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Introduction

The time has come, perhaps, to discard or limit the visionary goal of ‘one law’ or ‘one code’ for the whole world, and to substitute for it the more realistic aim of crystallising a common core of legal principles.¹

I The *Mens Rea* Enigma

Mens rea, the most significant factor in determining criminal responsibility, is still one of the most complex areas of criminal law, in most part, because so many imprecise and vague terms are used to define the mental element. Part of this problem was created by ‘discordant opinions voiced by judges, which reflect the failure of the legal profession to agree upon the meaning of elementary terms’.² Soon after the establishment of the International Military Tribunal at Nuremberg (IMT), the International Military Tribunal for the Far East (IMTFE) and other trials conducted under Control Council Law No 10, the *mens rea* enigma was transferred from the national to the international sphere.

The jurisprudence of the IMT and IMTFE as well as those of the two *ad hoc* Tribunals mirrors the difficulty of identifying the various forms and shades of *mens rea* in international criminal law.³ One reason for this is the lack of a general definition of the mental element in either the Nuremberg and Tokyo Charters,⁴ or the statutes of the two *ad hoc* Tribunals.⁵ Some judges have interpreted criminal intent to encompass a cognitive element of knowledge and a volitional element of acceptance,⁶ whereas others have been of the opinion that mere foreseeability of

¹ Rudolf B Schlesinger, ‘Research on the General Principles of Law Recognized by Civilized Nations’ (1957) 51 *American Journal of International Law* 734–53, 741.

² See Glanville Williams, *The Mental Element in Crime* (Jerusalem: The Magnes Press, 1965) 9.

³ See Mohamed Elewa Badar, ‘Drawing the Boundaries of *Mens Rea* in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’ (2006) 6 *International Criminal Law Review* 313–48.

⁴ Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the major War Criminals of the European Axis, 8 August 1945, 59 Stat 1544, 82 UNTS 279; Charter of the International Military Tribunal for the Far East, 19 January 1946, TIAS No 1589.

⁵ Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc S/RES/827; Statute of the International Criminal Tribunal for Rwanda, UN Doc S/RES/955.

⁶ See *Orić* Trial Judgement, para 279.

harm is sufficient to trigger the criminal responsibility of individuals for serious violations of international humanitarian law. In several judgments, judges lowered the *mens rea* threshold to reach the one of negligence or gross negligence.⁷

Common law terms such as direct intent, oblique intent⁸ and recklessness have been employed by judges sitting at international tribunals, whereas other judges adhered to continental law terms such as *dolus specialis*, *dolus directus* and *dolus eventualis*, regardless of the vast diversity between these terms.⁹ In some cases, a subjective test was adopted in order to ascertain the guilt of the accused, while in others the objective test was clearly employed.

As a result of the general uncertainty regarding the definition of various categories of *mens rea* and the absence of a conventional or customary rule regarding these issues, the drafters of the Rome Statute of the International Criminal Court (ICC) decided to include a special provision on the subject.¹⁰ However, it is doubtful that this provision – which is described in Article 30 of the Rome Statute – adequately covers all the significant variations of subjective elements of international crimes.¹¹ Soon after the ICC began operating, Article 30 has been subject to different interpretations by the Chambers of the same Court.¹² Some view Article 30 as encompassing the three categories of *dolus*, namely, *dolus directus* of the first and second degree and *dolus eventualis*. Others hold the opinion that the plain meaning of Article 30 is confined to *dolus directus* of the first degree (intent in *stricto sensu*) and *dolus directus* of the second degree (indirect or oblique intent).¹³

The same controversy took place in the realm of international criminal law when establishing the subjective requirements of each form of perpetration and participation in international crimes as well as the interrelation between the mental element and mistake of law and mistake of fact.

⁷ Surprisingly, the *Blaškić* Trial Chamber stretched the fault element required for serious violations of Art 2 of the ICTY Statute to reach the boundaries of criminal negligence; see *Blaškić* Trial Judgement, para 152.

⁸ See for instance, *Brđanin* Decision on Interlocutory Appeal, Separate Opinion of Judge Shahabudeen, para 6, referring to English case law, namely, *R v Moloney* [1985] AC 905 (HL); *Hancock and Shankland* [1986] 1 AC 455 and *R v Woollin* [1999] 1 AC 82. These cases, among others, will be discussed and examined in ch 3 of this volume.

⁹ See Mohamed Elewa Badar, 'Drawing the Boundaries' above (n 3) 313–48. See also Thomas Weigend, 'The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR, and the ICC: An Overview' (2004) 19 *Nouvelles études pénales* 319, 326.

¹⁰ Art 30 of the Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9 (17 July 1998) entered into force on 1 July 2002.

¹¹ See Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) 159–60. Schabas noted that 'article 30 of the Rome Statute is not only confusing and ambiguous, it is also superfluous, and that judges of the International Criminal Court, like their colleagues at the ICTY, would easily have understood the mental element of crimes without them having to be told'. William A Schabas, 'Mens Rea and the International Criminal Tribunal for the Former Yugoslavia' (2003) 37 *New England Law Review* 1015, 1024.

¹² See Mohamed Elewa Badar, 'Some Reflections on Article 30 of the Rome Statute in Light of the Lubanga and Katanga Decisions on the Confirmation of Charges' in O Triffterer, J Vogel and C Burchard (eds), *The Review Conference and the Future of the International Criminal Court* (The Hague: Kluwer Law International, 2010) 109–30.

¹³ See Mohamed Elewa Badar, 'Dolus Eventualis and the Rome Statute without it?' (2009) 12(3) *New Criminal Law Review* 433–67.

Schabas, who studied the evolutionary process of these institutions, observed that jurists at the Yugoslavia Tribunal ‘were experts in the legal system they had been educated in, but as a general rule the common lawyers had virtually no background, training, or familiarity with so-called civil law systems’.¹⁴ Bassiouni once observed:

The judicial process in the cases of the IMT, IMTFE, ICTY and ICTR was, for all practical purposes, an intuitive judicial method of ascertaining and applying what they believe to be part of *general principles of law*. The term intuitive means that the judges in a given case acting on the basis of their knowledge and individual research reach a conclusion without following a method recognized in comparative criminal law technique. The haphazard nature of the process, however, did not necessarily exclude the reaching of correct outcomes which are consonant with what a proper methodology would have reached. But that also meant that the process was unpredictable and the outcomes not always consistent with a given theory of law. The absence of pre-existing norms of a general part also meant that the prosecution was frequently uncertain as to what it had to prove, and the defence equally uncertain as to its ability to challenge it, or advance argument for exoneration.¹⁵

Mireille Delmas-Marty called for a pluralist conception of international criminal law based on a comparative criminal law which incorporates national legal principles into international criminal law.¹⁶ Bassiouni noted that ‘one of the most challenging exercises in comparative criminal law is trying to reconcile, let alone combine, concepts of different legal systems into the general part of criminal law’.¹⁷ Together with a group of comparative criminal law experts, he tried this exercise in 1987. He admitted that any comparative study ‘can never achieve a satisfactory synthesis of the world’s diverse criminal law concepts’.¹⁸ As Cassese suggested, coming to grips with the present dilemma requires that one must start from the assumption that what matters is to identify the possible existence of general rules of international law or principles common to the major legal systems of the world.¹⁹ Thus, knowledge of fundamental principles in both ‘common’ and ‘continental’ legal systems and other legal systems has become a must. Failing to acquire such knowledge may lead to a breakdown in communication between jurists appearing before international criminal courts.

Writers on international criminal law have used the comparative method, but have drawn almost exclusively on Western experience. This practice is not justified in a time when the family of nations is no longer made up principally of Western nations.

¹⁴ William A Schabas, ‘The Influence of International Law and International Tribunals on Harmonized or Hybrid Systems of Criminal Procedure’ (2005) 4 *Washington University Global Studies Law Review* 651, 653.

¹⁵ M Cherif Bassiouni, *Introduction to International Criminal Law* (New York: Transnational Publisher, 2003) 282 (emphasis added).

¹⁶ Mireille Delmas-Marty, ‘The Contribution of Comparative Law to a Pluralist Conception of International Law’ (2003) 1 *Journal of International Criminal Justice* 13.

¹⁷ M Cherif Bassiouni, *The Legislative History of the International Criminal Law: Introduction, Analysis and Integrated Text*, vol I (Ardslay, New York: Transnational Publisher, 2005) 158.

¹⁸ *ibid.*

¹⁹ Cassese, *International Criminal Law*, above (n 11) 159–60.

The utmost value of this research is its broad and all-encompassing legal analysis of substantive laws of several representatives of major world legal jurisdictions which undoubtedly reveals those much sought-after ‘universal values’ in diverse criminal justice systems that Fletcher spoke of.²⁰

By examining the concept of a crime in selected legal jurisdictions with the particular focus on the *mens rea* doctrine, this work reveals common denominators that exist in all major world jurisdictions and warns against the technical comparison of legal terms, which leads to nothing less than confusion.²¹ The major findings of this study are of particular interest to international criminal lawyers due to the lack of in-depth comparative analysis of substantive law notions in the jurisprudence of international criminal courts and tribunals, which has obviously affected the quality and strengths of court findings.²²

It appears that the transposition of legal terms into the terrain of international criminal law has been mostly of a technical nature rather than accompanied by the meticulous comparative legal analysis.²³ As noted by Raimondo, ‘the international criminal courts and tribunals have not adopted any particular methodology to choose the national legal systems to be examined for driving general principles of law’.²⁴ It is only the emphasis on general principles derivative from the major legal systems of the world accompanied by the careful comparative analysis that could truly attest to the fact that international criminal law is a unique amalgam of world legal practices without undermining its status as a distinct area of international law.

II General Principles of Law

In any system of law a situation may arise where the court in considering a case before it realises that there is no law covering the exact issue.²⁵ ‘Such a situation is perhaps even more likely to arise in international law because of the relative underdevelopment of the system in relation to the needs with which it is faced’.²⁶ It is here that general principles of law come into play by filling the gaps.

Many national codes recognise the recourse to general principles of law, sometimes transcending national territories in the search of a common core of laws.²⁷

²⁰ See M. E. Badar and I. Marchuk, ‘A Comparative Study of the Principles Governing Criminal Responsibility in the Major Legal Systems of the World’ (2013) 24 *Criminal Law Forum* 1-48, at 3.

²¹ *Ibid*, at 2.

²² *Ibid*, at 2.

²³ *Ibid*, at 2.

²⁴ Fabián O Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, PhD Thesis (University of Amsterdam, 2007) 186–87.

²⁵ Malcolm N Shaw, *International Law*, 6th edn (Cambridge: Cambridge University Press, 2008) 98; See also Frances T Freeman Jalet, ‘The Quest for the General Principles of Law Recognized by Civilized Nations – A Study’ (1963) 10 *UCLA Law Review* 1041.

²⁶ *ibid*.

²⁷ Schlesinger, above (n 1) 742, giving the example of the Egyptian Code, which in referring to the principles of Islamic law looks beyond the borders of a single country and invokes the common core of the laws of all Islamic nations.

General Principles of Law

According to scholars and practitioners of international law, general principles mentioned in Article 38 of the Statute of the International Court of Justice (ICJ), which lays down the sources of international law, are a primary source, often the only source of international law in the absence of an applicable treaty and even where there is a treaty its interpretation may require their application.²⁸

In this regard Raimondo states three different functions of general principles in international law: '(i) to fill legal gaps, (ii) to interpret legal rules, and (iii) to confirm a decision based on other legal rules, as to reinforce the legal reasoning'.²⁹

General principles have to be derived from national law that is in force and are therefore 'capable of undergoing a process of orderly change, as the municipal laws on which they are based are amended. In this way they respond to changing needs without throwing the law into uncertainty'.³⁰

According to Lauterpacht, recourse to general principles of law should not take place if the settlement of a given legal issue can be easily found in individual cases by filling the gap with 'logical deductions from existing rules of international law or of analogy to them'.³¹ The International Criminal Tribunal for the Former Yugoslavia (ICTY)³² in *Kupreškić and others* set the order of reference to different levels of general principles as follows:

- (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.³³

The subsidiary role of general principles does not however establish between the sources any additional hierarchy to the one created by the principles of *lex posterior derogat legi priori*, *lex specialis derogat legi generali* and *lex posterior generalis non derogat legi priori speciali*.³⁴ Only *jus cogens* is above these principles. In this regard, Judge Fernandes at the ICJ claimed in his dissenting opinion in the case of the *Right of Passage over Indian Territory* that although

it is true that in principle special rules prevail over general rules . . . there are exceptions to this principle. Several rules *cogentes* prevail over any special rules. And the general

²⁸ *ibid*, 735.

²⁹ Raimondo, above (n 20) 48 (fn omitted).

³⁰ Michael Akehurst, 'Equity and General Principle of Law' (1976) 25 *International and Comparative Law Quarterly* 815.

³¹ Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longman, Green and Co, 1927) 85.

³² With the exception of particularistic and limited examples of Nuremberg, Tokyo, the US Military and German Cases after the Second World War, and some sporadic national war crimes prosecution, there is not much state practice in the last half-century giving rise to custom in international criminal law. For an analysis of its sources one has to turn therefore to the present systems of international criminal justice and in particular the mandate *ratione temporis* of the ICTY. See Michael Bohlander and Mark Findlay, 'The Use of Domestic Sources as a Basis for International Criminal Law Principles' (2002) 1 *The Global Community Yearbook of International Law and Jurisprudence* 6.

³³ *Kupreškić et al* Trial Judgement, para 591.

³⁴ Raimondo, above (n 20) 47 with reference to scholarly writing who oppose the idea of hierarchy among sources of international law.

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principles to which I shall refer later constitute true rules of *ius cogens*, over which no special practice can prevail.³⁵

It appears that uncertainty still exists regarding the nature of this source. A five-judge pre-trial of the Extraordinary Chambers in the Courts of Cambodia expressed that ‘it is unclear whether the “general principles of the law recognized by civilized nations” should be recognized as a principal or auxiliary source of international law’.³⁶ However, the Cambodia Pre-Trial Chamber recognised that ‘such general principles have been taken into account, notably by the ICTY, when defining the elements of an international crime or the scope of a form of responsibility otherwise recognized in customary international law’.³⁷

A The Determination of General Principles of Law

Once an international criminal court or tribunal has decided to draw on general principles of law as a source of international criminal law, the question arises as to how judges sitting at these courts will determine the existence, contents and scope of application of applicable general principles of law.³⁸ When it comes to the question, by whom does a legal principle have to be recognised to be a general principle of law applicable at the international level, scholars mostly give nuances of the same answer: ‘States’,³⁹ ‘the community of nations’,⁴⁰ ‘the Member-States of the United Nations’.⁴¹

Post-Second World War military tribunals as well as contemporary international judicial bodies such as the European Court of Justice have accepted that for a domestic principle to be recognised as a general principle it must be recognised by *most* and not all the legal systems of the world.⁴² Thus, in the *Hostage* case a US war crimes tribunal described the search for general principles as follows:

In determining whether. . . a fundamental principle of justice is entitled to be declared a principle of international law, an examination of the municipal laws of States in the family of nations will reveal the answer. If it is found to have been accepted generally as

³⁵ *Right of Passage over Indian Territory* (Merits) Judgement, Dissenting Opinion of Judge Fernandes [1960] ICJ Rep 29.

³⁶ Extraordinary Chambers in the Courts of Cambodia, Public Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 002/19-09-2007-ECCC/OPIJ (PTC38) 20 May 2010, para 53

³⁷ Public Decision on the Appeals against the CO-Investigative Judges Order on Joint Criminal Enterprise (JCE), 002/19-09-2007-ECCC/OPIJ (PTC38) 20 May 2010, para 53 (fns omitted).

³⁸ Raimondo above (n 20) 48.

³⁹ Prosper Weil, ‘Le droit international en quête de son identité. Cours général de droit international public’ (1992-VI) 237 *RCADI* 148–49, cited by Raimondo, above (n 20) fn 218.

⁴⁰ Antonio Cassese, *International Criminal Law*, 2nd edn (Oxford: Oxford University Press, 2008) 188 cited by Raimondo, above (n 20) fn 217.

⁴¹ M Cherif Bassiouni, ‘A Functional Approach to General Principles of International Law’ (1990) 11 *Michigan Journal of International Law* 768–818, 768.

⁴² Ilias Bantekas and Susan Nash, *International Criminal Law*, 3rd edn (London: Routledge-Cavendish, 2007) 4.

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a fundamental rule of justice by *most nations* in their municipal law its declaration as a rule of international law would seem to be fully justified.⁴³

Francesco Capotorti, however, suggests a more practical approach with a reference to ‘the legal systems of States, which are the most representative of the different conceptions of law’.⁴⁴ Raimondo finds the latter the most appropriate test for the following 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 it can be limited to some of them – the most representative one.⁴⁵

Furthermore, Allan Pellet pointed out that the drafters of the ICC Statute rightly made reference not to national laws as such, but to the ‘national laws of legal systems of the world ... This implies that it is not necessary to make a systematic comparison of *all* national legal systems, but only to ensure, by *polling*, that the norms in question are effectively found in the ‘principal legal systems of the world’.⁴⁶ These, according to Pellet, can probably be reduced to a small number in the contemporary world: the family of civil-law countries, the common law and Islamic legal tradition.⁴⁷

However, looking at the statute of the ICC, it states after the reference to ‘national laws of legal systems of the world’ that those laws would include ‘as appropriate, the national laws of States that would normally exercise jurisdiction over the crime’.⁴⁸ This wording reflects the result of negotiations during the drafting of the Rome Statute where views diverged widely on the direct applicability of national law. During the deliberations some delegations⁴⁹ were strongly of the view that national law was directly applicable, while the majority thought national law should only be an indirect source, with the Court deriving common principles from the different legal systems.⁵⁰ The solution now found in the Statute was proposed by Norway at the Rome Conference.⁵¹ Saland points to the deficiency of accepting such a formula, stating that there is

⁴³ *USA v List* (Hostages case) (1949) 8 LRTWC 34, 49 (1948) 15 *Annual Digest* 632, 633 in Akehurst, above (n 26) 813 (emphasis added).

⁴⁴ Francesco Capotorti, ‘Cours general de droit international public’ (1994) 248 *RCADI* 9–344, 118, quoted in and cited by Raimondo, above (n 20) 56, fn 219.

⁴⁵ Raimondo, above (n 20) 57.

⁴⁶ Alain Pellet, ‘Applicable Law’ in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol I (Oxford: Oxford University Press, 2002) 1051–84, 1073.

⁴⁷ *ibid.*, 1074–75, with reference to Philippe Kirch, ‘The Development of the Rome Statute’ in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 456.

⁴⁸ Art 21(1)(c) ICC Statute.

⁴⁹ Japan, China, some Arab countries and Israel.

⁵⁰ See Per Saland, ‘International Criminal Law Principles’ in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 214–15.

⁵¹ *ibid.*

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a certain contradiction between the idea of deriving general principles, which indicates that this process could take place before a certain case is adjudicated, and that of looking also to particular national laws of relevance to a certain case: but that price had to be paid in order to reach a compromise.⁵²

B The Process of Establishing a General Principle

Once the ‘database’ is established, Raimondo describes the process of finding general principles as a double operation:

The first operation – the vertical move – consists in abstracting a legal principle of the legal rules from national legal systems . . . The second operation . . . the horizontal move . . . consists of verifying that the principle thus obtained is generally recognized by nations. The task . . . 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.⁵³

Differences of detail between municipal laws do not prevent the application of general principles of law, when there is an underlying common principle and one can also say that there is a general principle of law when different systems of municipal law achieve the same result by different means.⁵⁴ In this regard, the decision of the Appeals Chamber at the ICC in the situation of the Democratic Republic of Congo is questionable, since the Court asserted that there was no general principle of law on the issue of the right to appeal, because the modalities for the exercise of such a right differ and vary from one national legal system to another.⁵⁵

C Abstracting a Legal Principle from National Laws

Sorensen claims that the contents of general principles are different from the contents of legal rules from which they are derived, because principles consist of the abstractions of legal rules deprived of their particular elements.⁵⁶ Akehurst, on the other hand, points to the fact that although general principles of law often exist at a very high level of abstraction, there is no reason why detailed rules which happen to be common to different systems of municipal law should not be applied as

⁵² *ibid.*

⁵³ Raimondo, above (n 20) 49, 52 (fns omitted).

⁵⁴ Akehurst, above (n 26) 814.

⁵⁵ 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 Decision Denying Leave to Appeal, Case No ICC-01/04, App Ch, 13 July 2006.

⁵⁶ Max Sorensen, ‘Principles de droit international public. Cours général’ (1960-III) 101 *RCADI* 25, cited in Raimondo, above (n 20) 52.

general principles of law.⁵⁷ A difference of opinion could also be seen at the ICTY, between Judge McDonald and Judge Vohrah on one side, who claimed that in determining general principles the outcome should be a concrete legal rule, and Judge Stephen on the other, who stated that the outcome should not be a concrete legal rule, but a general rule that embodies the reason for the creation of a norm.⁵⁸

Different levels of general principles, in fact, exhibit different levels of abstraction. General principles of international criminal law and general principles of international law are very abstract and thus may prove to be of scant assistance for the regulation of a specific issue, while general principles of criminal law recognised by the community of nations are more likely to provide a normative standard applicable to a case at issue.⁵⁹ This is why international courts prefer the latter to the former.⁶⁰

The *Furundžija* case at the ICTY is an illustration of this. The Trial Chamber could not discern any element of the crime of rape from the general principles of international criminal law or the general principles of international law. In the hope of finding a rather specific definition of rape as a general principle, ie, the forcible penetration of the mouth by the penis, it turned to national legislations. Only after observing major discrepancies regarding the criminalisation of forced oral penetration, it stated:

Faced with this lack of uniformity, it falls to the Trial Chamber to establish whether an appropriate solution can be reached by resorting to the general principles of international criminal law or, if such principles are of no avail, to the general principles of international law.⁶¹

The Court thus revisited the more abstract categories of principles, somewhat confusing the order in which sources are to be applied, and squeezed a camel through the eye of a needle, by finding that forced oral penetration should be classified as rape due to the fact that it is a humiliating and degrading attack on human dignity and the essence of international humanitarian law and human rights law lies in the protection of that dignity.⁶²

D Verifying whether the Principle is ‘Generally Recognised’

What Raimondo calls the ‘horizontal move’ has been poorly applied at the international criminal courts and tribunals. Looking at the ICTY, the Court is at times referring to principles expressed in ‘numerous national laws’, but only

⁵⁷ Akehurst, above (n 26) 815.

⁵⁸ *Prosecutor v Erdemović*, Case No IT-96-22-A, Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para 27; *Prosecutor v Erdemović*, Case No IT-96-22-A, Judgement, Separate and Dissenting Opinion of Judge Stephen, 7 October 1997, para 63, cited in Raimondo, above (n 20) 107.

⁵⁹ Cassese, *International Criminal Law*, 2nd edn, above (n 36) 21.

⁶⁰ *ibid.*

⁶¹ *Furundžija* Trial Judgement, para 182.

⁶² *ibid.*, 183.

giving the example of one legal system, one jurisdiction or failing to indicate any national law from which it derived the principle at all.⁶³ The joint opinion of Judge McDonald and Judge Vohrah in *Erdemović* is the first wide-ranging comparative law research carried out in relation to the practice of the Court: it included 30 national legal systems classified in ‘civil law systems’, ‘common law systems’ and ‘criminal law of other States’.⁶⁴ In subsequent case law one finds a mix of superficial and in-depth research into various legal systems. Even when considering the different aspects of a same issue the Court uses different standards in determining whether the principles are generally recognised.

Furthermore, there is an absence of providing the legal context in which a particular concept is framed, and thus a failure to demonstrate whether the concept is indeed common in essence or just in name in two or more nations.⁶⁵ Judges and prosecutors failing to understand the other traditions often distort the existing differences and force uncomfortable compromises.⁶⁶

E Adapting the General Principle to the International Sphere

Pellet claims that the general principles of law require a triple mental operation. After a comparison between national systems and the search for common ‘principles’, the third step is their transposition to the international sphere.⁶⁷ In this regard, the ICTY Appeals Chamber stated in *Tadić* that the general principle found in national jurisdictions which demands that courts be established by law, cannot be applied as such when it comes to the international sphere. Since there is no legislative, executive and judicial division of powers in the international law regime, ‘the separation of powers element of the requirement that a tribunal be “established by law” finds no application in an international law setting’.⁶⁸ In *Delalić* the Trial Chamber similarly found regarding the principle *nulla poena sine lege*, that

⁶³ See *Prosecutor v Erdemović*, Case No IT-96-22-T, Ch I, Sentencing Judgement, 29 November 1996, para 19, fn 13, the Trial Chamber giving the only example of French criminal law on the conditions of application of the defences of duress, state of necessity, and superior orders; *ibid*, para 31, the Trial Chamber claiming there is a general principle common to *all* nations, whereby the severest penalties apply for crimes against humanity, but failing to indicate the national law in question; *Jelisić* Appeal Judgement, a total of 31 footnotes in the judgment and the dissenting opinions with references to national laws, however these are almost exclusively the law of England and Wales and the United States.

⁶⁴ *Prosecutor v Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, above (n 54) under civil law it examined France, Belgium, the Netherlands, Spain, Germany, Italy, Norway, Sweden, Finland, Venezuela, Brasil, Nicaragua, Chile, Panama, Mexico, Former Yugoslavia, Poland; under common law it examined England, the United States, Australia, Canada, South Africa, India, Malaysia and Nigeria; under criminal law of other states it examined Japan, China, Morocco, Somalia and Ethiopia. Cited in Raimondo, above (n 20) 108.

⁶⁵ Bantekas and Nash, above (n 38) 5.

⁶⁶ Bohlander and Findlay, above (n 28) 25.

⁶⁷ Pellet, above (n 42) 1073.

⁶⁸ *Tadić* Appeal Decision on Jurisdiction, para 43.

[w]hereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions or after a customary practice of the unilateral enforcement of a prohibition by States. 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.⁶⁹

F The Role of General Principles

As observed before, the most important and powerful role of general principles is that of filling legal lacunae. In the context of international criminal law, an established general principle of law can mean the difference between conviction and acquittal, as was the case in *Erdemović*. Had the Court found a general principle of duress as a general and complete defence for murder (as a crime against humanity), the accused would have been acquitted and released. On the contrary, it found that ‘there are legal systems admitting duress as a general and complete defence, while other legal systems admit it as a mere mitigating circumstance’ and therefore a general principle was not established on which the defence could rely.⁷⁰

The second important role of general principles is that of the interpretation of existing legal rules. For example, in *Delalić et al* the general principle of law that the establishment of criminal culpability requires an analysis of both the *actus reus* and *mens rea*, was used for interpreting Articles 2 and 3 of the ICTY Statute.⁷¹

The third role, ie, that of enforcing legal reasoning, appears somewhat less crucial. An example can be found in *Tadić*. In referring to the principle of personal culpability, although found in international criminal law, inter alia, in Article 7(1) of the ICTY Statute itself, the Court invoked its existence in national systems as laid down in constitutions, solely for the purpose of enforcing the legal reasoning.⁷²

The words of the Trial Chamber at the ICTY illustrate quite well the situation in the international criminal courts and tribunals, regarding the use of general principles:

In this search for and examination of the relevant legal standards, and the consequent enunciation of the principles applicable at the international level, the Trial Chamber might be deemed to set out a sort of *ius praetorium*. However, its powers in finding the law are of course far more limited than those belonging to the Roman *praetor*: under the International Tribunal’s Statute, the Trial Chamber must apply *lex lata* i.e. existing law, although it has broad powers in determining such law.⁷³

⁶⁹ *Čelebići* Trial Judgement, paras 404, 405.

⁷⁰ Separate and Dissenting Opinion of Judge Haopei Li. *Prosecutor v Erdemović*, Case No IT-96-22-A, Judgement, 7 October 1997, para 3.

⁷¹ *Čelebići* Trial Judgement, para 424.

⁷² *Tadić* Appeal Judgement, para 186, cited in Raimondo, above (n 20) 121.

⁷³ *Kupreškić et al* Trial Judgement, para 669.

This reflects the conflict between general principles as *lex lata* and the power a court has in determining them, which can give rise to arbitrary decisions in establishing a general principle of law when there is an absence of a clear and consistently applied method of doing so.

Even if there is a treaty, its interpretation may require the application of general principles of law recognised by the civilised nations particularly where the treaty employs broad terms.⁷⁴ In this situation, the interpretation of these broad terms acquires concrete meaning by reading into them the general standards of decency which civilised nations recognise in their municipal legal systems.⁷⁵ Although it may seem that there is little in common between comparative law and public international law, it is the former which is essential to a more genuine understanding of ‘the general principles of law recognized by civilized nations’.⁷⁶

III The Study

Based on this methodological consideration, this work will examine the general principles that underlie the various approaches to the mental elements of crimes as well as the subjective element required in perpetration and participation in crimes and the interrelation between mistake of law and mistake of fact with the subjective element.

The study commences with a brief discussion of the history and development of the *mens rea* concept. The examination and analysis of the concept of *mens rea* in both common and continental legal systems, the Chinese and Russian legal systems as well as Islamic legal tradition, constitute part one of the present study. This survey of the major legal systems of the world will allow for a better and more complete comprehension of this concept in international criminal law.

Part two consists of four chapters. An examination of the concept of *mens rea* in the jurisprudence of the post-Second World War trials, its contours in the *travaux préparatoires* of the Genocide Convention and its development through the work of the International Law Commission is the focal point of chapter eight. Chapters nine and ten discuss the boundaries of *mens rea* in the jurisprudence of the International Criminal Tribunals for Rwanda and the former Yugoslavia in light of the comparative study undertaken in part one of the present monograph. Chapter eleven examines the definition of the mental element as provided for in Article 30 of the Statute of the International Criminal Court in light of the decisions and judgments rendered by the Court from a comparative law perspective. The study concludes with general observations and a number of recommendations on how the international criminal courts and tribunals can, and indeed should, deal with this complex notion of *mens rea* in its future jurisprudence.

⁷⁴ Schlesinger, above (n 1) 735 (citing other scholars fn 7).

⁷⁵ *ibid.*, 735–36.

⁷⁶ K Zweigert and H Kötz (trans T Weir) *An Introduction to Comparative Law*, 3rd edn (Oxford: Oxford University Press, 1998) 7–8.