THE CONCEPT OF INTERNATIONAL PROCEDURAL CRIMINAL LAW (IPCL)

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12 JUNE 2018 AT KYOTO UNIVERSITY

2018 KYOTO-NCCU JOINT STUDENT SEMINAR IN INTERNATIONAL LAW
• International Procedural Criminal Law (IPCL)

: The procedural law(s) that are applied in international / internationalized prosecution and trial proceedings for core crimes (ICC, ICTY/R, SCSL, ECCC, EAC…)
EPISTEMIC PROBLEM

• The concept of IPCL?

• 2 competing doctrinal conceptions

A part of International law vs collection of the sui generis systems

...The existing views lack comprehensiveness

Aim: To seek for the comprehensive conception of IPCL

Argument: IPCL as a legal system is the comprehensive conception
STRUCTURE OF THE PRESENTATION

I. “International law” aspect of IPCL
II. “Sui generis” aspect of IPCLs
III. IPCL as a Legal System
I. “INTERNATIONAL LAW” ASPECT OF IPCL

1. IPCL as being apart from any domestic law
2. IPCL as a part of international law
3. The new sources
1. IPCL as being apart from any domestic law
2. IPCL as a part of international law
3. The new sources
1. IPCL AS BEING APART FROM ANY DOMESTIC LAW

- International Military Tribunal (IMT)

Procedure to ensure the equal participation of the four allied powers

⇒ general attitude that an international court would never apply domestic law of particular state
• International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)

• UN led tribunals were required to only apply rules which have become general international law…the requirement of legality

⇒ referring to the list of sources in article 38 of the Statute of the International Court of Justice (ICJ)
1. IPCL as being apart from any domestic law
2. IPCL as a part of international law
3. The new sources
2. IPCL AS A PART OF INTERNATIONAL LAW

- The positions to consider international criminal law as a part of international law and the sources of which can be found in the sources of international law

- IPCL is international law on criminal procedure

- Cassese, Werle, Akande, Degan, Simma...

- IPCL as a doctrinal concept
1. IPCL as being apart from any domestic law
2. IPCL as a part of international law
3. The new sources
3. THE NEW SOURCES
- JUDGE-MADE LAW

• Judges exercise a quasi-legislative function

• Article 15 of the ICTY Statute “The judges of the International Tribunal shall adopt rules of procedure”

• Article 14(2) of the SCSL Statute “the judges of the SCSL as a whole may amend the Rules of Procedure and Evidence or adopt additional rules”

• Judge-made laws (RPE of ICTY, ICTR, SCSL; ICC Practice Manual)

• (Cf. ICC Assembly of State Party’s control over rule-making)
3. THE NEW SOURCES
- JUDGE-RECOGNIZED PRINCIPLES

- Judges apply procedural unwritten principles
- General principles of criminal procedural law
  - Legality principle, Lex mitior, principle of consumption...
3. THE NEW SOURCES - DOMESTIC PRINCIPLES

• Article 21 of the Statute of the International Criminal Court (ICC)

• The list of applicable law - Statute, RPE, Elements of Crimes; applicable treaties and the principles and rules of international law; general principles of law derived by the Court from national laws of legal systems of the world
3. THE NEW SOURCES - DOMESTIC LAWS

• So called internationalized courts emerged and some of them apply certain domestic laws (e.g., SCSL, ECCC)
BECAUSE OF THE NEW SOURCES OF IPCL...

IPCL no longer exists only as international law
I. “International law” aspect of IPCL
II. “Sui generis” aspect of IPCLs
III. IPCL as a Legal System
1. IPCL AS A CROSS-SYSTEM COLLECTION OF RULES

• Each court develops its own sui generis system
  
• E.g, ICTY => adversarial system / ICC => inquisitorial system

⇒ IPCL as a doctrinal concept

• Ambos, Pocar, Safferling…

• Concept to serve for a comparative purpose between different international/internationalized courts
2. PLURALIZATION

• Different understanding of the applicable principle (E.g. Witness proofing (ICTY vs ICC))

• The disagreement about priorities helps explain much of the diversity we see in international criminal procedures (Turner)
3. RECOGNITION OF THE SYSTEMATIC LINK AMONG DIFFERENT COURTS

Phenomena

• Structural link (ICTY => ICTR => SCSL)

• ICC Statute as model (East Timor Panel, EAC)

• Crystallization of general principle of international criminal law (Legality principle, ne bis in idem, principles of individual responsibility…)

• => IPCL as a system?
3. RECOGNITION OF THE SYSTEMATIC LINK AMONG DIFFERENT COURTS

• “a special relationship envisioned between the Special Court and the international tribunals, as each institution is established to permit prosecutions for inter alia “serious violations of international humanitarian law.” As such, the International Tribunals, the Special Court and the International Criminal Court belong to a unique, and still emerging, system of international criminal justice.”*

• international criminal proceedings contemplate a body of norms and rules that primarily advance a sui generis system and the rules of IPCL should be exponents of a body of procedural law which wither attained the status of international customary law or represent general principles of procedural law (Knoops)

*Prosecutor v. Brima et al, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment (SCSL-04-16-PT) Trial Chamber I (1 April 2004), para. 22.
III. IPCL AS A LEGAL SYSTEM
1. WHAT IT CAN MEAN THAT IPCL AS A LEGAL SYSTEM?

“Legal systems are mainly the set of norms specifically related by certain criteria”*

(1) Legal system as tradition

(2) Legal system as an autopoietic subsystem of society

(3) Legal system as recognized body of law before a court

(1) LEGAL SYSTEM AS TRADITION

• Academic trend to discuss IPCL as a conflict of legal traditions
• IPCL as a legal system in the same sense as common law legal system / civil law legal system?
• System $\equiv$ tradition, model
• IPCL as the hybrid of common law/civil law model?
• => Does not explain the systematic nature within the legal system
(1) LEGAL SYSTEM AS AN AUTOPOIETIC SUBSYSTEM OF SOCIETY

• **Systematic** nature of legal system

• The system theory... A system composed of self-referential communicative operations (Luhmann)

• Law is an autopoietic subsystem of society that encompasses all communications that contain claims about (il)legality

=> Does not answer to the question of identity of a legal system
(3) LEGAL SYSTEM AS RECOGNIZED BODY OF LAW BEFORE A COURT

• The identity of a legal system

• Raz’s theory on the principle of authoritative recognition*

• “a momentary legal system contains all, and only all, the laws recognized by a primary law-applying organ which it institutes.”

=> The body of law that is applied as a whole before a primary law-applying organ

2. THE CONTOUR OF IPCL

The conditions of IPCL

• “International” or “internationalized” institution

and

• Institution on “international crime”
"INTERNATIONAL PROCESS" MODEL

• "a model described as international criminal procedure’s process of “becoming international”. International criminal tribunals have developed an international criminal procedure that is both adapted to the constraints imposed by their international environment, and the goals and values of international criminal justice."

• => Institutional effect

SUBSTANTIVE LAW AFFECTED ASPECT OF IPCL

• Taking into account of the seriousness of international substantive law

• Crystallization of **general** principle of international criminal law (Legality principle, *ne bis in idem*, principles of individual responsibility…)

- Genocide
- War Crimes
- Crimes against Humanity
- Aggression
THE CONDITION OF IPCL IS REFLECTED IN GENERAL PRINCIPLES

• Transposition of domestic principles to international criminal justice sphere
• Modification and selection taking into account the specific features and requirements of international criminal justice
• => Normative premise of international criminal law

=> The normative premises of international criminal justice make the contour of IPCL
3. CRITISISM: NOT A COHERENT SYSTEM BUT A “COMMUNITY”

• “international criminal procedure is currently not a coherent legal system, but is rather best described as the product of a decentralized “network” or “community” of courts.” (Turner)

• But the community requires “code of conduct” (Burke-white) (=general principle)

CONCLUSION
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• The comprehensive conception of IPCL
• As a legal system on core crimes that is applied as a whole before the international/internationalized courts
IMPLICATION OF THE PRESENTATION

Apprehending IPCL as a legal system:

1. Separation from international law:
   ➔ Autonomous of IPCL

2. Not just a collection but a system:
   ➔ Understanding the standardization from legal perspective