A Pragmatic Approach to the General Principles of International Criminal Law?

The Role of Asian Laws

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General principle in international law

ICJ

General principle in international criminal law

ICC

- Is there a critical difference between the two?

It is pragmatic.

The practice is illegitimate.
A Pragmatic Approach to the General Principles of International Criminal Law?

- **Aim**: to explore the practice of the ICC and the other international criminal tribunals on identifying general principles of international criminal law and propose a new theory of general principle.

- **Argument**: the approach of the international criminal courts and tribunals can be theoretically justified based on a new theory called ‘the premise theory of general principles’.

- => The critical difference exists in the premises taken into consideration in the process of recognition
2. Classification

3. The Transposition Theory

4. The Premise Theory

General Principle in International Law

ICJ Art. 38(1) (c)
“the general principles of law recognized by civilized nations;”

General Principle in International Criminal Law

ICC Art. 21 (1) (c)
“general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards”
Difference between General Principle of Law and General Principle of International Criminal Law

- The source is common to these different principles
- The difference might exist in the method to recognize the general principles
The Transposition Theory

International law

National law

The methods taken in transposition (Pellet):

Transformation

Choosing
The Transposition in International Criminal Law

The method of transformation taken in international criminal jurisprudence (Gradoni):

(i) The first step is called as the technic of ‘sampling’
(ii) The second step is called as ‘falsification’

International courts and tribunals adopt national laws as the “receptors” of possible solutions
Mégret: “a pragmatic approach”
Jain: “Illegitimate”
The Premises Theory

What has been considered as specificities in taking the methods of transformation or choice is, in other words, the factual or normative premises.

...The critical difference between the general principles of law as international law and the general principles of international criminal law might be the premises, especially the normative premises of these fields of law that are taken into consideration in recognition process.

=> Case analysis
Transformation

Principle of legality (IMT, ICTY)
Principle of consumption (ICTY)
Principle that a court must be established by law (ICTY)

Choosing

Modification of indictment (ICTY)
Definition of rape (ICTY)
Duress (ICTY)
Lex mitior (ICTR)
Witness proofing (ICC)
Abuse of process (ICC)
Factual and Normative Premises of International Substantive and Procedural Criminal Law

Factual premises
- Characteristics of law of war
- Non-existence of hierarchy among core crimes
- An international court can be established without law

Normative premises
- The balance between the rights of the accused and full exercise of the power of the court
- Respect for human dignity
- Effective implementation of international humanitarian law
- Interest of the accused persons
- Morality
- Fair trial
The Premise Theory and its Justification

Formalism
- Treaty
- Customary law

Voluntarism
- An agreement on attributing power to judges
5. Conclusion

This presentation has demonstrated the validity of the premise theory and that it is the premises considered in identifying general principle that is distinctive between general principle of law and international law and international criminal law.

Implications

• Not just a pragmatic or opportunistic response, but a coherent and inherent practice that contributes to the maintenance and furtherance of the premises of the international criminal justice.
• This approach opens the door for the laws of a state which has not been included in the discussion before (the rules and principles of Asian countries may affect the contents and scopes of general principles of international criminal law.)