason for this may be that Glenn's approach is vastly more demanding: not only does he identify seven<sup>33</sup> as opposed to two or three groupings, but many of the traditions he identifies, notably the chthonic tradition, may be difficult for international jurists to investigate.

Certainly, there is vast room for improvement in the practice of identifying general principles. Research on domestic legal systems could be carried out with much more rigour. International judges could pay closer attention to the research on municipal law presented to them by the parties.<sup>34</sup> International jurists could engage more with comparative law scholarship. Still, questions would remain regarding the pertinence of a finding that a particular rule is present in legal orders 'representing' the major systems or traditions of the world.

Another way of conceptualizing the problem of representativeness is to ask whether one should expect homogeneity among the legal traditions of the world sufficient to yield any workable general principles.<sup>35</sup> Assumptions about commonalities and convergences among municipal legal systems may not have been unreasonable at the time of the creation of the PCIJ, when one could still speak of 'civilized nations' without explanation or apology, but would have been questionable in 1948 and give rise to

<sup>31</sup> F. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (2008), at 54.

<sup>32</sup> Glenn, *supra* note 8.

<sup>33</sup> They are: chthonic; Talmudic; civil law; Islamic; common law; Hindu; and Asian: *ibid*.

<sup>34</sup> Verhoeven notes that on one occasion on which a party before the ICJ presented extensive documentation on municipal law, the Court does not appear to have taken it into account: Verhoeven, *supra* note 16, at 348. The case was *Case concerning the Continental shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Rep 18.

<sup>35</sup> Weil, 'Cours général de droit international public', 237 *RCADI* (1992-VI) 146; Verhoeven, *supra* note 16, at 348.

serious doubts today. Such problems were famously identified by Grigory Tunkin, who argued that ‘[t]here are . . . no general principles “common to all States”’.<sup>36</sup> More recently, Prosper Weil has expressed doubt as to the existence of a common legal patrimony: ‘[o]n retrouve ici les douces illusions de l’oecuménisme juridique et les dures réalités du multiculturalisme juridique: à moins de s’en tenir à un niveau très élevé d’abstraction et de généralisation . . . il y a plus de différences que de ressemblances entre les grands systèmes juridiques du monde’.<sup>37</sup> Tunkin concludes that general principles are to be found in international customary and conventional law;<sup>38</sup> Weil concludes that we should understand general principles as a material but not a formal source of law.<sup>39</sup>

If it could be shown, on the basis of fairly extensive data, that a given principle is widespread among municipal legal systems, then concerns about its validity as a general principle might be allayed. But this leads us to a third set of problems associated with representativeness, namely whether, assuming it could be established in a given case, it is an acceptable proxy for state consent. More importantly, does representativeness provide us with any assurances that the method of identifying general principles is consonant with democratic principles and self-determination? I will return to this question below.

## 2 Distillation

Another aspect of the methodology of deriving general principles, which appears to be linked to concerns about both pedigree and legitimacy, is the distillation of the municipal principle to its essential elements. The following extract from the separate opinion of Judge McNair in *South West Africa* is often quoted as an explanation of the means by which a general principle is extracted from a municipal rule:

The way in which international law borrows from this source [general principles] is not by means of importing private law institutions ‘lock, stock and barrel,’ ready-made and fully equipped with a set of rules. . . . [T]he true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policies and principles rather than as directly importing these rules and institutions.<sup>40</sup>

While the impetus for this process of distillation seems clear enough, its benefits are more difficult to discern. Weil expresses serious reservations about the process, arguing that it results in norms that are too general to be of any real value: ‘[l]e processus d’abstraction-généralisation conduit à s’en tenir à un essentiel de plus en

<sup>36</sup> Tunkin, ‘Coexistence and International Law’, 95 *RCADI* 5 (1958-III) at 26. Tunkin rejects the notion that there could be any but superficial resemblance between rules of socialist and bourgeois legal systems.

<sup>37</sup> Weil, *supra* note 35, at 146–147. See also Verhoeven, *supra* note 16, at 348, citing Weil with approval.

<sup>38</sup> Tunkin, *supra* note 36, at 26.

<sup>39</sup> In other words, international jurists can draw inspiration from the substance of domestic rules, but the fact that a rule exists in a range of domestic legal systems does not mean that it is valid as an international norm: Weil, *supra* note 35, at 148.

<sup>40</sup> *South-West Africa Case*, Separate opinion of Sir Arnold McNair, *supra* note 21, at 148.

*plus désincarné. . . . D'une certaine manière, le processus d'abstraction-généralisation est autodestructeur.*<sup>41</sup>

One result of the process of distillation is to purge a rule of its municipal taint – it no longer appears to have too close an association with particular legal systems or states, having been transformed through the process of distillation into a principle of *international* law. In a similar vein, Bruno Latour describes the process through which scientific discoveries are transformed from controversial arguments based on ambiguous data into simple facts, or black boxes: in this process, the association of a scientific conclusion with a group of scientists and with the process through which it was derived is attenuated until, finally, the conclusion is taken up without reference to the people and events that brought it into existence. It comes to be an element in arguments about other scientific conclusions; it ceases to be contested. Key to this progression from controversial argument to taken-for-granted fact seems to be the imposition of distance between the fact and the process through which it was brought into the world. Something like this seems to be at work in the methodology for the derivation of general principles, and may go some distance to explaining the authoritativeness of maxims, preferably rendered in Latin:<sup>42</sup> neither process nor authorship remains apparent to most observers, and the principle assumes the qualities of a black box.

## 4 Comparative Law Perspectives

### A *Functionalism*

The approach taken in international law to extracting general principles from municipal law is known in comparative law scholarship as functionalism, appearing to be most closely related to a particular approach to functionalism which Ralf Michaels describes as finalism. Finalism is rooted in Aristotelian notions of teleology: the function of the rule is its purpose. The purpose of rules which may appear dissimilar can be identified by asking what kinds of problems they are destined to solve. Legal institutions may be many and varied, but the problems they confront are universal; thus, universal principles of law can be discovered by working towards them through the function or purpose of legal rules.<sup>43</sup> This approach is evident in calls made by various scholars of international law to identify a 'common core of legal principles' through comparative research.<sup>44</sup>

This teleological approach has fallen somewhat out of favour among comparatists: doubts have arisen regarding the possibility of isolating *the* essence of a legal rule or in-

<sup>41</sup> Weil, *supra* note 35, at 146.

<sup>42</sup> As Schachter notes, '[e]xpressing tautologies in Latin apparently adds to their weight in judicial reasoning': Schachter, *supra* note 2, at 54.

<sup>43</sup> Michaels, 'The Functional Method of Comparative Law', in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006), at 345, 345–347.

<sup>44</sup> Schlesinger, *supra* note 13, at 741; this argument is probably closest associated with Jenks: C.W. Jenks, *The Common Law of Mankind* (1958).

stitution. Consider the various ways in which different legal systems determine when compensation must be paid. How are we to identify *the* essence of these norms? One could argue, quite plausibly, that the purpose of this rule is to ensure that victims of another's fault will be compensated for damage suffered thereby. In many legal systems, though not all, damages are supposed to serve the purpose of compensation, not punishment. Punitive damages are available in some jurisdictions, but a rule permitting punitive damages is probably not sufficiently widespread to qualify as a general principle. So can we say that the essence of the rule that victims of fault receive damages is compensation? Perhaps, but this is to ignore the other, vitally important function of the rule: to reinforce the standard of conduct. In a well-functioning legal system, the rule will serve not merely to compensate victims of fault but to reduce the number of faults, and thus the number of victims. So can we say that the compensation rule is really about enforcing standards of behaviour? Perhaps. Certainly, this explanation does a better job of indicating why a distinction should be drawn between victims of fault and victims of genuine accidents. But there is still another reading available: the essence of the rule may be to reduce resort to self-help, with its inherent dangers of tit-for-tat and escalation.<sup>45</sup> In short, a rule has many different 'essences', which advance or recede as a function of the perspectives and purposes of observers.

Another version of functionalism adopted by many leading comparatists is more instrumental in nature: the scholar is less interested in the ultimate finality of a rule than in the manner in which it meets social needs. 'If law fulfils functions and meets societal needs, then the lawyer's job is to develop laws that perform these tasks ("social engineering"), and comparative law can help compare the ability of different solutions to solve similar problems, and spur similar degrees of progress.'<sup>46</sup> Such assumptions as these seem to be at work in Lord McNair's approach to the trust in the *South West Africa* case:

Nearly every legal system possesses some institution whereby the property (and sometimes the persons) of those who are not *sui juris*, such as a minor or a lunatic, can be entrusted to some responsible person as a trustee or *tuteur* or *curateur*. The Anglo-American trust serves this purpose, and another purpose even more closely akin to the Mandates System, namely, the vesting of property in trustees, and its management by them in order that the public or some class of the public may derive benefit or that some public purpose may be served. The trust has frequently been used to protect the weak and the dependent, in cases where there is 'great might on the one side and unmight on the other', and the English courts have for many centuries pursued a vigorous policy in the administration and enforcement of trusts.<sup>47</sup>

Other comparatists seek to distance themselves from teleological approaches altogether, focusing instead on the utility of a particular institution to society<sup>48</sup> or functional equivalence.<sup>49</sup> The interconnections between law and culture, politics, society,

<sup>45</sup> I am grateful to Ron Niezen for this insight.

<sup>46</sup> Michaels, *supra* note 43, at 351.

<sup>47</sup> *South West Africa Case*, Separate opinion of Lord McNair, *supra* note 21, at 149.

<sup>48</sup> Michaels, *supra* note 43, at 349 ff.

<sup>49</sup> *Ibid.*, at 356 ff.

etc. are not denied, but it is assumed that '[l]aw progressively adapts to social needs or interests, or develops through interacting with its environment'.<sup>50</sup> Based on this assumption, one can think of law in terms of function – societies face similar problems and, though they respond to them in different ways, the results are similar.<sup>51</sup> A much-cited – and much criticized – description of the comparatist's task is provided by Zweigert and Kötz:

The basic methodological principle of all comparative law is that of functionality. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function. . . . The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results. The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concept of one's own legal system.<sup>52</sup>

Regarding the manner in which comparatists work, Zweigert and Kötz's approach bears a strong resemblance to the accepted international law methodology:

[W]hen the process of comparison begins, each of the solutions must be freed from the context of its own system and, before evaluation can take place, set in the context of all the solutions from the other jurisdictions under investigation. Here too we must follow the principle of functionality: the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need.<sup>53</sup>

As Michaels argues, functionalists working in the field of comparative law tend to use a wide range of concepts. 'Comparative lawyers', he argues, 'pick and choose different concepts, regardless of their incompatibility. There is still a strong faith that the similarities between different legal orders revealed by the functional method are neither the result of circular reasoning, nor mere evidence of similar needs between societies, but proof of deeper universal values.'<sup>54</sup>

Functionalism in comparative law is criticized on many scores, notably for its theoretical incoherence<sup>55</sup> and for taking a unidimensional approach to the complex social phenomenon that is law. As Günter Frankenberg states, responding to Zweigert and Kötz:

How solutions can be 'cut loose' from their context and at the same time be related to their environment, how law can be 'seen purely' as function satisfying a 'particular' need, escapes me. It seems to require two contradictory operations: first, suppressing the context and considering it; and then moving from the general (function) to the specific without knowing what

<sup>50</sup> Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law', 26 *Harvard Int'l LJ* (1985) 411, at 438.

<sup>51</sup> *Ibid.*, at 436.

<sup>52</sup> K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (2nd edn, 1998), at 34.

<sup>53</sup> *Ibid.*, at 44.

<sup>54</sup> Michaels, *supra* note 43, at 360.

<sup>55</sup> *Ibid.*, at 363.

makes the specific specific. The functionalist negates the interaction between legal institutions and provisions by stripping them from their systemic context and integrating them in an artificially universal typology of ‘solutions.’ In this way, ‘function’ is reified as a principle of reality and not taken as an analytical principle that orders the real world.<sup>56</sup>

Given the heterogeneity of international society, this focus on law and culture is well worth exploring. The generally accepted methodology for identifying general principles rests, as discussed above, on an assumption that it is possible to extract a legal rule or principle from its context, rendering it culturally neutral and therefore applicable at the international level. If this assumption is flawed, then the methodology must be rethought.

Rosalie Jukier’s comparisons of apparently similar civilian and common law concepts draw our attention to the significant problems with a functional approach. Her analysis takes into account the broader legal culture in which these concepts are embedded, permitting her to identify important differences between apparently similar pairs of concepts – concepts that carry out the same function in their respective legal systems.<sup>57</sup> In her discussion of specific performance, for example, she notes the relevance of historical features of legal systems, in this case the distinction between common law courts and courts of Chancery.<sup>58</sup> Another example Jukier provides involves a comparison of the common law doctrine of frustration with the civilian doctrine of *imprévision*. Again, from a functional perspective, these doctrines look pretty much alike, but from a doctrinal perspective one notes that not only is *imprévision* more difficult to invoke than frustration, it is also seen as an aspect of the performance of the contract, whereas frustration is considered at the point of analysing remedies for breach of contractual obligations. The civilian approach is shaped by the presence of the doctrine of good faith.<sup>59</sup>

It must be borne in mind that Jukier is discussing comparative law in the classroom; obviously, the goals of professor and student are different from those of judge and lawyer. Nevertheless, this analysis makes abundantly clear how much a functional approach based on a distillation of a rule – the approach espoused in international law – would miss. Her analysis provides a good deal of support to Weil’s concerns about the self-destructive nature of the process of distillation on which international law doctrine insists in the identification of general principles. It also becomes clear how difficult comparative law can be and how challenging the process of ‘borrowing’ or ‘transplanting’ norms. But Jukier’s point is most emphatically not *Cave! Hic dragones*.

Critics of functionalism generally argue that legal rules have emerged not only as responses to problems but also as parts of legal systems and cultures as well as broader cultures in which legal systems are embedded. These critics disagree, however, on

<sup>56</sup> Frankenberg, *supra* note 50, at 440.

<sup>57</sup> Jukier, ‘Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom’, 50 *McGill LJ* (2005) 789, at 799.

<sup>58</sup> *Ibid.*, at 801–803. It is well worth reading the further discussion of specific performance in common and civil law.

<sup>59</sup> *Ibid.*, at 799–801.

issues relating to the transplanting of legal rules from one system to another. Disagreement arises in particular as to whether one can speak of transplants at all and as to the conditions that favour a 'successful' transplant.

## B Law and Culture

Playing a key role in the controversy over legal transplants are different approaches to the relationship between law and society. Near one end of the spectrum is Alan Watson, who, while acknowledging an important connection, does not believe that law is closely intertwined with the society and culture within which it emerges:<sup>60</sup> it is much more the affair of lawyers and judges than of laypersons. He argues, further, that a law reformer looking for inspiration to solve a legal problem can feel free to borrow rules and institutions from other legal systems without being particularly concerned either about the legal, social, or cultural context of the rules or with how well they work in that context.<sup>61</sup> The legal rule is simply an idea that can be taken out of its context and applied elsewhere.<sup>62</sup> He acknowledges that a transplanted rule will not be identical to the rule in the original system, but points out that a rule in one legal system will not be the same at two moments in time.<sup>63</sup> The adaptation of the transplanted rule to its new host, and the host to it, should not, he argues, be seen as an indication of the failure of the transplant: it is an inevitable process. Watson's argument is bolstered by his extensive and detailed discussions of transplants from Roman law into legal systems around the world.

Near the opposite end of the spectrum is Pierre Legrand, who argues that law is inextricably linked not only to the legal culture but also to the broader culture in which it emerged and continues to be interpreted and applied.<sup>64</sup> He understands this embeddedness of legal rules in culture to mean that legal transplants are impossible:<sup>65</sup> to believe otherwise, he states, is to believe that a legal rule is nothing more than the series of words that appear in a legal instrument.<sup>66</sup> '[T]he meaning of a rule', Legrand argues, 'is a function of the interpreter's epistemological assumptions which are themselves historically and culturally conditioned'.<sup>67</sup> Interpretations thus depend on the interpreter, but also 'upon a framework of intangibles internalised by the interpreter . . . which colours and constrains the interpreter's subjectivities'.<sup>68</sup> This framework is a particular culture. When a rule is taken out of its culture, 'as the words cross boundaries there intervene a different rationality and morality to underwrite

<sup>60</sup> Watson, 'Comparative Law and Legal Change', 37 *Cambridge LJ* (1978) 313, at 314–315 and 321.

<sup>61</sup> *Ibid.*, at 315.

<sup>62</sup> *Ibid.*

<sup>63</sup> A. Watson, *Legal Transplants: An Approach to Comparative Law* (1993), at 19–20.

<sup>64</sup> Legrand, 'Against a European Civil Code', 60 *MLR* (1997) 47; Legrand, 'On the Singularity of Law', 47 *Harvard Int'l LJ* (2006) 517, at 524; P. Legrand, *Le droit comparé* (3rd edn, 2009), at ch. 1; Legrand, 'The Impossibility of Legal Transplants', 4 *Maastricht J European and Comparative L* (1997) 111.

<sup>65</sup> *Ibid.*, at 114.

<sup>66</sup> *Ibid.*, at 113–114.

<sup>67</sup> Legrand, 'What Legal Transplants?', in D. Nelken and J. Feest (eds), *Adapting Legal Cultures* (2001), at 58.

<sup>68</sup> *Ibid.*, at 61.

and effectuate the borrowed words . . . Accordingly, the imported form of words is inevitably ascribed a different, local meaning which makes it *ipso facto* a different rule.<sup>69</sup> ‘At best’, he concludes, ‘what can be displaced from one jurisdiction to another is, literally, a meaningless form of words. . . . In any meaningful sense of the term, “legal transplants,” therefore, cannot happen.’<sup>70</sup> It is likely, as Michele Graziadei argues, that the point being made here is more modest than it appears at first glance:<sup>71</sup> because the rule must undergo such significant changes as it is taken from one context and placed in another, it does not make sense to speak of it as the same rule,<sup>72</sup> a point which Watson acknowledges, as noted above.

As one would anticipate, other leading comparatists tend to fall between these two positions, seeing legal rules *both* as embedded in a legal system and a culture *and* susceptible of transmission from one system to another. H. Patrick Glenn develops an approach based on the notion of tradition, specifically, traditions as information<sup>73</sup> which can be transmitted through various means.<sup>74</sup> Glenn argues that legal traditions are commensurable, comparable. Indeed, he notes that complex traditions, which ‘incorporat[e] multiple internal and lateral traditions which are not consistent with each other and which may not even be consistent with the leading version of the major tradition’,<sup>75</sup> possess identities which are not exclusive of other traditions. He argues that traditions react to, interpret, learn, and borrow from one another all the time.<sup>76</sup>

A similar approach is taken by Nicholas Kasirer, who contrasts the empire and cosmos of law. Whereas an imperial approach focuses attention on the formally binding legal rules in force in a given, clearly defined territory, a cosmological approach is also concerned with legal cultures and with structures of thought characteristic of particular legal traditions.<sup>77</sup> Kasirer champions an approach in which emphasis is placed on the encounter between two legal traditions, seen as a cross-cultural dialogue. Kasirer envisages a nomadic jurisprudence which places emphasis on the ‘ongoing *métissage* between and among legal orders’.<sup>78</sup> An approach based on *métissage* requires one to bracket concern with the formal sources of norms and to step away from sources doctrine, and more in particular to take one’s distance from questions relating to the territorial application of formally binding legal norms: a nomadic approach. Kasirer states, ‘[N]omadic jurisprudence is neither universalist

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, at 63.

<sup>71</sup> Graziadei, ‘Comparative Law as the Study of Transplants and Receptions’, in Reimann and Zimmermann (eds), *supra* note 43, at 470.

<sup>72</sup> Legrand, ‘Issues in the Translatability of Law’, in S. Berman and M. Wood (eds), *Nation, Language and the Ethics of Translation* (2005), at 40.

<sup>73</sup> Glenn, *supra* note 8, at 13.

<sup>74</sup> *Ibid.*, at 43.

<sup>75</sup> *Ibid.*, at 367.

<sup>76</sup> *Ibid.*, at 374.

<sup>77</sup> Kasirer, ‘Bijuralism in Law’s Empire and Law’s Cosmos’, 52 *J Legal Education* (2002) 29.

<sup>78</sup> Kasirer, ‘Legal Education as *Métissage*’, 78 *Tulane L Rev* (2003–2004) 481, at 485.



nor cosmopolitan in ambition. It has none of the rootedness of local legal knowledge, nor does it have the moral pretensions of legal universalism or the brash confidence of cosmopolitan law that sees itself as at home in any setting.<sup>79</sup>

These insights are very pertinent for international jurists. They remind us of a central objective of the teaching of comparative and historical approaches to law: to learn to see one's own legal tradition through the eyes of others. This serves to remind jurists that our own traditions are particular as opposed to universal, representing just one out of many possible approaches to law and legal thought.<sup>80</sup> In international law, where the shadow of colonialism looms large, this is highly salutary. One of the reasons for treating general principles with suspicion is that, too often, the legal reasoning used to identify them simply involves elevating legal rules and concepts with which individual judges are familiar from their own legal education and practice to the level of universal truths, sometimes without any reference to a source at all. Comparative and historical perspectives help to remind jurists that our legal cultures did not spring from the heads of gods but were built, demolished, and rebuilt by many hands over the course of many years in response to local conditions, isolated events, trends that surged through societies and then disappeared, and many other forces besides. An awareness of the particularity of one's own legal culture can prompt the kind of concern for sources of law – or, perhaps more accurately, concern for possible sources of the law's validity – that even international jurists who are less than interested in questions of pedigree can feel acutely.

Beyond this, what does a nomadic approach offer to judges on international courts? To what extent can explorations of *métissage* make the journey from the Montréal classroom to the bench in The Hague? Judges charged with deciding a particular case are concerned with something other than opening their minds and learning about their own and others' legal cultures; they must pronounce on the validity and interpretation of rules and the content and boundaries of rights and obligations, and they must issue judgments that have immediate impacts on actors. In many domestic systems, judges can count on a degree of consensus about the legitimacy of their offices and the courts on which they sit, and may as a result benefit from some latitude to explore other legal systems in search of relevant rules and concepts. At the international level, a more conservative attitude towards the validity of legal norms may seem necessary for a variety of reasons: the need for international courts and tribunals to bolster their legitimacy in the eyes of parties to the dispute and to a wider audience; the jealousy with which states protect their sovereignty and resulting hesitations about 'submitting' to a group of judges; the relative thinness of the consensus that undergirds international law; the democratic deficit in international law.

Kasirer's comments about the importance of the encounter to which the notion of *métissage* draws attention are particularly helpful here. Underlying the methodology of general principles are questions about the relation between international and municipal law. General principles do not represent the only point of encounter or the

<sup>79</sup> *Ibid.*, at 491.

<sup>80</sup> Kasirer, *supra* note 77, at 40.

most important, but this is a particularly visible point, nonetheless, given its prominent (though ambiguous) place in the architecture of international law. Kasirer's characterization of *métissage* as being neither universalist nor cosmopolitan maps onto the two dominant threads in the doctrine of general principles. On the one hand is the natural law position that general principles are those principles that are proper to the concept of law and of the legal system itself. Among these are the principles that have taken on the qualities of the black box, with their origins and the controversies they once provoked forgotten by all but a few legal historians. On the other hand is the dominant, positivist position that general principles are those that, having a presence in many jurisdictions, are immediately recognizable to jurists around the world – at home everywhere. *Métissage* speaks of a very different process, in which a dialogue takes place among a group of lawyers and judges who draw on different legal cultures in order to understand a problem that arises in a particular time and place and identify a rule, principle, or legal concept that, it is hoped, will have some relevance at other times and in other places.

### C Legal 'Borrowing' or 'Transplantation'

The above discussion suggests several interim conclusions: bodies of law are not closed systems but are better regarded as traditions, embedded in cultures. Because cultures, including legal cultures, are in constant contact and communication with one another, they will inevitably 'borrow' and learn from one another in various ways. The embeddedness of legal rules in a culture dooms to failure any attempt to boil a rule down to its essence: when legal cultures learn from one another, they do not take up essences but living cultural artefacts. In order properly to understand and appreciate a rule, one must know a great deal – the more the better – about the culture in which it emerged and is embedded. But what are the preconditions for a successful 'transplant'? Watson, Glenn, and Graziadei provide us with similar answers, albeit from different perspectives: we do not know. Like any process of learning across cultures, or adaptation of a culture to changing conditions, its outcome can be neither predicted nor controlled.

Gunther Teubner describes the process of transplantation as one of 'irritation':

[W]hen a foreign rule is imposed on a domestic culture, . . . [i]t is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events. . . . It is an outside noise which creates wild perturbations in the interplay of discourses within these arrangements and forces them to reconstruct internally not only their own rules but to reconstruct from scratch the alien element itself. 'Legal irritants' cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.<sup>81</sup>

<sup>81</sup> Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences', 61 *MLR* (1998) 11, at 12.

One can make certain general predictions about the fate of a transplanted rule by reflecting on the legal cultures of the host and recipient, as Teubner does in discussing efforts to ‘transplant’ the doctrine of good faith into UK law via European law:

The specific way in which continental lawyers deal with such a ‘general clause’ is abstract, open-ended, principle-oriented, but at the same time strongly systematised and dogmatised. This is clearly at odds with the more rule-oriented, technical, concrete, but loosely systematised British style of legal reasoning, especially when it comes to the interpretation of statutes.<sup>82</sup>

He then describes the processes through which the German doctrine of *Treu und Glauben* was transformed from an open-ended, general principle into a highly structured rule comprising very specific doctrinal categories and sub-categories.<sup>83</sup> He makes some general predictions about how English law will receive this ‘transplant’. His predictions are based on comparisons between the legal cultures and styles of legal reasoning in Germany and England; in particular, he doubts that English lawyers and judges will approach good faith in the same systematic, doctrinally-driven way as German jurists; rather, they will likely treat it as a broad principle the role of which in a particular instance of dispute resolution will depend heavily on the facts and the context.<sup>84</sup>

These insights present many possible implications for international judges looking to municipal law for help in deciding cases before them. First, as already emphasized, attempts to distil rules to their essence are probably misguided, as this implies a mechanical, unidimensional approach to rules. Secondly, the generality of a rule – its presence in a number of different legal systems – probably tells us little of importance. Because a rule owes so much to its context, superficial similarities among rules in different systems may not be particularly meaningful. In any event, once the rule is taken from one context and introduced into another, one can be fairly sure that it will be transformed, without being able to make predictions as to how much or in precisely what way. As a result, thirdly, much depends, as Graziadei emphasizes, on those responsible for the process of borrowing<sup>85</sup> – in this case, international judges. This means that a good deal hinges on the process of judging.

### D The ICTY – Examples of Borrowing

General principles have received little attention from international tribunals of late, with some notable exceptions, one of them being the ICTY. As discussed above, rapid developments in international criminal law have resulted in greater attention to municipal law as a source of rules and a particularly rich source of information in the sense in which Glenn uses the term. Three examples drawn from two cases before the ICTY will be discussed below to demonstrate ways in which municipal law has been taken up by that tribunal, and to point to some missed opportunities.

<sup>82</sup> *Ibid.*, at 19.

<sup>83</sup> *Ibid.*, at 20.

<sup>84</sup> *Ibid.*, at 21.

<sup>85</sup> Graziadei, *supra* note 71, at 473.

## 1 *Furundžija*

In the *Furundžija* case, the Tribunal sought guidance as to the *actus reus* of the crime of rape. A fairly extensive analysis of municipal legal systems was carried out, but in the end the Tribunal concluded that there was too much divergence among these systems to produce a general principle, and turned instead to international human rights law for a general principle (not in the sense of Article 38(1)(c)) that would assist them. This is a somewhat curious order in which to proceed, as general principles of municipal law are generally considered to be a subsidiary source. However, this approach makes eminent sense from a comparative point of view: the first place to look for guidance on defining the *actus reus* of a crime would be to bodies of law which contain such definitions.

In light of the approach to comparative law outlined above, the Tribunal here took a far too narrow approach, paying no attention to questions of culture, legal or otherwise. This is particularly surprising as one would expect that – perhaps unfortunately – considerations of culture would play a huge role in the definition of the crime of rape. It may be, however, that the judges were seeking to avoid a *lowest common denominator* approach. This they seem to have accomplished by referring to an underlying purpose of the criminalization of rape: the protection of human dignity.

The Tribunal could have benefited from a more extensive comparative analysis. It noted, for example, that oral penetration is a criminal act in many of the jurisdictions surveyed, but that it is often classified as an offence of lesser gravity than the crime of rape. However, what this analysis missed is the abolition in certain jurisdictions of the crime of rape – considered to focus excessively on the crime from the point of view of the perpetrator rather than the victim – and its replacement with the crime of sexual assault. In Canada, for example, a range of acts other than penetration of the vagina by the penis now constitute the *actus reus* of the offence of sexual assault, which is as serious an offence as the crime of rape was.<sup>86</sup> Such an analysis would have helped the Tribunal make its argument: that the classic definition of rape is too narrow; that it does not take into account the range of ways in which a person can be humiliated and robbed of dignity through forced sexual acts. It may also have helped the Tribunal to understand the reasons for the divergence it observed: in some cases, the classification of oral penetration as sexual assault may have been more in line with the Tribunal's approach than it believed.

## 2 *Erdemović* – Duress

In this case, an ongoing debate in common law jurisdictions regarding the availability of the defence of duress against a charge of murder is played out at the international level. It was apparent that a general principle of law could not be identified on this point because of the divergence between the two main legal systems: duress is in theory available as a defence to murder in civilian jurisdictions, although in

<sup>86</sup> Bill C-127 (1983); Hinch, 'Inconsistencies and Contradictions in Canada's Sexual Assault Laws', 14 *Canadian Public Policy* (1988) 282; Tang, 'Rape Law Reform in Canada: The Success and Limits of Legislation', 42 *Int'l J Offender Therapy and Comparative Criminology* (1998) 258.

practice it is very difficult to invoke successfully. In common law jurisdictions, the current state of the law is clear enough: the defence is not available for murder. Nevertheless, Judge Stephen probed deeper and brought to light the deep controversies in English law regarding this conclusion. He also states his own opinion: that the English approach is wrong. He seeks to provide insights into the Anglo-American experience and encourage international jurists *not* to take the same approach:<sup>87</sup> 'In searching for a general principle of law the enquiry must go beyond the actual rules and must seek the reason for their creation and the manner of their application.'<sup>88</sup> Note that this argument does not follow the prescribed methodology for deriving general principles: the rule which Stephen proposes for adoption at the international level is *not* common to the major legal systems of the world. His approach owes much more to comparative law: what can we learn about our legal system by examining others? What conclusions can we draw from those lessons?

A similar approach is taken in the *amicus curiae* brief submitted to the Extraordinary Chambers in the Courts of Cambodia by the Centre for Human Rights and Legal Pluralism: the authors of the brief do not simply report on the extent to which the rule regarding individual guilt is present in a range of legal systems, but they also examine the impact that this rule has had, the problems and controversies it has given rise to, and the aptness of this rule for the international context.<sup>89</sup>

### 3 Erdemović – Guilty Plea

At another point in the Tribunal's consideration of this case, the question of the acceptance by the Tribunal of a guilty plea was raised.<sup>90</sup> As with the question of duress, it was difficult to approach this matter from the point of view of general principles, because only common law systems know a guilty plea, and the judges could therefore not demonstrate the representativeness of any relevant principles. They concluded that reference could and should be had to common law adversarial systems from which the rule in the Statute was derived.<sup>91</sup> Judge Cassese, for his part, concluded that such recourse was not permitted by law<sup>92</sup> and, furthermore, was unacceptable. He noted the strong

<sup>87</sup> *Prosecutor v. Erdemović* (1997), IT-96-22-A, ICTY Appeals Chamber, Separate and dissenting opinion of Judge Stephen.

<sup>88</sup> *Ibid.*, at para. 63.

<sup>89</sup> Provost, 'Amicus Curiae Brief on Joint Criminal Enterprise in the matter of the Co-prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch" dated 8 August 2008', 20 *Criminal Law Forum* (2009) 331.

<sup>90</sup> *Prosecutor v. Erdemović* (1997), IT-96-22-A, ICTY Appeals Chamber. The reasons on which the Tribunal relies in remitting the case to a trial chamber were set out in the separate opinion of Judges McDonald and Vohrah, *supra* note 28, at paras 2ff.

<sup>91</sup> *Ibid.*

<sup>92</sup> The accepted sources of international law upon which the ICTY may draw are restricted to well-established customary law in order to maintain adherence to the *nullum crimen* maxim. It is accepted that on 'ancillary questions', that is, matters other than the elements of a criminal offence, the Tribunal may draw upon the usual sources of international law: V. Morris and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (1995), at 49–52. However, it is difficult to draw this distinction while respecting *nullum crimen*, since virtually all issues addressed by the Tribunal will have a bearing on its finding.

tendency to refer to adversarial systems in seeking to interpret and apply the Statute, and argued that the result would be a skewing of the tribunal's approach towards such systems, something which the structure of the Statute sought to avoid.<sup>93</sup> He further concluded that all the guidance that the tribunal required in considering a guilty plea could be found in the Statute and Rules of Procedure.

There is a good deal of merit in Cassese's approach. Concerns about the overweening influence of one system at the expense of others are real, and the impacts of these subtle forms of domination on the legal system and on the actors – in the case of international criminal law, the individuals – whose actions are judged within it can be serious.<sup>94</sup> As noted above, the legitimacy of international law, international tribunals, and the conclusions of international judges can never be taken for granted, and jurists must be highly attentive to the influences at play in their legal reasoning. At the same time, one wonders if the dangers in this case were not overblown. The judges who turned to common law for insight into guilty pleas sought carefully to justify this move, and noted that they did not feel bound by the rules applicable in the jurisdictions considered. And while it is true that Cassese was able to locate guiding principles within the Statute and Rules of Procedure, he also deprived himself of the insights generated by decades, even centuries, of collected experience at the municipal level. Legal systems being social institutions, not machines, the processes of trial, error, adjustment, and amendment and the gradual accretion of norms and criteria all constitute a precious resource that international judges refuse to exploit at their peril. At the end of the day, the judges all reached the same conclusion, but some judges could rest their conclusion on insights derived from examinations of countless guilty pleas in a range of jurisdictions, while others were compelled to rely exclusively on an international instrument drafted a few years earlier.

## 5 Conclusions

The prevailing international law methodology for identifying principles in municipal law and transforming them into general principles of law is highly unsatisfactory. The first aspect of the international methodology, the quest for commonality or representativeness, must be justified on the basis of one of three assumptions, none of which is particularly convincing. The first possible assumption is one rooted in natural law thinking, namely that the presence of a rule in many legal systems is evidence of its belonging to the objective idea of law. The second is firmly rooted in a voluntarist approach to positivism, namely that the presence of the rule in many systems is evidence of state consent. The third is rooted in concerns about the democratic validity of international law, particularly in a postcolonial context, and takes national adoption of a rule as a kind of warrant for its production through democratic processes. Secondly, I have sought to challenge the validity of the second aspect of the international

<sup>93</sup> *Prosecutor v. Erdemović* (1997), IT-92-22-A, ICTY Appeals Chamber, Separate opinion of Judge Cassese.

<sup>94</sup> Delmas-Marty, *supra* note 13, at 106 ff.

methodology distillation through an examination of comparative scholarship, particularly that which focuses on 'borrowing' between jurisdictions. As for the third aspect, the transformation of the rule into one that is appropriate to the international context, I have not sought to challenge the validity of this objective but rather to suggest, adopting Teubner's approach, that the lawyer or judge who proposes a general principle cannot predict or control the shape that the rule will take on in international law, nor the shape that international law will take following the introduction of the 'borrowed' rule.

What are the alternatives? First, regarding commonality or representativeness, I agree with Weil, Verhoeven, and others that this quest for a universally shared body of legal rules or concepts is probably futile. Nor is it necessarily to be wished for. The heterogeneity and diversity of legal systems around the world need not be seen as an obstacle to overcome but rather as a source of richness. But if general principles are to be a viable source of law in a heterogeneous society, this source will have to be rethought. The legal traditions of the world could come to be treated as resources on which international jurists can draw in seeking to solve problems and disputes, but the pretence – in most cases, it is no more than that – of demonstrating the commonality or representativeness of a legal rule would fall away. This would mean that the validity of a general principle would have to be grounded in the soundness and persuasiveness of legal argumentation rather than in claims about the objective nature of law or implicit state consent. An advantage of this approach is its honesty. Rather than asserting the commonality of a general principle without providing evidence in support of this assertion, judges could present the actual line of reasoning that led them to identify a particular principle as useful or relevant. The kind of reasoning employed by Judge Stephen in the *Erdemović* case provides a good example of this approach, in that he sought to present the lessons he had absorbed regarding the common law approach to duress and in this manner convince his audience that this defence should be available to the defendant.

Secondly, regarding the interrelated processes of distillation of municipal rules and their transformation into principles suited to international society, the lessons drawn from comparative law scholarship are rather more difficult to identify, particularly due to the debate among comparatists as to the wisdom or possibility of 'borrowing' or legal 'transplants'. One lesson that emerges fairly clearly is the importance of considering a rule not as a discrete, autonomous entity but as part of a much larger and very complex narrative. Another is the need to compare 'host' and 'donor' systems not in a purely functional manner but more holistically. International jurists should treat municipal legal systems and the societies in which they are embedded as sources of ideas or inspiration rather than as machines from which parts can be extracted and inserted elsewhere. 'Borrowed' legal rules should be treated more like arguments – or, as Glenn would put it, information – that can be put to use in international law in ways that their authors may never have anticipated, intended, or desired.