The International Procedural Criminal Law (IPCL) as a Legal System

Megumi Ochi
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Introduction

- 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, SCSL, ECCC, EAC…)

- Statutes
- Rules of Procedure and Evidence (RPE)
- Regulations of the Prosecutor (RoP)
- Regulations of the Court (RoC)
- Regulations of the Registry (RoR)
- Chambers Practice Manual
- Various legal principles of procedure…
Introduction

- The concept of IPCL?
- 3 perceptions
  1. A part of international law
  2. A collection of similar rules
  3. A legal system

Aim: To examine the concept of IPCL as a legal system from analytical jurisprudence’s point of view
Implication of the study

Apprehending IPCL as a legal system:

1. Separation from international law:
   ➔ Freeing IPCL from rules of interpretation and theories on sources of international law

2. Not just a collection but a system:
   ➔ Understanding the harmonization from legal perspective
Structure of the presentation

I. A New Approach from Analytical Jurisprudence
II. General Principle of ICL
I. A New Approach from Analytical Jurisprudence
1. The features of IPCL

Procedural law for core crimes in international/internationalized courts:

1. It is (meant to be) different from any of the domestic laws of any country
2. It is often judge-made
3. IPCL embraces both standardization and pluralization
2. Three perceptions on the concept of IPCL

(1) A part of international law: doctrinal concept (Cassese, Werle, Akande, Degan, Simma…)

(2) As a cross-system collection of procedural rules: doctrinal concept (Ambos, Pocar, Safferling…)

(3) As a legal system: jurisprudential concept (Mégret, Knoops…)
3. Raz’s theory on a legal system* 

- 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.”

⇒ IF IPCL is a legal system...

The distinct feature of the rule of recognition of the primary law-applying organs for core crimes would be discovered through analyzing the practice in which the courts recognize the form of law which does not exist in international law.
II. General Principle of ICL
1. ICL sources

- International law sources
  - General principle of law
  - Statute (treaty/UNSC resolution)
  - Customary law

Comparative analysis of domestic laws

Transposition

International level

General principle of ICL

2. The mechanisms of transposition

1. **Modification**: when a single ‘common denominator’ of domestic laws (and international law) is found, judges modify it to ensure consistency with the *specificity* of ICL features; and

Ex.

IMT judgment, ➔ Principle of legality

Tadić case, 1995 (ICTY) ➔ Tribunal must be established by law

Kunarać case, 2002 (ICTY) ➔ Principle of consumption
2. The mechanisms of transposition

1. **Selection**: when a single ‘common denominator’ of domestic laws (and international law) cannot be found, judges select one rule or several rules combined as general principles of ICL, considering various ICL requirements.

Ex.

*Erdemović* case, 1997 (ICTY) ➔ Plea of duress (common law)

*Musema* case, 2000 (ICTR) ➔ No cumulative prosecution of genocide and conspiracy of genocide (civil law)

*Lubanga* case, 2006 (ICC) ➔ Witness proofing (English law)
3. Theoretical explanation of the two mechanisms

- **Logic of modification**…as a legitimate way to identify general principles of law transposed from domestic laws into international law (achieved by judges’ interpretative activity)

  ➔ not unique to IPCL

- **Logic of selection**…the judges have selected several domestic principles considering various normative premises of ICL

  ➔ unique to IPCL
3. Theoretical explanation of the two mechanisms

- **The normative premises of ICL recognized in case law**
  - the basic requirements of international criminal justice are to safeguard the accused’s rights and prosecute the perpetrators of international crime;
  - ICL must contribute to the essence of international humanitarian law, which is to protect human dignity;
  - ICL must be designed to promote the implementation of prohibiting certain illegal acts;
  - ICL must be interpreted to most benefit the accused;
  - ICL must not be immoral;
  - ICL must ensure fair trial….

- **Issue of legitimacy remains (who decide? Deductive method)**
Conclusion
The concept of IPCL… a legal system

Because a unique rule of recognition of ICL exists: method of selection in recognizing general principle of ICL

...why?

How the diversity in criminal law fits in international sphere