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Steer, C.

Publication date

2014

Document Version

Submitted manuscript

Published in

Pluralism in International Criminal Law

[Link to publication](#)

Citation for published version (APA):

Steer, C. (2014). Legal Transplants or Legal Patchworking? The creation of international criminal law as a pluralistic body of law. In E. van Sliedregt, & S. Vasiliev (Eds.), *Pluralism in International Criminal Law* (pp. 39-67). Oxford University Press.
<http://ssrn.com/abstract=2275233>

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Amsterdam Center for International Law
University of Amsterdam

RESEARCH PAPER SERIES

ACIL Research Paper 2013-09

**Legal Transplants or Legal Patchworking?
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as a Pluralistic Body of Law**

Cassandra Steer

Amsterdam Center for International Law

Cite as: ACIL Research Paper 2013-09,
available at www.acil.uva.nl and [SSRN](http://ssrn.com)

Forthcoming in: Sliedregt, E. van (ed.),
Pluralism and Harmonization in International Criminal Law (OUP, 2013)

LEGAL TRANSPLANTS OR LEGAL PATCHWORKING?

THE CREATION OF INTERNATIONAL CRIMINAL LAW AS A PLURALISTIC BODY OF LAW

Much emphasis has been placed on the relationship between domestic and international law in recent scholarship concerning the emerging body of International Criminal Law (ICL). Procedural experts will tell us there is a continuous draw from domestic law in developing a framework of international procedural rules,¹ but much of the emphasis in substantive law tends to revolve around the question of how international tribunals influence domestic application of international law norms: a top-down analysis. The question posed here deals rather with how the body of ICL is developing as a process of borrowing from domestic criminal law notions, or a bottom-up analysis. As a branch of public international law, ICL has been born out of the same institutional framework that governs law-making and law-applying in this traditionally inter-state playing field, yet because it deals with individual criminal responsibility, its normative content is drawn from domestic criminal law systems.

The claim being made here, and the extent to which it is being made, is important to understand. As with any branch of public international law, it cannot be denied that in ICL state consent is the core level at which law is created. This is clear where we have statutes that are created by treaty² or by bodies such as the UN Security Council.³ It is also clear when we look at the body of international humanitarian law (IHL) in treaties and custom, the breach of which leads to prosecution under ICL. However it cannot be denied that the drafting of the Rome Statute of the ICC is the result of long diplomatic discussions and political compromises, as is the case with the statutes of many other international tribunals, which therefore do not always result in carefully constructed codification of a fully developed

¹See for example Frederic Megret. 'Beyond Fairness: Understanding the Determinants of International Criminal Procedure' (2010) 14 UCLA J of Int'l L and Foreign Affairs ;Alphons Orie, 'Accusatorial v Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC' in Antonio Cassese, Paola Gaeta and John R. D. W. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford university Press 2002) 1439

² For example the Rome Statute of the International Criminal Court, 1988, U.N. Doc. A/CONF.183/9, created by multi-lateral treaty; or hybrid courts such as the Special Court for Sierre Leone, the statute of which was created by special agreement between the UN and the Government of Sierre Leone, available at <<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&>>

³ The statutes of the ad hoc tribunals were drafted by a coalition of 'experts', but endorsed by the UN Security Council in the resolutions which created the tribunals. See International Criminal Tribunal for Former Yugoslavia, S/Res/827 25 May 1993 and the International Criminal Tribunal for Rwanda S/Res/955, 8 November 1994.

criminal law system.⁴ This means much has been left up to practice. The role of state consent in the 'finding' and creation of norms within ICL becomes less clear when we look at judgments handed down by international tribunals, where the normative content is in fact derived from domestic legal systems.⁵ This author has argued elsewhere that the normative content of these latter sources are highly uncertain at best when it comes to some areas of ICL such as modes of responsibility, intent, defences, and some procedural questions.⁶ Others have argued that these notions may, due to their nature, even escape the demands of *nullum crimen*, leaving domestic law as a necessary tool for clarification.⁷ This author has further argued that from a realist perspective, the development of ICL in these uncertain areas results mainly from the contribution of non-state participants.⁸ Judgments of both international and domestic courts, as well as the academic commentary on these judgments, have become the primary source in determining these new areas of law, precisely because the state-created law has not covered these areas. To fill these important lacunae, participants such as indicting prosecutors, judges and academic commentators writing new texts on the subject matter, or even *amicus* briefs to courts posing these very questions,⁹ all look to the notions and institutions they know from their own domestic legal training, and apply them to the international context. This process of law-creation by way of borrowing from domestic systems is inevitable and unavoidable when we are confronted with lacunae in this nascent body of law, and is akin to the process of legal transplants in any domestic law system, creating a system which is pluralistic by definition.

⁴ Markus Dirk Dubber, 'Comparative Criminal Law' in Mathias & Zimmermann Reimann Reinhard (ed), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 1307

⁵ See for criticism of the resort to custom as a source in judgments handed down by international tribunals Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press 2008).

⁶ Cassandra Steer, 'What Makes Valid Law? Shifting Modes of Responsibility in International Criminal Law' in Jill E. B. Coster van Voorhout and others (eds), *Shifting Responsibilities in Criminal Justice: Critical Portrayals of the Changing Role and Content of a Fragmented Globalizing Law Domain* (Willem Pompe, Eleven International Publishing 2012).

⁷ See, among others, Antonio Cassese, *International Criminal Law* (Oxford University Press 2008) 5, 26, 38; *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Cesare P. R. Romano, Andre Nollkaemper and Jan Kleffner eds, Internationalized criminal courts, Oxford University Press 2004); H. G. Van Der Wilt, 'Equal Standards? On the Dialectics Between National Jurisdictions and the International Criminal Court' (2008) 1(2) *International Criminal Law Review* 271; (merged). Zahar *supra* note 5 at 98-99.

⁸ Cassandra Steer, 'Non-State Actors in International Criminal Law' in Jean d'Aspremont (ed), *Participants in the International Legal Order: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) at 96.

⁹ See for example the *amicus curiae* brief written by former judge the late Antonio Cassese upon request of the Extraordinary Criminal Chambers of Cambodia, *Amicus brief for Pre-Trial Chamber on Joint Criminal Enterprise from Professor Antonio Cassese and members of the Journal of International Criminal Justice*, Doc. nr D99/3/24, available at: <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D99_3_24_EN_Cassese.pdf>

One of the dual aims of this chapter is to look at what international criminal lawyers can learn from their fellow comparativists who have written much on this very process. Inter-systemic ‘borrowing’ has occurred for centuries as a process of law reform, whereby domestic systems look to foreign jurisdictions for possible solutions to shared legal problems. The comparative law notion of ‘legal transplants’ is therefore a useful analytical tool in ICL, however in the case of this developing branch of international law, it is not so much a question of law reform, but of law creation. The process of adding domestic law notions to an entirely new system of law could perhaps better be described as legal patchworking.

It is this dynamic process of law-finding, law-creation and law-application on the part of multiple participants in multiple legal forums which makes ICL such an exciting area of law, and at the same time which leads to uncertainty in its pluralistic nature. Because this emerging body of international law requires a certain consistency, predictability and coherency in order to maintain legitimacy not only in respect of fair trial requirements, but also in the eyes of the international community, this uncertainty is undesirable, however inevitable it may be. The discourse on fragmentation in international law leads to concerns which are difficult to answer, and the solution many academics seek is to change the semantic from ‘fragmentation’ to ‘pluralism’. It would seem there is a subtle normative tilt from ‘lack of coherence’ to ‘co-existence of different legal approaches and solutions’. Whether this is in fact the case, and whether there is a shared understanding of this semantic shift requires further investigation. The second aim of this paper is therefore to clarify the normative claim of ‘legal pluralism’ and consider what international criminal lawyers can learn from the body of scholarship on legal pluralism at a domestic level.

Firstly the socio-legal phenomenon of legal transplants will be discussed, and the scholarship that has emerged over recent decades will be used to illustrate how this process is occurring continually within ICL. Secondly, the notion of legal patchworking will be introduced as a descriptor of ICL as a legally pluralistic system by definition. The notion of legal pluralism and its normative claim will be further investigated in order to determine how this terminology can help us in our quest for harmony in the face of diversity. Finally conclusions will be drawn as to what specifically should be learned from the scholarship on legal transplants and legal pluralism, when it comes to the development of ICL as a body of law. Coherence is to a certain extent a requirement of legitimacy, so how can ICL lawyers learn

from the work done by fellow comparativists and pluralists on how to strive for such coherence when the sources and interpretations are so diverse?

1. Legal Transplants as formants of law

The idea of comparative law as a tool for finding and interpreting legal principles and rules in public international law is a phenomenon gaining recognition in recent international law theory. As Koskeniemi has pointed out, it is a mistake to consider international law to be entirely universal in its language, rules, interpretation and application, since each domestic system has its own perspective and context for approaching and applying international law.¹⁰ As the number of regimes and judicial forums increase, so does the concern for fragmentation, but, as Koskeniemi optimistically points out, rather than operate from a conflict of laws perspective, it is possible for international lawyers to deal with these multiplicitous regimes by using one's own familiar domestic legal context as a point of reference.¹¹ The young theorist Anthea Roberts goes further, arguing that in fact international comparative law has an important role to play in the development and enforcement of international law.¹² Domestic courts are no longer simply the guardians of enforcing international law, but because case law and practice is emerging more and more in domestic courts, this domestic law has arguably become a prominent source of law beyond its 'subsidiary' status according to the classical doctrine of sources.¹³

Against this background, coupled with the plea for more attention to be paid to comparative methodology in various legal and academic forums,¹⁴ the focus here is on the resulting phenomenon of legal transplants. Academic debate in comparative law was focused for many years on the question whether it is practicably possible to pluck a legal institution from one systemic context and transplant it successfully into another. In recent years there seems to be

¹⁰ Martti Koskeniemi. 'The Case for Comparative International Law' (2009) 20 Finnish Ybk Int'l L 6

¹¹ *Ibid* at 7.

¹² Anthea Roberts. 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 I C L Q 57.

¹³ Although Roberts refers to creating and enforcing international law, a distinction should be drawn between the role of domestic courts in enforcing and developing international law on the one hand, and the use of domestic case law by international tribunals in extrapolating 'general principles' of international law on the other hand. In both cases domestic case law had become an important source, and although the circuit of interaction between domestic and international tribunals is important for this chapter, the focus is mainly on the use of domestic case law to develop international law on the international plane.

¹⁴ See for example M. Delmas-Marty. 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law' (2003) 1(1) Journal of International Criminal Justice 13

a general agreement that transplants are possible – since they occur all the time – and the discussion now delves deeper into questions as to how this can best be done. Beginning with a historical perspective, and then considering some more modern theories of contextualisation, this section will demonstrate how the socio-legal phenomenon of legal transplants is occurring as part of law development in ICL and what the relevance of the scholarship is for ICL.

A. Historical Roots of Legal Transplantations

The term ‘legal transplants’ was coined by legal historian and comparativist Alan Watson in the 1980’s.¹⁵ His description of customary laws in thirteenth century Germany and France, prior to the reception of Roman law, demonstrated that wherever there was a desire for some certainty and clarity, legal transplanting took place on a surprisingly large scale. Because customary rules governing commerce, contracts, the building of town walls, or the regulation of town markets were so varied and disparate from town to town, a trend began to emerge where rules were borrowed from other towns and transplanted into emerging local systems, creating a more coherent body of law. Most influential was the *Sachsenspiegel*, a systematic description of customary rules covering public law and feudal law. Its 350 manuscripts were widely used as a source for minimizing the fragmentation of local customs.¹⁶ Watson drew some important conclusions from this and other examples:

First, in the absence of written law and of a central authority that imposes its will, custom is likely to be very local and fragmentary. The popularity of transplants here in part results from the fact that custom does not provide an answer or one easy to find for many issues. [...] Secondly, the great success of the *Sachsenspiegel* illustrates the principle that the choice of borrowing depends in large measure on the accessibility of the donor source. [...] And thirdly, the adoption of town law and use of decisions [...] of other towns are again

¹⁵ Alan Watson. 'Legal Change: Sources of Law and Legal Culture' (1983) (131) University of Pennsylvania law Review, UPALR 1121; A. Watson, *Sources of Law, Legal Change, and Ambiguity* (University of Pennsylvania Press 1984).

¹⁶ *Ibid* at 26-27.

indications of the importance of authority in legal borrowing and in legal growth generally.¹⁷

This principle that accessibility and authority are key components to one system becoming a donor or ‘mother’ system, while others become receiving or ‘daughter’ systems, is a recurring thread throughout Watson’s work. He observed that legal transplanting throughout Europe in the thirteenth to fifteenth centuries was very common, but that it would rarely happen when the law to be borrowed was not set out in a systematic and easily accessible fashion, and that in order for a system to become a donor or mother system, it was almost always ‘in a position of political and military authority over the borrower’.¹⁸

In fact the entire reception of Roman law throughout most of continental Europe could be considered a slow process of legal transplantation. The revival interest in Justinian’s *Corpus Juris Civilis* is usually attributed to the Bologna law school in the 11th century and the influence of this scholarship throughout Italy, into France and eventually many other countries.¹⁹ Taking Watson’s principles of authority and accessibility, it would appear that the authority of the *Corpus Civilis* itself was bolstered by the new authority of the Bolognian scholars, and the accessibility of the systemized approach of the Roman body of law was its very appeal.

In the same way, the process of creating and refining ICL as a system of law could be seen as a slow process of legal transplantation. When we consider the three conclusions Watson drew on the way in which legal transplants have occurred historically, there is a clear parallel with the way in which ICL is developing. Firstly there is an absence of central authority in the ICL system, and while there is certainly written law in the sense of treaties and statutes, this does not exist as one coherent body of law, but rather a fragmentary conglomeration of sources which are various in nature and have both international and domestic birthplaces. The core crimes are themselves based on the older body of international humanitarian law (IHL), such as the US-born Lieber code,²⁰ and on multilateral treaties making up the ‘Hague Law’ (methods and means of warfare) and ‘Geneva Law’ (protection of civilians and combatants). The institutional framework has been created, as already mentioned, by way of treaty and

¹⁷*Ibid* at 27.

¹⁸*Ibid* at 36.

¹⁹*Ibid* at 25.

²⁰ Promulgated as General Orders No. 100 by President Lincoln, 24 April 1863, available at <http://avalon.law.yale.edu/19th_century/lieber.asp>

special agreements with the UN. But there are areas of this new body of law which are not fully regulated by these codifications, and for which custom can provide no clear answer because the law on an international level is simply too new. As the jurisprudence and case law develops from numerous domestic and international courts applying and ‘finding’ this law, there is a repeated dialectic between the domestic and international level.²¹ Just as Watson concludes, where custom does not provide an easy answer, transplants become popular.

Secondly, as Watson points out, the principle of accessibility determines the choice of systems from which to borrow. Wherever there are gaps in the normative detail of ICL, there is evidence that participants in this process all reach to the law they know from their own background training, and that reference is made more and more to domestic law in order to extrapolate custom or general principles of international law.²² This most recent movement has not been a process over centuries but merely decades. Following Watson’s analysis, it makes sense that in a system which is already a patchwork of various sources, and which is developing so rapidly, when looking to fill gaps or uncertainties solutions will be sought by looking to familiar domestic systems to act as ‘mother’ systems. Which system is most accessible depends upon the linguistic capabilities of the participants seeking a solution, as well as cultural barriers or digital accessibility of domestic laws and judgments, leading to a highly selective process of surveying state practice.²³

Quite simply the system which is most accessible is the system which is best known to the participants asserting a rule at any given time: for example, the mode of responsibility familiar to common law lawyers known as Joint Criminal Enterprise made its way into the case law of the ICTY where the majority of prosecuting lawyers are trained in common law systems, whereas co-perpetration, a mode of responsibility familiar to continental lawyers, has recently been favoured by the ICC in judgments decided by benches with overwhelmingly civil law trained judges.²⁴ At the same time, dissent was heard on some

²¹ H. G. Van Der Wilt. 'Equal Standards? On the Dialectics Between National Jurisdictions and the International Criminal Court' (2008) 1(2) International Criminal Law Review 229

²² See M. Delmas-Marty. 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law' (2003) 1(1) Journal of International Criminal Justice 13; Cassandra Steer, 'Non-State Actors in International Criminal Law' in Jean d'Aspremont (ed), *Participants in the International Legal Order: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) 302; Anthea Roberts. 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 I C L Q 57.

²³ Zahar, *supra* note 5, at 94.

²⁴ See for a discussion of this phenomenon Zahar, *ibid*; Steer, *supra* note 8.

benches of the ICTY as to the validity of JCE, due in most part to the fact that these dissenting members of the bench have a background in a civil-law tradition and were uncomfortable with the unfamiliarity and far-reaching elasticity of this mode of responsibility.²⁵

Thirdly Watson points to the authority of a donor system as a key factor in selection by a receiving system looking to borrow a law or legal institution, and he asserts that the quality of the source of law is less important. What's more important is the desire for clarity of substantive law, which in Europe has led to a drive for codification in many waves throughout history, and to borrowing from the most authoritative mother systems rather than a search for greatest quality.²⁶ ICL is facing the same problem that domestic legal systems have faced over the centuries in terms of lack of clarity of sources, and the same solution seems to result, namely looking to other systems for solutions to specific normative problems. Wherever there are areas of law that are unclear, the sources themselves are not the focus, in the sense of consistency or legitimacy, but rather the ready adoption of rules to solve the problem. The question regarding *which* system to borrow from is not driven by the search for a source such as customary law, but rather the search for a normative rule which can be immediately applied.

Although historically the question of which system was most authoritative was a matter of military power, the principle of authority with respect to donor systems in ICL still applies. Now it is more a question of which systems have been able to assert themselves as more influential in this process of patchworking in one of two ways. One way is that the individual participants who are influential within certain tribunals manage to assert notions from their domestic systems, such as the example already given of JCE and its acceptance in the ICTY, which has been dominated by US-trained prosecutors. That the German notion of 'perpetration by means of another' was included in the ICC judgment *Katanga*²⁷ has a lot to do with the influential role not only of civil-law trained judges at the ICC, but also of the

²⁵Illustrative is the *Stakić* case, where it was decided in the Trial Chamber that JCE was inappropriate and should be replaced with co-perpetration, *Stakić*, (IT-97-24-T), Trial Chamber, 31 July 2003 §§ 436-438. This bench was made up of three judges with civil-law training: Judges Wolfgang Schomburg (presiding) (Germany), Volodymyr Vassilenko (Ukraine) and Carmen Maria Argibay (Argentina). In the Appeals Chamber this was overturned, with the argument that co-perpetration had no grounding in customary law, *Stakić*, (IT-97-24-T), Appeals Chamber, 22 March 2006, §62. This bench was made up of judges with a mix of legal backgrounds: Judges Mohamed Shahabuddeen, and Theodor Meron are from common law backgrounds; Judges Fausto Pocar (presiding), Andréia Vaz and Mehmet Güney are from civil law backgrounds.

²⁶Watson (1984), *supra* note 15, at 95-96.

²⁷Decision on the Confirmation of Charges, *Prosecutor v. Katanga and Chui* (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, §§ 477 – 518.

team of lawyers whose own domestic training influences the way in which such judgments are formed – a phenomenon which has been described as the ‘age of the law clerk’.²⁸ Alternatively, rather than assertion of authority on the part of individual participants, an entire legal system can assert authority by way of old colonial ties in certain countries now in the throes of transitional justice, or a state’s involvement in the development of new ICL institutions, such as the French influence on the drafting of the law applicable in Extraordinary Criminal Chambers of Cambodia.²⁹ Once such a domestic notion is transplanted through these judgments into the emerging body of ICL, the selection of this notion is often legitimized as a part of ICL by referring to customary law, when in fact there is scant custom in this nascent field of law.³⁰ What is actually occurring is exactly the process of legal transplantation that Watson describes, and the most accessible or most authoritative system wins out regardless of whether it is the most appropriate system or even the most appropriate rule to transplant.

B. Contextualizing the Transplant Process

If we accept the factual reality of this process of legal transplantation as part of law reform and law development both in domestic systems and in ICL, the question remains how international criminal lawyers can make explicit use of this process both to understand and to justify the processes by which ICL develops. If Watson is correct that authority and accessibility of a donor system are determinative factors in making a selection of a legal notion to be transplanted into the receiving system, the participants who are making the selection in this process are important players, since what is ‘accessible’ will depend upon the knowledge and background of these participants. Similarly, which donor systems appear as ‘authoritative’ has a subjective element.

Some recent scholarship on legal transplants may shed more light on how this process takes place. In his observation of public law transplants, Jonathon Miller looks at the motives both

²⁸ R. A. Posner, *How Judges Think* (Harvard University Press 2010). See also H. G. Van Der Wilt, ‘The Continuous Quest for Proper Modes of Criminal Responsibility’ (2009) 7(2) *Journal of International Criminal Justice* 309

²⁹ Craig Etcheson, ‘The Politics of Genocide Justice in Cambodia’ in Casare Romano, Andre Nollkaemper and Jan Kleffner (eds), *Internationalized Criminal Courts and Tribunals: Sierre Leone, East Timor, Kosovo and Cambodia* (International Criminal Courts and Tribunals Series, Oxford University Press 2004) 199

³⁰ Zahar, *supra* note 23 at 82, 85, 99.

of members of a receiving system and of a donor system, which offers a broader indication of why some transplants are successful while others are not.³¹ One of his typologies, the legitimacy-generating transplant, is the type most prevalent in ICL.³² Rather than the actual content of a rule or institution to be transplanted, the prestige of a foreign model is used to justify a transplant of a norm or of an entire legal institution such as a constitutional model. This is exactly as Watson describes in his principle of authority. Miller points out that because the transplant of a foreign notion or institution may be a difficult thing for participants in a receiving system to accept, the prestige of the model to be borrowed from is used as a kind of talisman, and it is assumed that following the model will produce good results without much need for local adaptation.³³ Again, the debate over modes of liability serves as the strongest illustration of this in ICL, where a legitimacy-generating appeal to post-World War II case law was used to justify the judicial invention of JCE. The incorporation of the entire body of case law of the ICTY as ‘custom’ into the Balkan state domestic criminal law is another example.³⁴ In terms of its likelihood of success, Miller posits that a legitimacy-generating transplant will only suffer in the face of a sharp decline in the prestige of the transplant donor, since the transplant will lose its purpose.³⁵

Generally Miller also asserts that the ‘success’ of a legal transplant, in the sense that it is accepted and observed in the receiving system, will also depend on some structural factors such as whether the state is strong or weak, and whether the law enjoys a certain authority and legitimacy in the receiving system beyond simply the ‘correct’ procedural enactment,³⁶ reminding us again of Watson’s principle of authority. This too is instructive when considering the success of transplants in ICL. Since there is no central overarching state-like entity or government, one could say this is analogous to a ‘weak’ state. Although transplants may be taking place from the domestic level to the international, such as is the case in the search for a body of international criminal procedural law, there is no central entity to

³¹ J. M. Miller. ‘A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process’ (2003) 51 Am.J.Comp.L. 842

³² Miller’s other typologies are: i) the Cost-Saving Transplant; ii) the Externally-Dictated Transplant; iii) the Entrepreneurial Transplant. The first two are less likely to occur in the context of ICL. The third type could be said to occur when one individual participant in the processes of ICL is determined to assert a particular notion or rule derived from domestic law to be part of ICL. This has been observed in the strength of Antonio Cassese’s assertion regarding JCE, in his capacity as judge, professor, editor-in-chief of the *Journal of International Criminal Law* and *amicus* to the ECCC. See Steer (2011), *supra* note 8.

³³ *Ibid.* at 865.

³⁴ See Antonietta Trapani, *Assessing the Impact of the International Ad-hoc Tribunals on the Domestic Courts of the Former Yugoslavia* (Reykjavic University DOMAC Country Report DOMAC/11, 2011)

³⁵ *Ibid.* at 869.

³⁶ Miller, *supra* note 31, at 844.

promulgate this body of law, nor to enforce it or bolster its coherency. The quest for a body of procedural law is often a case of assertion on the part of practicing lawyers, NGO's and academic analysts, or of 'trial and error' in the most literal sense. Furthermore, while the authority of law itself in any international legal regime must be assumed at a certain level, the legitimacy of international criminal procedure or substantive law is questioned by certain states who have had less involvement in its development, and by defendants who are faced with problems of legality; the debate around modes of liability and defences in ICL is illustrative.

Methodologically speaking, Miller argues that a functional approach would be advisable for all types of transplant, whereby some effort is made to consider the extent to which the foreign solution deals with problems similar to those in the receiving system, and to what extent a foreign institution can function in the receiving system.³⁷ The specific context of international crimes may make this an even more pressing concern: the context of armed conflicts or systematic mass atrocity crimes may lead to different answers as to the applicability of defences such as justifications and excuses, than in domestic criminal law.³⁸ However such a functional approach is rarely taken,³⁹ and once again Watson's observations about the principles of authority and accessibility explain why.

Beyond this typology a further contextualisation of transplants can help us understand and justify the process that can be observed in ICL. As mentioned earlier, Watson spoke of 'mother' towns and 'daughter' towns, to describe the donor and receiving systems which began to look more and more like each other as more legal transplantation took place.⁴⁰ This familial relationship between systems had been described in comparative law methodology throughout the late 19th and 20th centuries, which focused mostly on the taxonomy of different legal systems, grouping domestic systems into legal families, with a 'mother' system at the historical root.⁴¹ But the simplified notion of 'mother' systems led to a selective study of the main donor systems such as England or the US when one wanted to know about a common law rule, and Germany, Italy or France when one wanted to know about a civil

³⁷ *Ibid.*

³⁸ H. van der Wilt, 'Justifications and Excuses in International Criminal Law: An Assessment of the Case Law of the ICTY' in: B. Swart, A. Zahar & G. Sluiter (ed.s) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, (Oxford University Press 2011).

³⁹ Miller, *supra* note 31, at 846.

⁴⁰ Watson (1984), *supra* note 18.

⁴¹ H. Patrick Glenn, 'Comparative Legal Families and Comparative Legal traditions' in Reismann, M. & Zimmermann, R. (ed), *Oxford Handbook of Comparative Law* (Oxford University Press 2006) 424

law rule, to the exclusion of other domestic systems which may have developed in interesting and new directions. More recent comparative law has moved away from this simplification and from the project of classification and taxonomy. Instead scholars talk of legal traditions and legal cultures, which can span across societies and are not necessarily tied to historical inheritance.⁴² One useful analysis is provided by the comparativist Glenn, who argues that the approach of classifying systems into legal families is based upon a mistaken assumption of incommensurability,⁴³ much like the conflict of laws. The mistaken assumption is that no two systems can co-exist, so to solve a problem of substantive law where 'foreign' laws conflict with local ones, procedural conflict of law rules must be created to determine which system applies to any given legal problem. Similarly, any comparative law approach that is predicated on classifying systems into legal families is asserting an 'epistemology of separation',⁴⁴ which is inherently conflictual, a static approach that ignores changes in systems over time and processes of reciprocation and influence, and disallows reconciliation between systems or between rules.

Glenn also argues that this limiting methodology is 'Eurocentric' due to the inherent bias of the concept of legal families.⁴⁵ Many colonized states took on aspects of the legal systems of the colonizing powers, and not always by choice.⁴⁶ To group these systems into a legal family with their historical 'mother' systems leads to the highly selective study of systems as mentioned above, and also to a misunderstanding of the role of legal institutions in these 'daughter' or receiving systems. When it comes to comparing possible solutions to any given legal problem, only 'law' as it is understood within this taxonomic paradigm is considered to be a valid object of comparison. Non-western laws are classified as non-law, and states with political systems or conflict solving mechanisms which differ from the western sources recognized as common law, civil law and socialist law, are classified as 'Other', automatically giving them a subordinate status. The very notion of a legal 'system' is a western one, born of the western project of classification and of the need to describe law,

⁴² Glenn, *ibid*; David Nelken, 'Legal Culture' in J. M. Smits (ed), *Elgar Encyclopedia of Comparative law* (Edward Elgar Publishing 2006) 372; M. Van Hoecke and M. Warrington. 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47(495-536) *International and Comparative Law Quarterly*. Some traditional schools of comparative law research still use the 'legal families' taxonomic approach, see e.g. Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Clarendon Press 1998) 57.

⁴³ H. P. Glenn. 'Are Legal Traditions Incommensurable' (2001) 49 *Am.J.Comp.L.* 133

⁴⁴ *Ibid.* at 430.

⁴⁵ *Ibid.* at 435

⁴⁶ This is an example of Miller's 'externally dictated' typology of legal transplantation, *supra* note 31, at 847.

rather than just to live according to it.⁴⁷ The problems raised by this approach will be revisited in the discussion on legal pluralism below.

This same Euro-centrism can be recognized in the doctrine of sources in international law, which, according to article 38 of the Statute of the ICJ, allows for general legal principles ‘recognized by civilized nations’. Of course this text is a product of its time, and we must trust that international lawyers today do not exclude a state from study when in search of a general principle on the basis that it is not a ‘civilized’ nation, but the Euro-centric idealism behind this text may not have entirely disappeared. Although article 21(1)(c) of the Rome Statute of the International Criminal Court uses less archaic language, and speaks of ‘legal systems of the world’, one would be hard pushed to demonstrate that European states are not still the main sources cited both for state practice when in search of a rule of customary international law, and for the assertion of a general legal principle.

The selection of the most dominant systems, the ‘mother’ systems in a legal families analysis, is a phenomenon that can be witnessed in ICL judgments and which has been criticized as a questionably selective ‘survey style’ approach.⁴⁸ For example, the European influence on the search for a customary norm is unambiguous in the majority *Erdemović* appeal judgment at the ICTY, where the question at hand was whether duress is considered a complete defence to the killing of innocent persons under ICL. Following the ‘legal families’ approach, first a survey was done of a selection of ‘civil law jurisdictions’.⁴⁹ Next it was stated:

‘In stark contrast to this acceptance of duress as a defence to the killing of innocents is the clear position of the various countries throughout the world applying the common law. These common law systems categorically reject duress as a defence to murder. The sole exception is the United States... State practice on the question [is] far from consistent.’⁵⁰

This survey led to the conclusion that the customary norm being sought did not exist. What has occurred here is a highly selective, Euro-centric survey of jurisdictions which are grouped together in definitive legal families, while explicitly ignoring the fact that a prominent

⁴⁷ *Ibid.*

⁴⁸ Zahar, *supra* note 23 at 96.

⁴⁹ The jurisdictions surveyed were: Austria, Belgium, Brazil, Greece, Italy, Finland, the Netherlands, France, Germany, Peru, Spain, Switzerland, Sweden and the former Yugoslavia. *The Prosecutor v. Erdemović*, IT-96-22, Appeal Judgment, 7 October 1997, as listed in the separate opinion of Judges McDonald and Vohra, § 49.

⁵⁰ *Ibid.*

jurisdiction in the family of common law in fact does something entirely different than the rest of its ‘family’ members. And finally the discrepancy between the jurisdictions is used as a basis for the assertion that the customary rule does not exist. Yet custom does not require unanimity among different systems, it requires similarity in state practice (coupled of course with *opinio juris*) among enough different jurisdictions that it could be said to be a rule. Precisely because it is far from certain how many jurisdictions with a consistent or shared norm are required in order to establish that norm as customary law, this same survey of jurisdictions could perhaps just as well have been used to assert that the norm *is* customary law. There is no inherent conclusion to be drawn from this survey other than that the categorization into legal families in fact fails to describe the similarities and differences between these jurisdictions, and all that we know is some states accept duress as a defence and some do not. The same survey-style approach was taken in the definitive *Tadić* judgment when the assertion was first made that JCE is a mode of responsibility according to customary law.⁵¹ In many other judgments the case law of the European post World War II judgments is heavily relied upon as a basis for the same reasoning.⁵² This approach has been repeated in international tribunals continuously, where a mere handful of jurisdictions are surveyed to make a general conclusion. International lawyers of the 21st century, and particularly international criminal lawyers who must be sensitive to the inherent divergences in domestic criminal laws, must make a broader, more diverse and non-Euro-centric selection of jurisdictions in order to assert that a rule does or does not exist as custom.

For these exact reasons, Glenn has proposed the concept of ‘legal traditions’ to replace that of ‘legal families’ when undertaking any comparative study of rules or notions across different legal systems. Where ‘legal families’ lead to a static, taxonomic approach and an assumption of incompatibility, such as the conclusion drawn by the ICTY Appeals Chamber in *Erdemović*, the concept of ‘legal traditions’ provides no inherent demarcations, and can serve as a technique for reconciliation of different laws which can be applicable on the same territory.⁵³ Legal traditions involve constant comparison, and facilitate a ‘coming together’, since they speak constantly to the relations between the local and the non-local, and, in scientific terms, expresses relations rather than properties.⁵⁴ Because there are constant flows

⁵¹ *The Prosecutor v. Dusko Tadić*, IT-94-1, Appeal Judgment, 15 July 1999, §§ 214-219.

⁵² Zahar, *supra* note 23 at 94, 96, 99, 239.

⁵³ H. Patrick Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’, in M. Reimann & R. Zimmerman (ed.s) *Oxford Handbook of Comparative Law*, (2006, Oxford University Press) at 433.

⁵⁴ *Ibid.* at 432.

of normativity between systems, the concept of legal traditions allows a more useful basis of comparison, an issue by issue comparison rather than a taxonomy of difference or similarity. Glenn still uses the terms 'civil law' and 'common law', but he speaks of these as traditions rather than families, allowing for more domestic systems to be included, as well as the possibility that one domestic system may fit into more than one tradition.⁵⁵ This is particularly helpful if we consider that ICL has characteristics of both traditions but could never be happily classed as belonging to one legal 'family' or the other.

Glenn's approach is instructive also because there are many examples of a system which might be simply placed in the family of civil law, but which borrows successfully from systems which might be termed common law.⁵⁶ One example is the Argentinian import of a constitution modeled very closely on that of the USA, including judicial review, while the rest of the legal system is much closer to European civil law models.⁵⁷ This family taxonomy does nothing to help instruct on how transplants take place, nor on how they *should* perhaps take place when one wants to ensure a greater chance of successful reception. A similar but even more dynamic approach is taken by comparativist Richard Small, who argues that context is an even greater determinant in the necessary conditions for a successful transplant than legal culture, although he does implicitly agree with an approach such as Glenn's that legal culture is a better descriptor than legal families. But rather than pitch the debate between culturalists on the one hand, who argue that because society is an inherent part of law, transplants between different legal 'families' or even legal cultures are never going to be successful, and transferists on the other hand, such as Watson, who argue that law and society have no inherent relationship, and therefore that legal transplants can and do take place regardless of the systemic differences between donor and receiving systems,⁵⁸ Small posits that specific contexts can change over time and become shared between legal cultures, whether or not these legal cultures are similar. As an example he shows how insider trading laws were borrowed from the US and introduced into both the UK and Japan, with little success in the beginning until the context for such an import changed, and then the transplant

⁵⁵ H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, USA 2007)

⁵⁶ See e.g. *supra* note 31, at 846. See also Richard G. Small. 'Towards a Theory of Contextual Transplants' (2005) 19 Emory Int'l L Rev 1436 and

⁵⁷ Marcelo Ferrante, 'Argentina' in Kevin John Heller and Marcus D. Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 12

⁵⁸ Richard G. Small. 'Towards a Theory of Contextual Transplants' (2005) 19 Emory Int'l L Rev 1437

became more successful.⁵⁹ In fact Small suggests an entire context may be imported, such as capitalist interests being transplanted into Russia, with legal transplants following this contextual shift.⁶⁰ The context guides both the phenomenon of a legal transplant and the selection of which foreign institution will be transplanted, only the final form of the law transplanted will be guided by the legal culture into which the institution is being transplanted.

C. What Can Be Learned From the Scholarship on Legal Transplants?

In the end all of the scholarship discussed here is most useful to international criminal lawyers because it describes the phenomenon at hand, and at the same time, in fact *because* it is a transparent descriptor, it can help to ensure the success of an asserted transplant. For example, Miller's typology of how transplants occur demonstrated that the most successful transplants are those which have been selected with a more functionalist approach, and combining this with Glenn's notion of legal traditions could help instruct participants in the legal process on how to build a stronger methodological argument for why their asserted solution to a legal problem should be received into ICL. Rather than surveying the practice of a number of states according to a legal family taxonomy, the looser notion of legal tradition may help to guide not only the selection, but also in the reasoning for why a particular legal notion could play the desired function successfully in the receiving system. Because ICL is a combination of different legal traditions, there is no reason why one tradition should weigh out over another, and yet in searching for a functional solution, differences between domestic solutions may be explained by the differences in tradition, without this leading to a war of legal culture. In the case of *Erdemović*, the court could have come to the same conclusion, and yet grounded its decision on the fact that the function of duress as a complete defence in domestic law differs from the function it would play in the context of international crimes, and that the fact that some legal traditions display certain tendencies was instructive but not persuasive. Alternatively, the court could have argued that it chose to follow certain domestic legal traditions based on whether in these legal traditions a distinction is made between (objective) justifications and (subjective) excuses, and whether such a distinction exists in the

⁵⁹*Ibid.* at 1454.

⁶⁰*Ibid.* at 1438.

statute or jurisprudence of the court.⁶¹ This is both a functional approach and an approach that allows legal traditions to guide the court. A domestic judge seeking to answer a question of international criminal law could use the same approach and feel confident that his or her conclusion is well grounded, whether or not there is a consensus in other courts on the same issue.

Both Watson and Miller tell us that what the judge will do is exactly what other law-makers do when making a selection from possible foreign legal institutions, namely look to the most authoritative and/or most accessible solution. This often means the most familiar solution. The point, though, is to be transparent about this process as being one of legal transplantation, and to use what comparativists can tell us about how this process works. Particularly since this process is multi-layered in ICL, given that there are so many law-makers and law-appliers in a multitude of forums, both at the international and domestic level. If the domestic judge wants to know what he or she should do when faced with an uncertainty regarding a defence or a mode of liability for an international crime, she is likely to look to international tribunals as authoritative and possibly to other domestic courts which are accessible, thereby transplanting across domestic jurisdictions, but also back ‘down’ from international tribunals, which have been transplanting ‘upwards’ from domestic systems as well. If she is explicit about this process, and makes a conscientious selection from a range of legal traditions, and considers from a functional perspective whether the asserted rule is likely to transplant successfully given the context from which and into which it is being transplanted, then not only will the reasoning for the final choice made be far more solid, but the chance of successful transplant will also increase because the transparency of the methodology will lead to a greater degree of acceptance by other participants in the processes of ICL.

The language of legal transplants has thus far been used to demonstrate the process by which certain normative areas of ICL are being developed, and we have expanded the understanding of this phenomenon by including an analysis of different types of transplants and the contextualization of this process. The next step is to consider the impact this process has on ICL as a system, from a more external perspective.

⁶¹ See for a comprehensive discussion on this, Annemieke van Verveveld, *Mistake of Law: Excusing Perpetrators of International Crimes* (TMC Asser Press 2012).

2. Legal Patchworking and Legal Pluralism in ICL

By looking at this process of legal transplants within ICL, an implicit analogy is being made between ICL as a system of law and any domestic system of law which borrows from other domestic systems. But in fact ICL is unlike any domestic system of criminal law, in as far as it is not only very nascent, but more importantly it is not an instrument of a central political authority which has a recognizable legal tradition, in the sense that Glenn intends us to use the notion of 'tradition'. Domestic criminal systems have developed over time inside the context of the nation-state, and where domestic systems have borrowed from other systems, the legal transplants have merged into the receiving system in the way a transplanted organ merges into the recipient body, becoming a part of the original whole.⁶² Within the social, political and legal context of a nation-state, criminal law has traditionally been an instrument of the sovereign (be that an individual or a government) to express norms and punish transgressions of these norms.⁶³ The legal tradition of any nation-state will determine much about the form this criminal law system takes. But ICL does not have the same relationship to public international law that domestic criminal law has to the rest of the nation-state law of which it is a part. Public international law may have many sub-fields, in the way a domestic legal system has many sub-fields, but it has no central authority. If we see ICL as a part of a meta-system, then it has a peculiar place, if only for the fact that it deals with the punishment of individuals and the notion of individual responsibility, whereas the rest of public international law traditionally has been focused upon the state entity. ICL is such a new addition to international law that the process of legal transplantation could in fact be described as one of legal patchworking. Rather than transplanting organs into an existing body, an entirely new creation is being put together piece by piece, like a patchwork quilt.

This patchworking results in a multiplicitous system. There is much discussion on the concern of fragmentation in international law in general, and in ICL in particular, due to the increasing number of international tribunals which may decide similar questions in entirely different ways. This is amplified by the fact that international tribunals have different statutes, which contain different interpretations of, for instance, defences or modes of responsibility, and perhaps by the fact that they each deal with different types of conflict and different ways

⁶² Alan Watson, *Legal Transplants : An Approach to Comparative Law* (Scottish Academic Press 1974) 27

⁶³ Markus Dirk Dubber, 'Comparative Criminal Law' in Mathias & Zimmermann Reimann Reinhard (ed), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 1289

in which international crimes are being committed.⁶⁴ On top of this, domestic courts are asked to deal with the same questions, and may look to these international tribunals for guidance, sometimes taking the entire body of case law from a tribunal to be binding law,⁶⁵ and sometimes taking it to be an exercise in comparative law, but in the end often applying domestic implementation laws to solve the problem. A diversity of law-makers and law-apppliers means an inevitable diversity in the norms being applied, with the risk that this leads to a lack of legal certainty and undermines ICL as a system.

Many scholars have attempted to alleviate the concern for fragmentation by describing this phenomenon as pluralism – a move which is not merely semantic but in fact normative. If fragmentation means a splintering and a loss of coherence, threatening the very legitimacy of ICL as a body of law, then pluralism is rather an acceptance that diverse tribunals and diverse participants will lead to diverse possible interpretations of the law, but that this does not have to lead to lack of legitimacy.⁶⁶ Rather it is an inevitable attribute of a field of international law which is developing so rapidly. But there are scholars who would deny that we can speak of pluralism without destroying the necessary coherence to speak of a ‘system’ of law. Behind these linguistic shifts hide some very fundamental assumptions about whether ‘the law’ in general, and ICL specifically, can be seen as systems at all. What exactly do we mean by pluralism? If we mean the possibility of co-existence of different legal traditions, of different normative paradigms, this requires on the one hand negating the assumption of incommensurability, but on the other hand questioning what in fact are the sources of law, and whether all interpretations and applications of concepts within the law are equally valid. For this reason, the scholarship of legal pluralism will be considered here as a useful and perhaps necessary tool to combine with the scholarship on legal transplants in the context of ICL.

The term ‘legal pluralism’ has its own legal scholarly history which will be used here to develop two important points. Firstly, despite some contentions to the opposite, multiple normative regimes which appear on the surface to clash, can in fact co-exist as part of the

⁶⁴ Mark Drumbl

⁶⁵ Trapani *supra* note 34.

⁶⁶ Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders (Introduction)* (Cambridge University Press 2012); M. Delmas-Marty. 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law' (2003) 1(1) *Journal of International Criminal Justice* 13; H. G. Van Der Wilt. 'Equal Standards? On the Dialectics Between National Jurisdictions and the International Criminal Court' (2008) 1(2) *International Criminal Law Review* 229; H. Van der Wilt. 'National Law: A Small but Neat Utensil in the Toolbox of International Criminal Tribunals' (2010) 10(2) *International Criminal Law Review* 209;

fabric of a single, coherent system. Secondly, and perhaps most poignantly, that harmonization and pluralism are not antonyms, and may in fact be notions which, when combined, can bolster the legitimacy and strength of the international criminal justice project. But in order for this to be the case, we must first be very clear what we mean by pluralism.

A. *ICL as Legal Pluralism*

‘Legal pluralism’ is a term that legal sociologists and anthropologists have been using since the 1970’s and 1980’s, mostly in observation of the processes and difficulties faced by colonial and post-colonial societies attempting to incorporate local customary law into the imposed system of western law.⁶⁷ Legal anthropologists wrote about tribal communities and societies which were not based on a central state-like authority, describing their mechanisms of social control, conflict resolution and norm enforcement as ‘law’. Legal sociologists sought to consider the way in which these mechanisms might co-exist with the (western) state-based concept of law specifically in colonial and post-colonial regions. However this terminology met resistance from those who favoured a legal sciences approach, who believed that to give the name ‘law’ to any form of social organization or rule that was not linked to a state would weaken the concept of law as a normative regime, and make it unclear as to the sources of law and how it can be enforced.⁶⁸ This brings us back to Glenn’s criticism of a Euro-centric ‘legal families’ approach to comparative law, which classifies any non-western traditional or customary laws as non-law for the purposes of determining what may be a legitimate system of law to be borrowed from. In his early writings on this debate, legal sociologist John Griffiths termed this the centralist view, which denies the possibility of legal pluralism because it sees law as part of the hegemonic claim of the state.⁶⁹

In the centralist view, according to Griffiths, law is ‘an exclusive, systematic and unified hierarchical ordering of normative propositions’,⁷⁰ created, applied and administered by the state. A Kelsian or Hartian approach would fit this definition, which contains a hidden

⁶⁷ John Griffiths. ‘What is Legal Pluralism?’ (1986) 24 J Legal Pluralism & Unofficial L 1; M. Delmas-Marty. ‘The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law’ (2003) 1(1) Journal of International Criminal Justice 13

⁶⁸ Franz Von Benda-Beckmann. ‘Who’s Afraid of Legal Pluralism?’ (2002) 47 Journal of Legal Pluralism & Unofficial Law 48

⁶⁹ Berman, *supra* note 66, at 12.

⁷⁰ Griffiths, *supra* note 67, at 3.

assertion that this is not only the way law is, but the way it ought to be.⁷¹ Anything that does not fit this hierarchical ordering of norms, and is not a result of state-volition, is not law. The goal of centralism is unification within a single, coherent system, and a centralist view therefore denies the possibility of legal pluralism in its simplest sense as meaning ‘the presence in a social field of more than one legal order’. When observing the plurality of judicial fora, legal commentators, and divergent interpretations among these participants in ICL, centralists would therefore prefer the term ‘fragmentation’, since it describes a splintered system of international law, lacking coherency, foreseeability and therefore legitimacy. As Kelsen argued: law therefore ceases to operate as a system.⁷²

The conundrum for international criminal lawyers, then, is how to admit of the diversity and even unpredictability of interpretation and application of certain areas of ICL both substantive and procedural, and at the same time maintain legitimacy. The principle of legality is no small character in this drama. In his example of plural legal sources in European private law, Martijn Hesselink points out that the problem arises when it is unclear *which* set of rules apply:

Unless we regard the law (or a branch of it) as a systematic whole with outer limits which we can establish at least approximately, we cannot adopt the internal perspective from which the law is treated as being binding ... The reason is that we need to know whether we are inside a given system (i.e. within its borders), and not inside a different system (e.g. the national system as separate from the European system) ... Without the internal perspective we can develop sophisticated theories about the law ... but we do not know where to start finding an answer to questions of law.⁷³

Instead Hesselink prefers the monist approach which allows for sub-systems within one greater over-arching system.⁷⁴ He admits there may be divergent interpretations within these sub-systems, but harmonious interpretations are made easier when all the sub-systems recognize the boundaries of the greater system of which they form a part. This is

⁷¹*Ibid.*

⁷² Martijn Hesselink, 'How Many Systems of Private Law Are There in Europe? On Plural Legal Sources, Multiple Identities and the Unity of Law' in L. Niglia (ed), *Pluralism and European Private Law* (2012)

⁷³ *Ibid.* at 4.

⁷⁴ *Ibid.* at 34.

harmonization with unification as its goal, the polar opposite of legal pluralism as a 'descriptive theory that rejects the idea that law is one coherent legal system'.⁷⁵

Griffiths moved against this monist depiction of the legal world when he said that legal sociology and anthropology teach us that law in a modern society is in fact plural rather than monolithic by definition, and that it is legal centralism which is the myth, 'an ideal, a claim'.⁷⁶ Not knowing where to start to find an answer of law is only a problem inside the paradigm that assumes there is a single, sovereign, law-giving authority and a monist system with a single answer to any legal question. Legal pluralism in the 'strong' sense, according to Griffiths, debunks this centralist ideal and describes a situation in which 'not all law is state law, nor administered by a single set of state institutions, and in which law is neither systematic nor uniform'.⁷⁷ This claim is disturbing to a centralist ear, but one which better fits the reality of public international law in general and ICL in particular.

The distinction between legal pluralism in a 'strong' sense and a 'weak' one is absolutely key. Legal pluralism in the 'weak' sense according to Griffiths describes a legal system as pluralistic when it contains different bodies of law for different groups in the population governed by that system,⁷⁸ for example choice of law under a conflict of laws regime, or multiple layers of EU contract law, or pre-existing customary law for indigenous groups in a post-colonial setting. Pluralism in the weak sense is actually a substratum of the centralist ideal, since the sovereign authority or the Kelsian *grundnorm* is the source for allowing what is actually merely legal diversity within a single over-arching system. We must be careful in our use of the term 'legal pluralism' when discussing the diversity we observe in ICL for exactly this reason: are we committed to a centralist ideal, or are we willing to accept multiple normative regimes in one social space?

If we are committed to the centralist ideal, then we actually use legal pluralism in the weak sense, as a synonym for legal diversity or non-uniformity. But then we face great problems when it comes to the participants in the process of ICL who are self-appointed law-makers and law-appliers. The disparity between judgments from different tribunals, the lack of hierarchy between tribunals, the widely differing interpretations on the part of commentators and experts on the law, and the uncertainty which defendants face in their trials, all would

⁷⁵*Ibid.* at 6.

⁷⁶*Ibid.* at 4.

⁷⁷Griffiths, *supra* note 67, at 5.

⁷⁸*Ibid.*

force us to accept the conclusion of fragmentation: this system does not operate coherently as one system.

If, however we are willing to accept the simultaneous co-existence of multiple normative regimes, we sidestep the debate on fragmentation entirely, since the law is no longer viewed as a single system with the requirement of a clear hierarchy of norms and sovereign authority. This is in fact legal pluralism in the ‘strong’ sense, acknowledging the phenomenon of multiple legitimate sources of law, and of divergence in norms, interpretation, law-making and law-applying.

Legal pluralism in the ‘strong’ sense, described since by others as ‘deep’⁷⁹ or ‘radical’⁸⁰ legal pluralism, shifts from the focus of classical pluralism which examined the effects of society on law, to a new focus which describes a complex of norm-ordering from multiple sources. Pluralists have noted over and over again since Griffiths first made this distinction, that law does not have to originate only from the sovereign state.⁸¹ Rules can be generated by any number of the semi-autonomous social fields which interact, either from within a field, from smaller sub-fields, or externally from other fields.⁸² Examples of these semi-autonomous fields relevant to our discussion are the fields of public international law, ICL itself, the law of international tribunals, the law of domestic courts, the norms developed by academic commentators, the fields developed by NGOs such as the ICRC and its studies on customary law in IHL⁸³ or the International Law Commission and its Draft Principles on State Responsibility,⁸⁴ the arena of the European Court of Human Rights and its interaction with domestic courts⁸⁵ and the way in which its norms are imported by international criminal courts.⁸⁶

⁷⁹ S. E. Merry. 'Legal pluralism' (1988) 22 Law & Soc'y Rev. 873

⁸⁰ Mattias Kumm, 'Constitutionalism and the Moral Point of Constitutional Pluralism: Institutional Civil Disobedience and Conscientious Objection' in Dickson and Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford University Press 2012) 2

⁸¹ Griffiths *supra* note 67 at 25. See also Sally Falke Moore. 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7(4) Law & Society Review 719; Merry *supra* note 79, at 889; Berman *supra* note 66, at 7.

⁸² *ibid*

⁸³ Jean-Marie Henckaerts and Louise Doswald-Beck, *International Committee of the Red Cross's study of Customary International Humanitarian Law*, (Cambridge University Press, 2005).

⁸⁴ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol II, Part 2.

⁸⁵ ...

⁸⁶ ...

This is no longer simply a description of non-diversity among the rules and norms generated by these multiple sources, but of the way in which ICL operates in the context of a dynamic interaction between many fields. This approach solves the problem of the question of sources, especially when we consider the dialectic between domestic and international law in the development of ICL. A centralist view struggles to categorize the reference to domestic law as a source, unless it can be called custom or a general principle, but a pluralist can easily incorporate this dynamic process of the development of norms because the relationship between domestic and international law is a natural and inevitable part of this pluralistic legal order.⁸⁷

While one may argue that this leads to a risk of relativism, it cannot be denied that states and other players on the international legal field work within a framework of overlapping jurisdictional assertions by other state, international and non-state communities, creating a hybrid legal space.⁸⁸ Delmas-Marty points out that this hybridity occurs in many areas of international law, and gives the example of early human rights law, which, faced with the criticism of Western hegemony, in fact benefited in terms of both legitimacy and effectiveness by engaging in a dialogue between cultures.⁸⁹ ICL is the quintessential hybrid legal space, in which accusatorial and inquisitorial elements have been taken from various legal traditions and combined to create new legal procedures and substantive law, to a greater or lesser degree of success. One could observe the clash of legal cultures that has appeared in judicial and academic debate, for example in the ICC *Lubanga* judgment which took a distinctly different tack to the case law of the ICTY on modes of participation, and raised much debate in doing so.⁹⁰ It is for this very reason that Delmas-Marty argues for a pluralist conception of ICL by seeking a common ‘grammar’, following the model of the European *Corpus Juris* project.⁹¹ By working on a common ‘grammar’, which can be grounded in principles or selected terminology that is not specific to any given legal tradition, we can move away from the conflictual nature of the clash of legal cultures and towards agreeing on

⁸⁷ See for example Merry *supra* note 79 at 889, and Van der Wilt (2010) *supra* note 7.

⁸⁸ Berman *supra* note 66 at 5.

⁸⁹ Delmas-Marty *supra* note 14 at 14.

⁹⁰ See *The Prosecutor v Thomas Lubanga Dyilo, Confirmation of Charges*, Case No. ICC-01/04-01/06-803, 29 January 2007 at para 339; *The Prosecutor v Thomas Lubanga Dyilo, Judgment*, Case No. ICC-01/01-01/06, 14 March 2012 at paras 997-999; and see especially Judge Sir Adrian Fulford’s separate opinion to the Judgment at paras 10, 12. See also Kai Ambos, ‘The First Judgment of the International Criminal Court (*The Prosecutor v Lubanga*): A Comprehensive Analysis of the Legal Issues’, (2012) 12 International Criminal Law Review 115; James G. Stewart, ‘The End of ‘Modes of Liability’ for International Crimes’ (2012) 25(01) Leiden Journal of International Law 165;

⁹¹ Delmas-Marty *supra* note 14 at 19.

universal principles, without ICL becoming an imperial or western project. A pluralist conceptualization of ICL will, according to Delmas-Marty, avoid the criticisms both of relativism and Western hegemony.⁹²

Given that ‘strong’ pluralism as a descriptive model denies the hegemony of the state as law-maker, it follows that a pluralist conceptualization of ICL will avoid western hegemony as well, since acknowledging the co-existence of multiple normative orders invites awareness of as many of these orders as possible. If international criminal lawyers, who hail from as many legal traditions as exist in this world, take a pluralist approach to their field, when attempting to fill lacunae in the law they are likely to seek answers beyond their own familiar systems, which we see occurring often, and also beyond the few dominant western systems. The question remains, however, what this means for the notion of harmonization and coherency in ICL.

B. Harmonization and Pluralism

The choice to use ‘pluralism’ in a strong or weak sense when we describe the non-uniformity of ICL is an important one when we consider the normative consequences. Most international criminal lawyers would agree that states are certainly no longer the only law-makers let alone law-appliers in international law, leading to the situation of diversification which is our focus here. We could therefore safely say that we have moved away from the Westphalian model, which assumes that international law is born only as a result of the will and consent of states. In light of the above discussion, this means we could generally agree that the centralist ideal is difficult to apply to public international in general, and to ICL in particular. And yet the international criminal justice project requires a certain level of coherency and foreseeability in order, among other things, to fulfill the principle of legality. So although we speak of pluralism, and in fact prefer this term to the fearsome notion of fragmentation, in fact most of us operate from an intention that ICL should be considered a single legitimate and enforceable system of law – even if, empirically speaking it is not, or not yet, entirely so in all areas. If this is so, can we rightfully use the term ‘pluralism’ in its strong sense, without destroying this ideal of a coherent system, given that pluralism in fact rejects a monistic

⁹²*Ibid* at 25.

‘system’ as such? Are we not using the term ‘pluralism’ while at the same time striving for a centralist ideal of harmonization under a single monist system?

Choosing to identify ‘legal pluralism’ in the weak sense does not solve this problem. While international taxation lawyers, or European private law lawyers may be able to operate inside of this paradigm with slightly more ease, this is because there appears to be an easier boundary to draw around the greater, single system within which a plurality of sources and laws arise. In this weak sense of pluralism, non-uniformity is a temporary state of affairs, and harmonization or convergence is possible over time.⁹³ However what we observe in ICL may not be a parallel phenomenon, if we observe the increase in plurality of judicial fora and the diversification of interpretations and applications of certain norms into contexts both domestic and international, as pointed out by Koskiniemmi.⁹⁴ Take the classic example of the moment at which the ICTY departed from the ICJ in its interpretation of the fundamental notion of ‘effective control’, noting that the context for doing so was different and that there is no hierarchical relationship between the two tribunals.⁹⁵

So where does this leave us? Can we still speak of a ‘system’ of ICL? Can we even rightfully consider ICL to be a sub-system of public international law, relying on its sources and institutional framework, yet developing in ways divergent from this greater system and with a topsy-turvy approach to the hierarchy of sources such as domestic and international case law and academic commentary?⁹⁶ This conundrum may be resolved by finding some solace in the notion of cosmopolitanism, borrowed from our fellow constitutional theorists. It may act as a kind of restraint on the potentially chaotic picture that emerges from pluralism in the strong or radical sense, which has virtually no boundaries as to who or what can be a source of law, leaving the criminal justice project, and the defendant in particular, without sufficient legal certainty. Constitutional cosmopolitanism moves away from the nation state as the point of reference, and insists that the different legal orders making up public international law are not hierarchically integrated, yet at the same time these legal orders don’t simply co-exist alongside one another,⁹⁷ in parallel universes, without regard for respective developments being made. In the EU, the relevant participants have developed mechanisms and doctrines

⁹³ Hesselink, *supra* note 73.

⁹⁴ Koskiniemmi, *supra* note 10.

⁹⁵ *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Judgment, 7 May 1997 at paras 586-588, in which it departed from the definition given by the ICJ in *The Case Concerning the Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, 27 June 1986.

⁹⁶ Steer, *supra* note 8.

⁹⁷ Kumm, *supra* note 80, at 2.

for ‘constructive mutual engagement between different legal orders’, allowing for coherence even without hierarchical integration.⁹⁸

The discourse of constitutionalism already has a reach beyond the domain of EU law, for instance in the transition to a democracy in South Africa, the moments of transitional justice in Northern Ireland and other post-conflict societies, and the use of constitutional rights jurisprudence as a way of accommodating competing human rights claims from civil groups, national, sub-national, trans-national, and supra-national political spaces.⁹⁹ The cosmopolitan approach of constitutional pluralism recognizes the traditional birth-place of the institutional framework of international law regimes such as EU law or ICL as being the state, but also recognizes these regimes have moved beyond the original framework and that competing constitutional claims can exist alongside each other in a horizontal rather than vertical relationship, or ‘heterarchical rather than hierarchical’.¹⁰⁰

At the same time, cosmopolitanism works from a set of universal principles which guide interpretation of the law and its progressive development.¹⁰¹ As Mattias Kumm points out, even though it might be desirable to have only one legal point of view, this does not have to be the reality.¹⁰² Cosmopolitanism advocates for awareness of the various developments in the multiplicitous legal spaces such as domestic and international tribunals and the teachings of academic commentaries, such that the heterarchical relationship is not a blind and parallel one, but a self-aware and interconnected one. Although a judge at a domestic or an international level who is faced with a question on defences or modes of participation in ICL may choose a certain direction influenced by a specific accessible or authoritative legal tradition, she should do this with full awareness of the choices available to her, and harmonise her interpretation where possible, according to some universal guiding principles.

These guiding universal principles bring us back to Delmas-Marty’s plea for a common ‘grammar’, which also matches the notion of a meta-language to integrate a plurality of legal orders in the sphere of EU law, as described by constitutional pluralist Niel Walker.¹⁰³ What this common grammar or meta-language might be in ICL may take some finding, since we cannot rely on the political starting point which guides constitutional pluralism, ‘those

⁹⁸*Ibid.*

⁹⁹Niel Walker. ‘The Idea of Constitutional Pluralism’ (2002) 65 *Modern Law Review* 318

¹⁰⁰*Ibid.* at 337.

¹⁰¹Kumm, *supra* note 80, at 22.

¹⁰²*Ibid.* at 17.

¹⁰³Walker *supra* note 99, at 357.

[principles] central to a liberal democratic constitution'.¹⁰⁴ We might take instruction from theorist Mirjan Damaska; that the point of ICL is to strengthen the public sense of accountability for human rights violations.¹⁰⁵ What this guiding principle means when a judge is faced with a question on applicable defences or whether there is a hierarchy among modes of liability in a case of international crimes, may have to be distilled over time. Does strengthening the public sense of accountability mean prosecuting *all* of those involved in collective crimes as equal participants, following the trend of the ad-hoc tribunals, or does it mean distinguishing between participants normatively, allotting different modes of participation as different qualifications and with differing elements, following the new trend of the ICC? Although domestic law has been the inspiration for both of these trends, in the sense of legal transplants, the differing legal traditions cannot solve this problem without a continuing 'clash of cultures', and so the patchworking process requires a little more time, as each of these transplants become integrated into the international context and the specific nature of the crimes and conflicts that ICL faces, form these transplants into part of the whole of this new system. And this is the goal of harmonization, though no longer in the context of a centralist ideal of unification or a monistic system, which requires a winner and a loser in each conflict over which norm or rule is correct, but of a system which is inherently pluralistic yet self-aware of the concurrently existing plural legal spaces, and of the process by which these spaces interact and may, over time, lead to a clearer view of what the patchworked whole looks like.

Thus we do not have to throw away the hope for harmonization in ICL as a legitimate, functioning legal system, even as we acknowledge the inherent existence of plural normative regimes within this system. Although Griffiths would argue that harmonization and unification are by definition goals of the centralist idea, tied to the assumption that pluralism is only a temporary state of affairs,¹⁰⁶ we are in fact on a different point along the continuum between his 'strong' or 'radical' notion of legal pluralism, and the other extreme of a Kelsian centralist ideal. By taking the cosmopolitan approach of looking to an over-arching 'grammar' or meta-language that will guide interpretation and application of new and developing areas of ICL over time, we can maintain a goal of harmonization, without negating the multiple

¹⁰⁴ Kumm, *supra* note 80, at 22.

¹⁰⁵ Mirjan Damaska. 'What Is The Point of International Criminal Justice?' (2008) 83 Chicago-Kent Law Review 329

¹⁰⁶ Griffiths *supra* note 67, at 8.

sources of law and the dynamic processes of interaction between these sources, particularly those on the domestic plane *vis-à-vis* those on the international plane.

C. What Can Be Learned From the Scholarship on Legal Pluralism?

Hesselink points out in his attempt to answer the question how many systems of private law there are in Europe, that it is difficult to answer the question to what extent a field of law is a coherent or pluralistic system, or indeed a system at all, unless we have some idea of where that field is going,¹⁰⁷ in the sense whether it is developing into its own predictable system of *sui generis*, or whether it will simply continue to splinter and develop in multiple directions. And it is difficult to predict where it is going without having some notion of where it ought to be going: in other words, the descriptive question is difficult to answer without a normative starting point. The terms ‘fragmentation’, ‘harmonization’ and ‘pluralism’ are not neutral descriptors in this sense: they carry with them a more powerful context and normative claims which we should be aware of in any debate on what is happening in this developing field of international law. The normative starting point may be easy: given that international criminal lawyers want to see the international criminal justice project succeed, which requires legal certainty for defendants and coherency as a matter of legitimacy, most of us would agree that harmonization over time is where ICL ought to be going, when it comes to those areas which now lack sufficient clarity.

If this is our normative starting point, we can begin to make clear choices about the language we use to describe the state of affairs and the direction ICL appears to be taking. We could agree with Griffiths and Hesselink that harmonization can only take place inside the paradigm of a centralist ideal, which assumes one (over-arching) system of law and a single sovereign authority, such as the state, as the authoritative law-maker. However not only does this picture not match the reality of how many areas of ICL are formed as a matter of process, it is also an undesirable one in terms of the conclusion that must be drawn: the current divergence of law-makers, law-appliers and the normative interpretations that result from these participants in the process of ICL must be described as fragmentation. The system of ICL within this paradigm ceases to operate successfully as a system if it splinters, since there

¹⁰⁷ Hesselink, *supra* note 72, at 9.

is no way of predicting for defendants which way a particular tribunal may go in its interpretation of available defences or applied modes of responsibility. The principle of legality is not fulfilled, and the entire international criminal justice project is therefore undermined and reduced to a clash of cultures between a few dominant domestic legal traditions.

The alternatives are twofold: One is to reject harmonization as the normative starting point, and return to a more 'radical' or 'strong' notion of legal pluralism, leaving us with a field of law that is inherently uncertain. This is not only a description of a pluralist reality of sources and interpretation of the law, but it also has a normative conclusion: ICL ought to be permitted to remain floating in uncertainty, because to try and force it into some kind of systemic singularity is to ask the impossible, if it is inherently plural in this radical sense. However this will not satisfy the criticism or concern of fragmentation from the centralist perspective, since all it does is sidestep it by giving a new name to 'fragmentation', without addressing the problem of the principle of legality and the necessity of foreseeability for defendants in a legitimate criminal process.

The other alternative may therefore be the most compelling: by taking a cosmopolitan approach, departing slightly from Griffiths' dichotomy between radical pluralism and centralism, we can use the language of legal pluralism in a more flexible paradigm. One where we acknowledge multiple legal spaces and therefore multiple legal sources, and a dynamic interaction between them, but where this dialectic is in fact a concerted effort towards clarification on those areas of ICL which are still developing. Towards harmonization over time. Towards, in fact, patchworking a quilt which becomes a more and more coherent - if colourful – whole. For some specific areas of ICL, such as modes of liability or defences, this may lead to a *sui generis* context which differs from the various domestic legal traditions which have contributed to its development, due to the specific nature of mass atrocity crimes. The transplants from domestic systems will continue in the manner described in the first part of this chapter, and the reasoning behind a particular transplant can be further justified if participants in the processes of developing ICL are willing to accept the patchworking that is taking place, rather than looking for a winner or loser in possible solutions drawn from domestic systems.

3. Conclusions: How can comparative law scholarship benefit ICL?

Firstly, the question has been posed what can be learned from the scholarship of our fellow comparativists on legal transplants. At the conclusion of his seminal work on legal transplants, Watson has some general reflections, many of which are immediately applicable to the way in which some areas of ICL develop as a process of comparative law. First, he says the transplanting of individual rules or large parts of a legal system is extremely common, as witnessed by the reception of Roman law in many European countries, but also in modern developments of domestic and international law.¹⁰⁸ Secondly, Watson says that transplanting is in fact the most fertile source of law development: ‘most changes in most systems are a result of borrowing’.¹⁰⁹ This would lead to the further conclusion that international criminal lawyers have a professional obligation to familiarize themselves with comparative law as a methodology, to the processes of borrowing, and with legal traditions other than their own domestic background training. This is of importance not only for an individual participant who wishes to be effective in the processes and application of the law, but also for legal progress itself in the field of ICL.

One of Watson’s solutions to the ambiguity of sources and processes of change in any legal system is an analytical two-tier system of law. He describes a front-rank law that is immediately comprehensible to most citizens, and which will provide answers to the majority of legal problems.¹⁰⁹ In ICL we could consider this to be at the very least the core crimes. It is clear what conduct the international community as a whole considers to be a breach of the acceptable boundaries of warfare and of humanity. This front-rank law would then be supported by a second-rank law which would be of greater depth and detailed content, and would be accompanied by commentaries which may themselves have such interpretative authority that they gain the force of law themselves. This second-tier law could in fact be the layers of case law and commentaries by authoritative academic voices that we see arising and proliferating in ICL. Those areas of the law which we agree upon in ICL are therefore comfortably within Watson’s first tier, and the creation of law in the second tier is a result of legal pluralism in the cosmopolitan sense developed here, some norms of which may move into the first tier after a certain time with a process of harmonization in interpretation and

¹⁰⁸ *Ibid.*

¹⁰⁹ Watson (1984), *supra* note 15, at 112.

application. The first section of this paper aimed to demonstrate that the more transparent this process is, and the more deliberate the comparative method applied, the better grounded and more easily accepted a given solution to a gap in the law may be.

Much of the scholarship on legal transplants is therefore useful as we answer the second question posed on legal pluralism. For example, making use of Glenn's notion of legal traditions is more helpful here than a classical notion of legal families, since ICL can clearly not be placed in any single taxonomy of a legal family, and at the same time it is more than just a combination of various domestic systems. As well as legal transplants from domestic criminal law hailing from differing traditions, there is the background legal tradition of public international law and the *sui generis* tradition of IHL, which was not born of state law. In this sense, ICL is by definition pluralistic, born of multiple sources operating in fields that are not necessarily part of one single system. Although we may strive for harmonization within this pluralism, this mix of legal traditions means that unification is an impossible ideal. The centralist claim to unification or hegemony stems from the same line of thought that would classify systems into taxonomies of legal families, and which would lead to the conclusion that ICL suffers from an inherent fragmentation and ceases to operate as a coherent system of law. By using legal traditions as a point of departure, a pluralist conception of ICL becomes possible.

Delmas-Marty draws attention to the contribution comparative law can make to a pluralist conception of ICL in an important way. She too observes the fact that 'lacking the necessary means, judges will give precedence to their personal knowledge (i.e. knowledge of their own or similar legal systems) and otherwise limit their search to data which is immediately available, notably via internet, in a language that they understand.'¹¹⁰ Watson's principles of authority and accessibility are once again confirmed in this analysis. Delmas-Marty argues that hybridization, or legal patchworking, can only successfully take place over time with the adoption of a common grammar and a re-interpretation once a notion has been transposed into the specific context of international law.¹¹¹ In this way the 'clash of cultures' which results from lack of knowledge or a misunderstanding of a differing legal tradition can be evaded. Because this clash of cultures appears to be limited to very few dominant systems of

¹¹⁰ Delmas-Marty, *supra* note 66, at 18.

¹¹¹ See also Van der Wilt, *supra* note H. Van der Wilt. 'National Law: A Small but Neat Utensil in the Toolbox of International Criminal Tribunals' (2010) 10(2) International Criminal Law Review 209.

western law, such fusion techniques and a pluralist approach can therefore also allay criticisms of neo-colonialism in ICL.¹¹²

Furthermore, if what we seek as international criminal lawyers is harmony within the areas that currently lack clarity, then taking a cosmopolitan approach to this paradigm of legal pluralism helps to advance from Griffiths' more radical approach, which would insist that harmonization can only take place inside a centralist paradigm striving for a single overarching system and singular law-making authority. A cosmopolitan approach seeks to consciously create this common 'grammar' or common principles which guide participants in multiple judicial and legal forums towards a harmonious interpretation and application of the law.

'Legal pluralism' is more than a replacement semantic for 'fragmentation': it is a paradigm shift which goes to the very question of sources of law, and the validity of diverging interpretations. The problem of fragmentation is in fact evaded, because the paradigm of pluralism acknowledges multiple sources of law in both domestic and international legal spaces, and sees the interaction between them to be a dynamic and necessary one for forming law, rather than a problematic one.

Put simply, what this means for the practitioner is that we have both a descriptive model of what the domestic or international judge is currently doing in searching for sources of law, and a normative model for how this should be done as we strive for harmonization within pluralism. In seeking to answer a question of interpretation on areas of law that are unclear, such as modes of responsibility or defences in ICL, the principles of authority and accessibility teach us that a judge will likely reach for the case law or theory of a system that is both familiar and accessible by looking to his or her own domestic training, or to a system of which the judge knows the language, or to an interpretation that carries a certain authority. The descriptive paradigm of legal pluralism allows these fields to act as sources of law. Cosmopolitanism adds to this a single internal perspective, with the aim to provide universal principles which can guide in harmonizing divergent interpretations over time. Normatively speaking, in order to justify the specific choices made in borrowing from domestic law or the case law of another international tribunal over other possibilities, a judge should make use of a transparent comparative law methodology, clarifying the selection of jurisdictions, ensuring a range of legal traditions and not simply those systems which are historically the most

¹¹²Delmas-Marty, *supra* note 66, at 20.

dominant. This results in a justification for the very process of patchworking which takes place: the imported legal transplants slowly become part of the new whole, and gain a life of their own. The result is a coherent, if colourful new system, which has borrowed from various domestic legal traditions as well as the unique context of IHL, and has created its own context and legal life.

In the final analysis, the areas of ICL which currently lack clarity develop as a result of context-driven choices, which may be pragmatic, political or moral in nature. Over time, these legal transplants will lead to a full process of legal patchworking, creating a body of *sui generis* law in certain areas, due to the specific nature of international crimes. As ICL has time to mature and develop, it will continue to draw from multiple sources of law or legal spaces, with differing legal traditions that in turn interact with one another both horizontally across domestic lines or international ones, as well as vertically between domestic and international planes. Legal transplants are an inevitable part of this process, and we can do much to learn from and apply the instructive scholarship in both comparative law and legal pluralism if harmony or coherency is what we seek.