International Criminal Procedure:

A Coherent Body of Law?

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Structure

1. LICP: in need of coherence
2. General principles and rules: role and effects
3. Identification: methodology aspects
I. LICP: a need in coherence (1)

• LICP: a branch of (international) law?

  • Georg Schwarzenberger, 1983:

    ‘The Law of International Criminal Procedure ... does not exist in the international customary law of unorganized international society. ... Subject to insignificant consensual exceptions, International Criminal Procedure as the adjective law of an International Criminal Law in any substantive sense remains in the limbo of lex ferenda.’

  • Nomination as a ‘branch of international law’:

    → ‘based on practical ground, and thus do not call for much theoretical inquiry’: T. Opsahl (1961);
    → ‘a formal and abstract virtue’ (ILC Fragmentation Report, par. 491);
    → ‘existence of a sufficient number of significant rules and principles which give identity and cohesion to a branch of law’: Schwarzenberger (1983).
I. LICP: a need in coherence (2)

● Status quo

● Proliferation of ICTs, with their distinct procedures:

1945-6: IMT; IMFTE [2]
from 1993 on: ICTY, ICTR, ICC, SCSL, ECCC [5], STL [+1], SPSC [-1]

● LICP: uncodified to an inadmissible extent?

- pre-trial phase: coercive measures
- law of the evidence:

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Rule 89(B) ICTY/R RPE: ‘In cases not otherwise provided for…, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it…’ → cf. witness proofing ICTY/R v. ICC
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● Incessant amendment process (40 ICTY; 15 ICTR; 10 SCSL)

● Consequences

→ Lack of procedural lex certa in the tribunals’ legal orders
→ Uncertainty in the overall system of ICP
→ Tribunals as self-contained regimes (Tadic jur. appeal, para. 11); fragmentation of procedural law and lack of coherence?
I. LICP: a need in coherence (2)

Need ‘from within’: self-beneficiary effects

• Avoidance of non-liquet

‘[T]he rôle of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in mathematical sciences—the solution of the problem’ (British-US Claims Arbitral Tribunal, *Eastern Extension, Australasia and China Telegraph Co., Ltd.*, 1923)

• Resolution of normative conflicts: normative hierarchy and structure of LICP.

Traditional normative hierarchies in international law:

- *jus cogens* and *erga omnes*
- Art 103 UN Ch.,
- maxim *lex specialis/posterior derogat lex generalis/prior*
I. LICP: a need in coherence (3)

- A need from without: spill-over effects

- Possible beneficiaries
  - National jurisdictions: authoritative guidance in war crimes cases
  - Internationalised criminal jurisdictions:

  ECCC - Art. 12 UN/Cambodia Agreement: when the Cambodian law contains lacunae, leads to uncertainty regarding interpretation or application, or is inconsistent with international standards, judges shall seek guidance in the ‘procedural rules established at the international level’

  SPSC - Section 54.5 of UNTAET Regulation 2000/30 + 2001/25: “[o]n points of criminal procedure not prescribed in the present regulation, internationally recognized principles shall apply’

  STL – Article 28(2) STL: when adopting RPE, the judges of the Tribunal shall consider not only the Lebanese CCP as a blueprint of procedures, but also ‘be guided … by other reference materials reflecting the highest standards of international criminal procedure’, with a view to ensuring a fair and expeditious trial.
II. General Principles and Rules (1)

1. Term of art for non-existing reality?

   I. Includes both principles and rules; ii. established at the international level; iii. embodying ‘highest standards’ of ICP

Cassese (2003):

GPs of ICP (presumption of innocence; independence and impartiality; fair and expeditious trials; and prohibition of trials in absentia) →
- Can be extracted by generalization from Statutes, RPE, case law and general principles of law
- GRs of ICP: non-existent due to the lack of a uniform ICP model ‘generally accepted’ by States

Conceptual problems
- single model: practicable?
- Disconnection between principles and rules: issue of sources
II. General Principles and Rules (2)

2. Correlation with other terms

- general principles of law recognised by civilised nations (Art 38(1)(c) ICJ St.; 38(I)(3) PCIJ St.):

  ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: … c. the general principles of law recognized by civilized nations’: controversies and ACJ’s travaux on PCIJ St. (‘principles accepted by all nations in foro domestico’ – Lord Phillimore)

- general principles of international law –
  - fundamental, constitutional principles of general international law; derived from custom or treaty; normative hierarchy (erga omnes and jus cogens)

  Ex. 1 - Furundzija trial judgement, pars. 153-4: ‘the prohibition of torture imposes upon States obligations erga omnes, … the other major feature relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules.

  - general principles of branches of international law: IHRL; IHL; ILoS; and LICP (?)

  Ex.2 - par. 183: ‘The general principle of respect for human dignity is the basic underpinning and indeed the very raison d’être of international humanitarian law and human rights law; … it has become of such paramount importance as to permeate the whole body of international law’.
II. General Principles and Rules (3)

3. Legal nature and systemic effects

**General principles LICP:**
- Fundamental, constitutive, standards of LICP; no sources of LICP
- Abstract, non-conclusive and non-conflicting
- Position in the normative hierarchy of that law: ‘exceptionlessness’
- Not subject to fragmentation in the overall system

Ex.: principle of *fairness* (Art 67(1)(f) ICC; R 5(C) ICTY)

- **Fair** determination of the matter before the Court (Art 89(b) ICTY)
- **Fair** functioning of the Court (Art 64(4) ICC; R 126(3) ICC RPE)
- **Fair** conduct of proceedings (R 84, 101(1), 132(2) ICC RPE)
- Principle of (right to) *fair* trial (hearing) (Art 21(4) ICTY; Art 67(1) ICC; R 20(1), 91(3)(b) ICC RPE)

‘Spirit of the Statute’ (R. 89 and 7 ICTY/R/SCSL RPE)
II. General Principles and Rules (4)

4. Legal nature and systemic effects

General rules LICP:
- More specific; conclusive standards of LICP
- Relativity and susceptibility to exceptions within a Tribunal’s legal regime

**Ex. 1**: rule on a public hearing (Art 21(4) ICTY St.), subject to Arts 21(2) and 22 on the protection of victims and witnesses

**Ex. 2**: rule on the oral conduct of proceedings (subject Rule 89(F) ICTY)

*Halilovic* appeal decision of 19 August 2005:
‘the principle of orality … is not an absolute restriction but instead simply constitutes a preference for the oral introduction of evidence’

- Systemic fragmentation

**Ex. 1**: interlocutory appeals regarding preliminary motions challenging jurisdiction and admissibility – ICTY/ICTR and ICC models (R. 72(B)(1) ICTY/R RPE and Art. 82(1)(a) ICC St. and 154(1)’ICC RPE) **versus** SCSL model (amended in 2003 Rule 72(E) and (F) SCSL RPE – jurisdictional issue must be ‘serious’ and ‘affect fairness and expeditiousness or outcome of the trial’). Cf. also re motions other than preliminary: Rule 73(B) allows interlocutory appeals only in ‘exceptional circumstances’.

**Ex. 2**: witness proofing: ICTY/R/SCSL practice **versus** Lubanga ICC **versus** Ojdanic (ICTY) & Nzizorera (ICTR)
II. General Principles and Rules (5)

Laws of Fragmentation

- Braithwaite (2002) on the complex systems of law:

  ‘as the regulated phenomena become more complex, principles deliver more consistency than rules. A central reason is that the iterative pursuit of precision in single rules increases the imprecision of a complex system of rules. … A key choice here is between binding rules interpreted by non-binding principles and non-binding rules backed by binding principles. The more complex the domain, the more likely it is the latter that will deliver greater consistency’.

- General principles of LICP should serve as axis of Harmonization and rules as margins of Fragmentation
- Regularity: abstraction (vertical generality) ~ normative force ~ proneness to fragmentation (horizontal generality).
III. Identification (1)

1. Sources of LICP

Art. 38(1) ICJ St.
1. The Court, whose function is to decide in accordance with international law …, shall apply:
   • a. international conventions…;
   • b. international custom, as evidence of a general practice accepted as law;
   • c. the general principles of law recognized by civilized nations;
   • d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Art. 21(1) ICC St. (+ R. 72bis SCSL):
1. The Court shall apply:
   • (a) In the 1st place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
   • (b) In the 2nd place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
   • (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world …, provided that they are not inconsistent with the Statute and with international law and internationally recognized norms and standards.
   • 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
III. Identification (2)

*Furundzija* trial judgement, par. 177, 182

1. international treaty; customary law; *general principles of international criminal law* or to *general principles of international law*

2. general principles of law

3. general principles of international humanitarian law (??)

*Kupreškic et al.* trial judgement, par. 591

1. Statute (interp. SG Report)

2. Rules of customary international law or *general principles of international criminal law* (??)

3. lacking such principles, *general principles of criminal law common to the major legal systems of the world*; (??)

4. lacking such principles, *general principles of law consonant with the basic requirements of international justice* (??)
III. Identification (2)

Methodological aspects of establishing GPRs LICP:

1. Distinction between sources of law and other categories (law in itself; law-determining agencies – jurisprudence and doctrine) to be strictly upheld;

2. Hierarchy of law does not follow hierarchy of various categories of sources, thus all sources need to be consulted despite lex specialis rule, despite prima facie varying practical value (ex. Art 21(3) ICC St)

3. Law-determining outcomes (jurisprudence and doctrine) need to be consulted as a reference to or confirmation of the existing GPRs LICP (cf. Cassese).

4. Procedural steps: i) perusal of (written) sources; ii) comparison; and (iii) consultation with the law-determining by other agencies. Methodological difficulties with regard to ‘general rules of LICP’.