General Principles of Law for Internal and Inter-jurisdictional Issues: The Two Faces of *Ne Bis In Idem*[1]

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Abstract

This article focuses on domestic criminal law principles in international criminal justice. It aims to provide a framework to understand the different roles and recognition mechanisms of domestic criminal principles as a general principle of law applicable to international criminal adjudications. Being guided by the four conceptions of general principles of law, it seeks a proper framework to grasp the whole nature of domestic principles utilized in many judgments. Through the assessment of a unique principle—*ne bis in idem*—that prohibits trying a person for which the person has already been tried, it reveals the two dimensions of the principle: internal and inter-jurisdictional regulation. This article highlights the comparison between international criminal adjudication and interstate adjudication as well as appropriate sources for recognizing this general principle of law depending on the role that this domestic criminal law principle plays in international criminal law.

Introduction

International criminal justice is a concept that describes the response of international society against so-called core crimes, namely, genocide, crimes against humanity, war crimes, and crime of aggression.[2] To end impunity for the

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1. This work is based on the presentation made at the International Law Research Seminar (Kyoto University) on 25 April 2015 and was supported by JSPS KAKENHI Grant Number 19K13517.

2. The definition of international criminal justice varies: See, e.g., M. Cherif Bassiouni, "International Criminal Justice in Historical Perspective: The Tension between States' Interests and the Pursuit of International Justice," in Antonio Cassese (ed.), *Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), p. 131; Gideon Boas, "What is

perpetrators of these crimes, international society has attempted to create an international criminal justice system composed of different international criminal jurisdictions, including international courts/tribunals, internationalized courts/chambers, and domestic authorities. To maintain consistency of jurisprudence and regulate the interrelations between the system components, the question of legal regulation applicable to all jurisdictions arose. Such regulation is necessary to maintain legal security or stability inside the system and to protect the system from the harms produced through the activities of each component. Reflecting such needs, domestic criminal principles have played a significant role in international criminal practice. However, simultaneously, the rise of domestic criminal principles as one of the main sources of law in international criminal adjudication brought theoretical confusion with respect to the nature of such principles applied in international criminal jurisprudence. Are they the general principles of law as sources of international law? Are these sources specific to international criminal law? Are they applicable as long as the court in question decides to apply them to its cases and they do not have universal applicability?

This article focuses on domestic criminal law principles in international criminal justice. It aims to provide a framework to understand the different roles and recognition mechanisms of domestic criminal principles as a general principle of law applicable to international criminal adjudications. Being guided by the four conceptions of general principles of law, it seeks a proper framework to grasp the nature of domestic principles utilized in many judgments. Through the assessment of a unique principle—*ne bis in idem*—that prohibits repeatedly trying a person for which the person has already been tried, it reveals the two dimensions of the principle: internal and inter-jurisdictional regulation. This highlights the comparison between international criminal adjudication and interstate adjudication as well as appropriate sources for recognizing this general principle of law depending on the role that this domestic criminal law principle plays in international criminal law.

I. Application of Domestic Principles as General Principles of Law

A. Concept of General Principles of Law

International courts have applied domestic legal principles when there is no

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International Criminal Justice?," in Gideon Boas, William A. Schabas and Michael P. Scharf (eds.), *International Criminal Justice: Legitimacy and Coherence* (Edward Elgar Publishing, 2012), p. 1.

specific written applicable law or customary rules on the issue in question. Such a source is now recognized as a general principle of law as one of the sources of international law.

Mosler divided the concept of general principles of law into the following four categories.[3] Traditionally, scholars have employed the concept of general principles of law in the sense of general principles generally and widely recognized in national law.[4] The insertion of this concept in the Statute of the Permanent Court of International Justice was to close the gap that might be uncovered in international law and to solve this problem, which is known legally as *non liquet,* by adopting domestic law principles as long as they are analogous to the procedure concerned.[5] This source of law is applicable to international relations simply because international law admits its application, or it is "necessarily inherent in any legal system within the experience of States".[6] According to this view, international courts apply the general principles of law by analogy.[7]

The second view asserts that the principles have their origin directly in international legal relations, and are applied generally in all cases of the same kind that arise in international law, such as sovereign equality of states, or the principle of non-intervention.[8] Some scholars understand the general principles as mainly general principles specific to international law.[9] These principles seem to be sometimes called principles of international law, but this concept might not be distinguishable from the concept of customary law.[10] Comparative research on national law does not always contribute to determining this type of principle.

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3. Hermann Mosler, "General Principles of Law," in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (Elsevier, 1995), pp. 511-512. The Special Rapporteur of the International Law Commission takes the position that there are mainly two distinct approaches, which includes the first and second typology. *First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteu*r, UN Doc. A/CN.4/732188 (5 April 2019), para. 188; *Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, UN Doc. A/CN.4/74114 (9 April 2020), para. 14.

4. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953), at 24; Robert Jennings and Arthur Watts, *Oppenheim's International Law, Volume 1: Peace*, 9th edition (Oxford University Press, 2008), p. 37.

5. See, e.g., Malcolm N. Shaw, *International Law*, 6th edition (Cambridge University Press, 2008), p. 98.

6. Jennings and Watts, *supra* note 4, p. 36.

7. See, Hersch Lauterpacht, *Private Law Sources and Analogies on International Law* (Longman, Green Co., 1927).

8. Mosler, *supra* note 3, p. 511.

9. See, e.g., Dionisio Anzilotti, *Cours de Droit International* (Pantheon-Assas, 1929), p. 117.

10. Manfred Lachs, "The Development and General Trends of International Law in Our Time," *Recueil des Cours de l'Académie de Droit International de La Haye*, Vol. 169 (1980), p. 196.

The third view considers the term as legal principles recognized in all kinds of legal relations, including national law, international law, the law of international organizations, and so on.[11] In this view, principles represent basic values that must be guaranteed by any legal system that deserves to be considered as governed by the rule of law, and principles such as good faith, equity, estoppel , and *pacta sunt servanda* are counted as examples.[12] According to Cheng, "[t]his part of international law does not consist, therefore, in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law that express the essential qualities of juridical truth itself, in short of Law."[13] Generality or commonality in many national laws might be considered as evidence to strengthen the argument of the existence of a principle.

Finally, the fourth view considers the principles of legal logic that determine the legal consequences resulting from the interrelation of two legal situations.[14] Thirlway takes the position that the general principles of law follow legal logic and determine the legal consequences that arise from the interrelation of two legal situations.[15] This concept includes *lex specialis derogate legi generali*, or *pacta sunt servanda*. Taking this view, the meaning of the requirement of generality or commonality in national laws becomes vague.

B. The Classification of General Principles of Law in International Criminal Jurisprudence

1. *Kupreskić et al.*'s taxonomy

The question now is which of the four views or which views on general principles of law explain well those found and applied in international criminal jurisprudence. The general principles of law have been utilized to supplement, interpret, or confirm existing rules,[16] and such applications are increasing in international criminal jurisprudence. Reflecting such development of the concept, the International Criminal Tribunal for the former Yugoslavia (ICTY) *Kupreskić et al.* case attempted

11. Mosler, *supra* note 3, p. 513.

12. *Ibid*., p. 514.

13. Cheng, *supra* note 4, p. 24.

14. Mosler, *supra* note 3, p. 514; Ian Brownlie, *Principles of Public International Law*, 5th edition (Oxford University Press, 1998), pp. 18-19.

15. Hugh Thirlway, "The Sources of International Law," in Malcolm D. Evans (ed.), *International Law,* 4th edition (Oxford University Press, 2014), p. 105.

16. See, Lorenzo Gradoni, "L'exploitation des Principes Généraux de Droit dans la Jurisprudence des Tribunaux Internationaux Pénaux ad hoc," in Emanuela Fronza and Stefano Manacorda (eds.), *La Justice Pénale Internationale dans les décisions des Tribunaux ad hoc* (Dalloz, 2003), pp. 10-40.

to systematically explain the general principles of law in international criminal jurisprudence in the *obiter dictum*. In the judgment, it states that in the absence of any applicable rules in the Tribunal's Statute or rules, it falls to the Tribunals to draw upon, in addition to international customary rules, (i) "general principles of international criminal law", or, lacking such principles, (ii) "general principles of criminal law common to the major legal systems of the world", or, lacking such principles, (iii) "general principles of law consonant with the basic requirements of international justice".[17]

The judgment itself does not provide further explanation about this categorization. However, Cassese, who took the role of presiding judge in the *Kupreskić et al.* judgment, discusses the more specific content of each categorized principle. According to Cassese and Gaeta, the "general principles of international criminal law" include principles specific to this branch of international law, such as the principles of legality, specificity, the presumption of innocence, the principle of equality of arms, the principle of common responsibility, a corollary in international criminal law of the principle of responsible command existing in international humanitarian law, and so on.[18] Further, they describe that the application of these principles at the international level normally results from their gradual transposition over time, from national legal systems to the international order.[19] Therefore, their identification does not require an in-depth comparative survey of all the major legal systems of the world, but can be carried out by way of generalization and induction from the main features of the international legal order.[20]

Second, the "general principles of criminal law recognized in domestic legal systems" are drawn from a comparative survey of the main legal systems of the world, and their articulation is therefore grounded not merely on interpretation and generalization, but rather on a comparative law approach.[21] These principles are expressly referred to in such human rights treaties.[22] This source is subsidiary in nature and therefore recourse to it can only be made if reliance upon the other source has turned to be of no avail.[23]

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17. See, e.g., *Prosecutor v. Kupreskić et al.*, Judgment (IT-95-16-T) Trial Chamber II (14 January 2000), para. 591.
18. Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law*, 3rd edition (Oxford University Press, 2013), p. 15.
19. *Ibid*.
20. *Ibid*.
21. *Ibid*.
22. *Ibid*.
23. *Ibid*.

Cassese and Gaeta do not provide a clear explanation of the concept of "general principles of law consonant with the basic requirements of international justice". Raimondo assesses this concept as follows: "such principles cannot be other than the 'usual' general principles of law, such as the *res judicata* and *iura novit curia* principles."[24]

2. Criticisms against *Kupreskić et al.*'s taxonomy

The argument on the three categories of general principles of law in international criminal law has been the topic of much debate. Akande mentions that even if it is acceptable to distinguish those general principles of law that underlie and are inherent in the international legal system from general principles that are identified from national legal systems and then transposed to the international system, it is still difficult to see that there is a separate category of general principles of international criminal law that does not fall into the other two categories.[25]

With respect to the distinction between principles of international criminal law and the general principles of law, some discussed the meaning of Article 21 of the ICC Statute. While Simma and Paulus point out the fact that Article 21 (1) (b) of the ICC Statute acknowledges that the "principles and rules of international law" exist separately from the general principles of law provided in (c),[26] Pellet argues that the use of the word "principle" in Article 21 (1) (b) is just an "error" that is actually an awkward reference to the international customary law.[27]

3. Methodology to Determine a General Principle of Law

The significance of talking about these categories are their implication to the methodology to determine the existence and contents of a general principle of law. Scholars have attempted to establish a methodology to ascertain the existence, content, and scope of a general principle of law. The prevalent view regards it as involving two steps. The first step is to identify a principle that is common to municipal legal orders belonging to the main legal systems of the world through a

24. Fabian O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff Publisher, 2008), p. 171.

25. Dapo Akande, "Sources of International Criminal Law," in Cassese, *supra* note 1, p. 51.

26. Bruno Simma and Andreas Paulus, "Le Rôle Relatif des Différentes Sources du Droit International Public: Dont les Principes Généraux du Droit," in Hervé Ascensio, Emmanuel Decaux and Alain Pellet (eds.), *Droit international pénal,* 2me édition révisée (Editions A. Pedone, 2012), p. 68.

27. Alain Pellet, "Applicable Law," in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), pp. 1071-1072.

comparative analysis, and the second step is to distill the essence of the principle.[28] The third step, often added, modifies the principle to suit the particularities of international law.[29] However, some scholars argue that international courts have found general principles imported from international law or deduced from legal logic and did not apply the methodology discussed in the academic writings.[30] Meanwhile, Raimondo divides the determination process into national and transposition levels in international law and demonstrates that the first step consists of a "vertical move", which is abstraction of legal rules, and a "horizontal move", which means a comparison of national legal systems.[31] These types of methodology are derived from a logical analysis of the concept of general principles of law itself, and therefore, such a methodology can be described as derived through deductive analysis. However, if the principle in question is of customary law nature, such comparative analysis of national laws would avail nothing.

II. The Ne Bis In Idem Principle as a General Principle of Law in International Criminal Justice

This article adopts an inductive approach to find a proper explanation of the concept and recognition mechanism of the principles of law applicable in international criminal justice. By taking the *ne bis in idem* principle as an example, I will first overview how general or common this principle is and how it can be found in various legal instruments. Second, by assessing which content of *ne bis in idem* principle is shared in what sense, I will prove that different methodologies are needed to grasp the two distinct functions of *ne bis in idem* in international criminal justice.

My analysis is based on the assumption that the *ne bis in idem* principle is a general principle of law. This assumption is not groundless because it is understood that the ICTY confirmed purposely or accidentally that *ne bis in idem* was already a general principle of law in the *Tadić* case in 1995.[32]

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28. Jaye Ellis, "General Principles and Comparative Law," *European Journal of International Law,* Vol. 22, No. 4 (2011), p. 954.

29. Fabian O. Raimondo, "Les principes généraux de droit dans la jurispridence des Tribunaux ad hoc: une approche fonctionnelle", in M. Delmas-Marty et al. (eds), *Les sources du droit international pénal: L'expérience des tribunaux pénaux internationaux et le statut de la Cour pénale internationale* (Société Législation Comparée, 2004), p. 79.

30. Antonio Cassese, *International Law*, 2nd edition (Oxford University Press, 2005), p. 192.

31. Raimondo, *supra* note 24, p. 1.

32. *Prosecutor v. Duško Tadić*, Decision on the Defence Motion on the Principle of Non-Bis-In-Idem (IT-94-1-T) Trial Chamber (14 November 1995); Raimondo, *supra* note 24, p. 94. On *ne bis in idem* as general principle of law: Michele N. Morosin, "Double Jeopardy and International Law:

A. Generality and Commonality of *Ne Bis In Idem* in Different Materials

1. Domestic laws

The *ne bis in idem* principle is a principle that prohibits trying a person for which the person has already been tried, and this principle has been developed as a principle of domestic law. Although the principle is reflected in the constitutions or codes of criminal procedures in many countries, its application and scope vary from country to country. The greatest differences in its interpretation may be attributed to its rationale in different jurisdictions, as the principle developed mainly in two different ways under the two primary types of legal systems.

(a) Legal security

One of the rationales of the *ne bis in idem* principle is the maintenance of legal order or the stability of legal proceedings. Regarding criminal procedures, the rationale for the principle is that conducting identical proceedings on the same case more than once is inefficient, and conflict between two separate judgments in the same case should be avoided. Based on such ideas, a theory was developed in the civil law legal system called the theory of "*Rechtskraft*" (the "determination force" or "binding force") or *res judicata* (*chose jugée*).[33]

In Germany, the protection of *ne bis in idem* is regarded as at the level of constitutional doctrine, and Article 103 (3) of the German Basic Law stipulates that "[n]o one shall be punished more than once under the general criminal laws for the same conduct".[34] Similarly, Article 369 of the French Code of Criminal Procedure

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Obstacles to Formulating a General Principle," *Nordic Journal of International Law*, Vol. 64 (1995), p. 263; Anthony J. Colangelo, "Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory," *Washington Journal of International Law*, Vol. 86 (2) (2009), p. 816. Some different views about *ne bis in idem* as customary law: Henri Donnedieu de Vabres, *Les principes modernes du droit pénal international* (Sirey, 1928), p. 304; "Draft Convention on Jurisdiction with Respect to Crime," *The American Journal of International Law,* Vol. 29 (1935), pp. 439-442; M. Cherif Bassiouni, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions," *Duke Journal of Comparative and International Law*, Vol. 3 (1993), p. 292; M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (Oxford University Press, 2005), pp. 754-755; Daniel A. Principato, "Defining the 'Sovereign' in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts?" *Cornell International Law Journal,* Vol. 47 (2014), p. 783; Gerald Conway, "Ne Bis in Idem in International Law," *International Criminal Law Review*, Vol. 3 (2003), pp. 221, 238.

33. Claus Roxin, *Strafprozessrecht,* 3. Auflage (C. H. Beck, 1967), p. 367; Graf zu Dohna, *Das Strafprozessrecht,* 2. Auflage (Heymann, 1929), p. 217.

34. "Niemand darf wegen derselben Tat auf Grund der allgemeinen Strafgesetze mehrmals bestraft werden." Article 103 (3) of the Basic Law, Germany.

provides that "[n]o person lawfully acquitted cannot be recaptured or charged to the same facts even under a different qualification".[35] The similar provisions can be seen in, for example, Article 34 of the Constitution of Albania, Article 649 of the Code of Criminal Procedure of Italy, Article 68 of the Criminal Code of the Netherlands, Article 395 of the Code of Criminal Procedure of Cameroon, Article 29 of the Constitution of Colombia, Article 76 of the Criminal Code of Indonesia, or Article 187 of the Constitution of Egypt.

(b) Protection of accused persons

The other rationale for the *ne bis in idem* principle is grounded in protecting basic human rights in criminal proceedings and shielding the accused from an abusive state authority seeking to file repeated indictments until the court finds the suspect guilty.[36] The *ne bis in idem* effect of an acquittal or prohibition of double jeopardy was clearly declared in the French Constitution of 1791 and the Bill of Rights of the United States of America (US) of 1791.[37]

In the United Kingdom, it is currently established as a plea for *autrefois* acquits and *autrefois* convicts.[38] This principle is also called "the principle of double jeopardy" because it regards any situation in which the accused faces state prosecution as "jeopardy".[39] In the US, a broader application of double jeopardy is accepted, and both prosecutorial appeal and a new indictment are prohibited because the US judiciary has held that the accused is regarded to have been put into jeopardy at the stage of appointment of juries.[40] Legal provisions which reflect double jeopardy are found in, for example, Article 20 of the Constitution of India, Article 50 of the Constitution of Kenya, Article 5 of the Code of Criminal Procedure of Israel, Article 28 of the Constitution of Uganda, Article 138 of the Code of Criminal Procedure of Zambia, Article 13 of the Constitution of Pakistan, or Article 21 of the

35. "Aucune personne acquittée légalement ne peut plus être reprise ou accusée à raison des mêmes faits, même sous une qualification différente." Article 369 of the Code of Criminal Procedure, France.

36. Christine Van Den Wyngaert and Tom Ongena, "*Ne bis in idem* Principle, Including the Issue of Amnesty," in Cassese, et al., *supra* note 27, p. 707.

37. "(…) nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;(…)." Fifth Amendment to the Constitution of the United States; David Stewart Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution* (Praeger, 2004), p. 1.

38. William Blackstone, *Commentaries on the Laws of England in Four Books* (Baker, Voorhis and Company, 1938), p. 1019.

39. Law Commission (United Kingdom), *Double Jeopardy and Prosecution Appeals* (Law Com No. 267, 2001), para. 2.6. See also, *Green v. United States*, 355 U.S. 184, 187-188 (1957).

40. See, e.g., *Kepner v. United States*, 195 U.S. 100, 128 (1904); Jay A. Sigler, *Double Jeopardy: The Development of a Legal and Social Policy* (Cornell University Press, 1969), pp. 41-43.

Constitution of Liberia.

2. International human rights treaties

In various human rights conventions, protection against double trials is widely included as one of the rights to fair trials. Article 14 (7) of the International Covenant on Civil and Political Rights (ICCPR) provides that "[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." Article 4 of Protocol No. 7 of the European Convention on Human Rights also provides the right not to be tried or punished twice. The Inter-American Convention's provision differs slightly; it states, "[a]n accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause." Meanwhile, Article 19 (1) of the Arab Charter on Human Rights simply provides that "[n]o one shall be tried twice for the same offense".

3. Treaties of international cooperation in criminal matters

While the *ne bis in idem* principle has been developed as a principle regulating double trial within a jurisdiction, it appears in the context of international cooperation as a principle guiding how to deal with a prior judgment when extradition or mutual assistance is requested.

In the context of extradition, *ne bis in idem* is adopted as one of the mandatory grounds for refusal of extradition. Model Treaty on Extradition, for example, provides in its Article 3 (1) (d) that extradition shall not be granted "[i]f there has been a final judgment rendered against the person in the requested State in respect of the offence for which the person's extradition is requested." Similar provisions are observed in various actual extradition treaties, such as the Treaty on Extradition between Japan and the US, or the European Convention on Extradition.

The system of mutual legal assistance has much in common with extradition treaties, as it traditionally evolved within the system of extradition. However, *ne bis in idem* is only accepted as an optional ground for refusal. According to Article 4 (1) (d) of the Model Treaty on Mutual Legal Assistance, assistance may be refused if "[t]he request relates to an offence the prosecution of which in the requesting State would be incompatible with the requested State's law on double jeopardy (*ne bis in idem*)". While the Japan-EU treaty and US-Swiss treaty have such provisions, the European Treaty and the Japan-US Treaty do not provide *ne bis in idem* as grounds for refusal.

There is a regional treaty on cooperation that provides a wide application of

the *ne bis in idem* principle. Article 54 of the Convention Implementing the Schengen Agreement (CISA) stipulates that "[a] person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts".

4. Statutes of international criminal courts/tribunals

(a) Post-World War II tribunal

Older international criminal courts, such as the International Military Tribunal (IMT) and the International Military Tribunal for the Far East (IMTFE), did not have specific provisions regarding the *ne bis in idem* principle. Article 11 of the Charter of the IMT is the only provision that recognizes the *ne bis in idem* principle by limiting the scope of a second trial in domestic courts.[41] No provision related to the *ne bis in idem* principle can be found in the Charter of the IMTFE. Several cases before Japanese domestic courts were conducted after acquittal by the Military Tribunals of the Occupying Powers, but none of them admits the *ne bis in idem* effect to Japanese courts. The Japanese Supreme Court did not apply the *ne bis in idem* principle in these cases because the court concluded that the Japanese constitution only prohibited double prosecution by the judicial authority under the Japanese Constitution.[42]

Thus, the issue of concurrent jurisdiction was not as relevant as it is today because of the nature of international tribunals at that time. However, as the common understanding of the concept of core crimes has developed and as prosecution of such crimes is sought by both domestic courts and international criminal bodies, concurrent jurisdiction has emerged as an important matter to be settled.

(b) The United Nations *ad hoc* tribunals

The *ne bis in idem* principle was included in the statutes of two *ad hoc* tribunals established by the United Nations: Article 10 of the Statute of the ICTY and Article 9 of the Statute of the International Criminal Tribunal for Rwanda (ICTR). The wording of both statutes is almost identical, dividing cases relevant to the *ne bis in idem* principle into the following two categories: (i) those raised in a domestic court after an acquittal or conviction by the international tribunal, which is often called "downward *ne bis in idem*", and (ii) those raised in a trial of an international tribunal after an acquittal or conviction by a domestic court, which is often called "up-

41. Wyngaert and Ongena, *supra* note 36, p. 718.

42. Supreme Court of Japan, 22 July 1953, [Saikō Saibansho Hanreishū (Keishū)] Vol. 7, No. 7, 1621.

ward *ne bis in idem*".

(c) ICC Statute

The *ne bis in idem* principle is provided in Article 20 of the ICC Statute. Paragraph 1 addresses a second trial before the ICC after a judgment by the ICC itself. Paragraph 2 concerns a second trial held before another court after judgment by the ICC (downward *ne bis in idem*). Paragraph 3 addresses a second trial undertaken by the ICC Prosecutor after a judgment by another court (upward *ne bis in idem*).

One of the special characteristics of the *ne bis in idem* principle in the ICC Statute is that it provides for a possible second trial before the ICC after a judgment by the ICC itself. Article 20 (1) states: "[e]xcept as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court". No international tribunal prior to the ICC had an article providing for this situation, and there were no cases of dual trials before such international tribunals.

(d) Other internationalized courts

The *ne bin in idem* provisions in the so-called internationalized criminal courts and tribunals vary. The conditions for applying *ne bis in idem* provided in Article 9 of the Statute of the Special Court for Sierra Leone (SCSL) are almost the same as the two *ad hoc* tribunals' provisions. On the contrary, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (ECCC) does not specifically provide protection from dual trials, but Articles 33 and 35 provide general human rights protection in accordance with international human rights instruments such as those guaranteed by the ICCPR.[43]

Meanwhile, Section 11 of the Regulation 2000/15 by the United Nations Transitional Administration in East Timor (UNTAET), which establishes the East Timor Panel, and Article 19 of the Statute of Extraordinary African Chamber have very similar *ne bis in idem* provisions as the ICC Statute.[44]

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43. *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* (NS/RKM/1004/006). The applicable law at the Special Chamber of the Supreme Court in Kosovo follows a similar approach. Section 1.3 of Regulation No. 1999/24 declares that "all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards", and the main international instruments including regional human rights conventions are listed. Regulation NO. 1999/24 (UNMIK/REG/1999/24).

44. Section 11 of the Regulation No. 2000/15 on the Establishment of Panels with Exclusive

B. The Meaning of the Generality/Commonality

The principle of *ne bis in idem*, or the essence of the principle, or the word "*ne (non) bis in idem*" or double jeopardy is found in several different types of legal materials. The question now concerns the meaning of the generality or commonality of this principle. Does it suggest the need to assess both domestic and international materials in order to determine the existence and content of the *ne bis in idem* principle as a general principle of law, or that such generality or commonality implies the existence of a more essential legal principle underlying the whole international criminal justice system?

According to Mosler's first category of the conception of the general principle of law, which regards the concept of the general principle of law as a legal principle that is widely recognized in domestic laws, *ne bis in idem* is proven to be a general principle of law only by the assessment of commonality in domestic law, and the commonality expanded to international treaties is not relevant in the determination of the existence of the *ne bis in idem* principle as a general principle of law.

One might be able to say, according to the second conception that considers that such principle comes out from international relations and regards the general principle of law to be almost identical to customary law, the evidential significance lies in the fact that *ne bis in idem* is found in a variety of international materials such as treaties on international judicial cooperation or statutes of international courts.

Further, if one takes the third conception, it might be essential to check all of the materials that I introduced in the section above to prove that the concept of *ne bis in idem* is inherent in any legal system such as domestic law, treaties on international cooperation, or human rights.

When it comes to the fourth conception that talks about the legal logic, whereas the commonality in various legal instruments itself is not considered essential, the content of the *ne bis in idem* principle is important to assess whether the application of *ne bis in idem* is a logical consequence of legal order.

However, we need to be aware of the fact that there are two types of objects of *ne bis in idem* principles in legal materials. First, *ne bis in idem* is applied in the case of a double trial within a jurisdiction. This type of regulation is provided in domestic law, human rights treaties, and ICC-type statutes. Second, the principle is utilized to regulate interrelations between two different jurisdictions, such as the

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Jurisdiction over Serious Criminal Offences (UNTAET/REG/2000/15).

treaties on international judicial cooperation, and the rules regulate the "upward" or "downward" situation between the international or internationalized courts and states.[45]

Therefore, while we are talking about one principle, *ne bis in idem*, this principle has two different dimensions: internal and inter-jurisdictional regulation. Articulating the former as "internal *ne bis in idem*" and the latter as "external or inter-jurisdictional *ne bis in idem*" would help understand the different meanings of each legal material in the determination of *ne bis in idem* as a general principle of law in some sense.

III. A Framework for Understanding Domestic Criminal Law Principles as Sources in International Criminal Justice

A. Principles for Internal Regulation

1. Analogy from national legal system

The object of the legal principle for internal criminal issues concerns the modality in which investigations, including arrest and detention, trial and appeal proceedings, and sentencing, is conducted. These procedures in international criminal jurisdictions are almost identical to domestic legal systems; therefore, a direct analogy is sometimes possible.

The traditional view, however, was that domestic principles needed to be modified to suit the so-called "specificities of international law." An analogy can successfully be made to the extent that there is a relevant similarity between the national law institution from which the legal principle derives (the source of analogy) and the corresponding international law institution in which the legal principle would apply (the target of analogy).[46] Therefore, it has been argued that legal constructs and terms of art upheld in national law should not be automatically applied at the international level.[47]

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45. On inter-jurisdictional function of *ne bis in idem*: Christine Van den Wyngaert and Guy Stessens, "The International Non bis in Idem Principle: Resolving some of the Unanswered Questions," *International and Comparative Law Quarterly*, Vol. 48 (1999), p. 785; Dionysios Spinellis, "The Ne bis in Idem Principle in 'Global' Instruments (Global Report)," *Revue Internationale de Droit Pénal,* Vol. 73 (2005), p. 1154; Diane Bernard, "Ne bis in idem-Protector of Defendants' Rights or Jurisdictional Pointsman?" *Journal of International Criminal Justice*, Vol. 9 (2011), p. 8680.

46. Raimondo, *supra* note 24, p. 58.

47. For Cassese's view on this point: *Prosecutor v. Erdemović*, Separate Opinion of Judge

However, what are the obstacles to the direct analogy of domestic principles to international criminal adjudication? Internal procedures at international criminal adjudicating bodies are basically analogous to the national proceedings of some countries. The structure of recourse is always "public authority vs. natural person". Therefore, the argument emphasizing the so-called structural difference[48] does not always apply to internal regulations within an international criminal jurisdiction.

Another argument is that of the so-called special character of international law, which protects different interests from that of domestic law. However, as long as international criminal justice is concerned, protected interests such as legal security or human rights by a domestic principle such as *ne bis in idem* must be shared between international criminal jurisdictions, including international and national courts.

2. Need for comparative research

While the argument of specificity of international nature does not seem valid in international criminal law, there is still a question as to why and when analogy is possible and useful. To answer this question, we need to consider the significance of comparative research.

When international criminal jurisdictions, including the ICC, the *ad hoc* tribunals, the internationalized courts, and domestic criminal courts, face a legal difficulty to adjudicate on a specific procedural matter while dealing with a core crime, they are allowed to examine how other jurisdictions have dealt with such procedures and to find a general principle of law if there is a common principle between different jurisdictions. Some argue that a comparison between the laws of "states most representative of different conceptions of law" and selecting them "based on equitable geographic distribution" is required, and that a comparison only between common law and civil law tradition is not sufficient.[49]

My argument here is that generality in legal systems is a fiction that is very hard to realize, as already shown in jurisprudence and practice. Meanwhile, what has actually been done is that after a comparative research, judges become aware of the variation of legal principles, and then necessarily make a choice because, as is always the case, they find some irregularities or different approaches and thus cannot identify generality in all legal systems. What is required then is a reasonable choice to pick up one of these various legal systems that best suits the

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Cessese (IT-96-22-A) Appeals Chamber (7 October 1997), paras. 2-5.

48. Raimondo, *supra* note 24, p. 66.

49. *Ibid.,* pp. 54-56.

current procedure in question.[50]

Here, I suggest that comparative research is a preliminary exercise to confirm what options the judges have. Then, the judges need to find the best analogical or the most similar legal system that shares the most purpose and object of international criminal adjudication.[51] Regarding procedural rules, international courts usually have a hybrid system of common law and civil law and are hardly equipped with Islamic or other independent legal systems. This also explains why judges usually consider only civil law and common law. Other legal systems are simply not analogous to the ICC or ICTY.

3. Need for transposition

As mentioned before, in international criminal adjudication, "specificity of international law" would not be an obstacle to the analogical application of domestic principles. However, consideration of "specificity of the criminal jurisdiction in question" and "purpose of international criminal justice" would be relevant.

For example, the ICC adopts a system of victim participation, relies on national cooperation, and adopts a mixed system of criminal proceedings. At the ICC, each procedure has either civil or common law features. Systems of victim participation or pre-trial chambers reflect the civil law system but count systems and adversarial trials are originally from the common law system. Meanwhile, national/internationalized courts/chambers usually have exclusive jurisdiction and their own investigatory authority based on their own laws and are authorized to take coercive measures.

Therefore, the so-called "transposability" analysis is not the assessment of the applicability of the principle considering "the specificity of international criminal law in general," but the assessment of whether the application of the principle is reasonable in the jurisdiction at the point of the procedure in question.

As to the need to consider the "purpose of international criminal justice" in the application of a principle, we might have to consider the specificity of core crimes such as the lack of hierarchy among different core crime.

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50. See, Alain Pellet, "Recherches sur les principes généraux de droit en droit international public" (thèse, Paris, 1974), pp. 272-324. This better explains, for example, the ICTY's approach in various cases: e.g., *Prosecutor v. Erdemović*, Joint Separate Opinion of Judge McDounald and Judge Vohrah (IT-96-22-A) Appeals Chamber (7 October 1997), paras. 57, 59-61.

51. For more articulation about this theory, see, Megumi Ochi, *The System of International Procedural Criminal Law: The Premise Theory and the Principle of Ne Bis In Idem* (Shinzansya, 2020) (in Japanese), chapter 3.

B. Principles for Inter-Jurisdictional Regulation

1. Analogy from Inter-state relations

Inter-jurisdictional regulation is analogous to international relations. It is the interrelation between a jurisdiction and another jurisdiction. In the context of international criminal justice, extradition or surrender processes and double proceedings in more than two jurisdictions are the main targets.

Here, the concept of general principles derived from international relations may be applicable. The methodology to discover such laws might not be easily distinguished from the components to establish international customary law.

However, the "specificity of criminal law" is problematic. Because of the structural difference of the recourse from that of international relations, the protected interests may differ from those of inter-state adjudication. For example, the rules or principles regulating the "forum shopping" do not directly regulate the inter-jurisdictional relationship between international criminal jurisdictions.[52]

2. Need for comparative research

The problem of the necessity of comparative research becomes more complex for the recognition of inter-jurisdictional *ne bis in idem*. There are two possible explanations for this finding.

One is that it is a search for an international custom by looking at domestic laws and treaties to find *opinio juris* or state practice. However, to establish a customary international law, one will be challenged by the lack of state practice. This is the main reason why the general principles of law have played important roles in international criminal jurisprudence.

Hence, the other explanation might be the better one to understand the significance of the concept of general principles of law in international criminal practice. It is that there are different meanings of the general principle of law in international criminal law, separately from international customs. It seems that through a comparative analysis, an abstract and underlying principle that provides normative guidance to the problem might be found, and such an underlying principle contributes to guiding judges when interpreting the rules or confirming its determination to be consistent with the underlying principles of international criminal justice. Regarding the principle of *ne bis in idem*, there are two rationales: legal security and human rights of the accused. A principle that represents these rationales

52. See, Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2004).

extracted through comparative research might lead adjudications to be conducted in accordance with the fundamental purpose and object of international criminal justice.

3. Need for transposition

As long as a general principle is extracted by an analogy from inter-state relations, one might argue that such a principle does not need to be transposed to the international sphere, because it is already a part of it. However, to determine a general principle of law regulating an inter-jurisdictional matter, one needs to check, after the extraction of rationales or underlying principle of a general principle of law, at least its applicability in the inter-jurisdictional sphere. Additional analysis of applicability in the relationship between different jurisdictions would require an additional consideration of two points.

The first point is the specificity of international criminal justice. Such specificities include the lack of central authority or three independent branches of government: legislative, administrative, and judicial.[53] The specificity of international criminal justice would also include the inevitable need for international cooperation in the investigation and surrender process. Such specificity is also attributed to the definitions or protected interests of the subject matter. International criminal justice is a mechanism that responds only to core crimes, and these crimes are specific in the sense that they are of international concern because they threaten the peace and security of the world. In addition, the scale of a core crimes case is usually large and involves many other lower crimes. Such complexities are mainly specificity at a substantial level, but sometimes such substantial specificity affects the proceedings.

The second point to be considered is consistency with the object and purpose of international criminal justice. As Bassiouni states, "no principle is value-free, nor is it free of a value-oriented goal or outcome." [54] Therefore, it is important to be aware of the necessity to determine the applicable rule that comports with the object and purpose of the establishment of the international criminal justice system.[55]

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53. As the most relevant example: *Prosecutor v. Duško Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (IT-94-1-AR72) Appeals Chamber (2 October 1995), para. 78.

54. M. Cherif Bassiouni, "A Functional Approach to 'General Principles of International Law'," *Michigan Journal of International Law*, Vol. 11 (1989), p. 775.

55. See, *Prosecutor v. Erdemović*, Joint Separate Opinion of Judge McDounald and Judge Vohrah (IT-96-22-A) Appeals Chamber (7 October 1997), paras. 57.

Conclusion

When applying a domestic principle to international criminal justice issues, one should check whether the object of the principle in question is an internal or inter-jurisdictional problem. Depending on which issue is relevant, methodology and materials to determine the existence, content, and scope of such a source of law can be different. This preliminary assessment is essential, and skipping this process causes theoretical confusion. Furthermore, we need to be aware that one principle can regulate these two different dimensions. Therefore, it is important to be aware of which dimension of principle is going to be determined and then what materials are to be used for the extraction of such a concept as a general principle of law as an applicable source for international criminal adjudication.

It should be noted, however, that when it comes to substantial law, this categorization requires further modification. Substantial international criminal law does not seem to be consonant with the idea of the general principle of law, which is an abstraction of legal rules, and this abstraction does not go along with the basic requirement in criminal matters: the principle of legality. However, in the actual judgment, principles to determine culpability or elements of crimes are defined by finding the relevant general principles of law.

The role of domestic criminal principles in international criminal adjudications has become increasingly apparent. Furthermore, I would like to add some remarks on the other significance.

First, the inter-jurisdictional aspect of the domestic criminal principle contributes to the development of "international law in criminal matters". Domestic criminal principles often have different protected interests from what public international law does, but once such principles are recognized as principles that regulate inter-jurisdictional issues, they will spill over to other fields such as extradition or mutual legal assistance.

The second additional significance of finding domestic criminal principles as sources of international criminal law is to contribute to maintaining consistency among judgments of various international criminal jurisdictions in a moderate form. As a precondition, each international criminal jurisdiction has its own statute or applicable rules. These rules work as *lex specialis* to the general principles of law. Therefore, the application of general principles of law must be secondary or used as guidance for interpretation. In such a way, domestic principles of law might be found as the underlying guidance of every international criminal jurisdiction in a way that promotes moderate harmonization. However, as I explained

before, application of the domestic principle of internal regulation will be the same as the selection of applicable domestic principles and will be done based on the special need of the international criminal jurisdiction applying it. Therefore, principles that maintain consistency may be limited to those principles that regulate inter-jurisdictional issues.

Finally, I would like to point out that the additional significance of the use of the general principles of law in international criminal jurisprudence is to highlight the distinctive differences between the public international law system and international criminal law system. There has been some discussion on international criminal law as a "self-contained regime".[56] Domestic criminal principles are only applicable to criminal matters, as they protect different values from those of public international law. As this article remarks, the argument that the methodology to find a source of law is different reflects the structural difference between international adjudication and international criminal adjudication. The academic views of general principles of law in international law are suggestive, but their adequacy is limited because of the specificity of international criminal principles. This discussion indirectly proves that the established theories of international law would be insufficient to explain the legal phenomenon in international criminal law.

International criminal law might be a field of law that requires the full construction of its own legal theory. The difficulty in finding out what legal norms exist to regulate problems such as procedural overlap, which is caused by the features of the activity of international criminal justice, drives us to think of unwritten law. International criminal jurisdictions all seek the same objects and values, which entitle them to enforce and implement the so-called international criminal law. However, the rules applicable to them are inconsistent. The state as an active actor in international criminal justice is bound by its own domestic law, treaties that it ratifies, and customary international law. Meanwhile, international adjudicatory bodies, such as the ICC, are bound by its statute (the treaty establishing the ICC) and may be customary international law. The law applied to other internationalized courts and tribunals is vague. In the absence of an international treaty or clear international custom applicable to all international criminal jurisdictions to avoid procedural overlap, it seems that it is a good start to look at the third legal material, general principles of law.

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56. See, Larissa van den Herik and Carsten Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff Publishers, 2012).